

Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings

*Peter L. Markowitz**

I. INTRODUCTION

In 1889, in the infamous Chinese Exclusion Case,¹ the United States Supreme Court laid the foundation for the now well-established rule that immigration removal proceedings² are civil, not criminal, in nature.³ Over a century later, the civil label is firmly embedded in our conception of removal proceedings, and the idea of criminal removal proceedings may seem counterintuitive to some. However, for noncitizens who have been the subject of both removal and traditional criminal proceedings, the two can be indistinguishable but for the relative lack of procedural protections and the often graver liberty interest at stake in the former. This Article seeks to explore the tension between the firmly established civil label and the contrary experience of people subject to removal proceedings.

* Assistant Clinical Professor of Law at Cardozo School of Law. Before entering academia, I developed and ran an in-house immigration project at The Bronx Defenders, a public defender office. At The Bronx Defenders, I represented hundreds of individuals in both criminal and deportation proceedings. Much of the inspiration for and insight into this topic derives from my experience at The Bronx Defenders, and I owe a debt of gratitude to my clients and to my exceptional colleagues. In addition, I am grateful to Barry Friedman, Deep Gulasekaram, Randy Hertz, Nancy Morawetz, Juliet Stumpf, Bill Taylor, Michael Wishnie, the Hofstra Faculty Workshop participants, and the NYU Lawyering Faculty Scholarship Colloquium participants for their thoughtful comments on earlier drafts of this article. I am also indebted to Anthony DeSacia, Vichal Kumar, David Peterson, Kristen Siracusa, and Lee Turner-Dodge for their superb research assistance. In addition, I would like to thank the Executive Office of Immigration Review for cooperating in providing some of the data used to prepare this article. Finally, I would like to thank my wife, Amy, for reading countless drafts, offering invaluable insights and comments, and providing unending support.

¹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

² Immigration removal proceedings, colloquially referred to as “deportation proceedings,” are the primary mechanism by which the government expels noncitizens from the United States or prevents their admission under the Immigration and Naturalization Act (“INA”). Prior to 1996, there were two different types of such proceedings: “deportation proceedings” for noncitizens who had entered the United States and “exclusion proceedings” for noncitizens seeking admission. There is now a single type of proceeding—“removal proceedings”—which encompasses both situations. For the sake of clarity, I will use “removal proceedings” as a blanket term to describe all proceedings whereby the United States government seeks to expel a noncitizen from within its borders or to exclude a noncitizen from entering, regardless of the point in history when those proceedings occurred.

³ *Chae Chan Ping*, 130 U.S. at 606. The infamy of this case comes not from its conclusion that removal proceedings are civil but rather from the caustic anti-Asian sentiments laced throughout the opinion.

The Chinese Exclusion Case was, as its name implies, an exclusion case wherein the United States sought to prevent the entry of a noncitizen from outside its borders.⁴ Four years later, in *Fong Yue Ting v. United States*,⁵ the Supreme Court clarified that the civil designation of removal proceedings applies not only to exclusion cases, used to prevent the admission of noncitizens, but also to expulsion cases, used to expel noncitizens.⁶ Before *Fong Yue Ting*, this civil designation, now taken for granted, was the subject of considerable debate.⁷ Since its initial pronouncement in these early cases, the Supreme Court has, despite frequent criticism,⁸ relied on the principle of *stare decisis* and repeatedly refused to revisit the issue of whether removal proceedings are civil or criminal in nature.⁹

My contribution to this inquiry is a bifurcated analysis based on the distinction between (1) “exclusion proceedings” seeking to prevent the physical entry and/or political admission of noncitizens and (2) “expulsion proceedings” seeking to expel lawful permanent residents¹⁰ from within the United States. This bifurcated approach enables the otherwise conflicting guidance provided by current Supreme Court doctrine, the historical record, and the Supreme Court’s claim regarding the nature and source of the sovereign immigration power to be reconciled. I conclude that the Supreme Court’s fundamental error stems from *Fong Yue Ting*: assigning the civil designation to expulsion proceedings. This bifurcated approach leads to the conclusion that the determination of whether to *exclude* a noncitizen from entering is a civil proceeding, in which the respondent is shielded only by traditional civil due process protection,¹¹ but the determination whether to

⁴ See *infra* notes 46-57 and accompanying text.

⁵ 149 U.S. 698 (1893).

⁶ *Id.* at 730; see also *infra* notes 66-80 and accompanying text.

⁷ See *infra* note 227 and accompanying text.

⁸ See *infra* notes 36-37 and accompanying text.

⁹ See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (“Deportation is not a criminal proceeding and has never been held to be punishment.”); *Mahler v. Eby*, 264 U.S. 32, 38-39 (1924) (rejecting the argument that “the same constitutional restrictions apply to an alien deportation act as to a law punishing crime” because “[i]t is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment”); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) (refusing to apply Fifth Amendment protection against self-incrimination “[s]ince the proceeding was not a criminal one”); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (noting that deportation “is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want”).

¹⁰ Permanent residency is the most favored immigration status in the United States short of citizenship. Lawful permanent residents (“LPRs” or “permanent residents”) are allowed to live and work in the United States indefinitely. *But see* INA § 237, 8 U.S.C. § 1227 (2000) (detailing the various grounds upon which a permanent resident can be deported).

¹¹ The level of due process protection applicable in exclusion proceedings would vary based upon the political and physical circumstances of the noncitizen respondent. See *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (noting that “both

expel a noncitizen whom the government has previously invited into the national community as a lawful permanent resident is a criminal proceeding, in which the defendant is entitled to the full panoply of criminal procedural protections guaranteed by the Constitution.

The line I have drawn between exclusion and expulsion proceedings is not necessarily intuitive but neither is it arbitrary. At the outset, my categories are in need of some defense and explication. The current statutory framework draws a different line. Noncitizens in removal proceedings are subject to charges of “deportability”¹² if they have been lawfully admitted to the country in any status;¹³ they are subject to charges of “inadmissibility”¹⁴ if they are seeking admission, political or physical, or have entered the country unlawfully. Under the previous statutory framework, different categories were employed. Noncitizens were placed in “deportation proceedings” if they had physically entered the country, even unlawfully, and “exclusion proceedings” if they were seeking admission.¹⁵ I reject both of these categorizations and instead make the critical dividing line lawful admission to the United States as a permanent resident. Thus, as I define them, the terms “exclusion” and “expulsion” are political in nature. Exclusion applies to anyone who the government has not previously made the affirmative choice to admit into the national community as a permanent resident.¹⁶ Expulsion proceedings are the government’s attempt to cast out a noncitizen who was previously admitted to the national community as a permanent resident.¹⁷

removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious”); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (applying due process rights to returning permanent residents); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (stating that the Fifth and Fourteenth Amendments protect aliens, including those in the country illegally); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (noting that aliens have the same due process protections that citizens have); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); *Yamataya v. Fisher*, 189 U.S. 86, 98 (1903) (holding that noncitizens get procedural due process protection in deportation proceedings but stating that, with respect to noncitizens seeking initial entry, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law”).

¹² INA § 237, 8 U.S.C. § 1227.

¹³ This category includes people who have come temporarily as tourists or students, for example, in addition to people who have been permanently admitted as residents.

¹⁴ INA § 212, 8 U.S.C. § 1182.

¹⁵ See 8 U.S.C. § 1252b (repealed 1996). The 1996 law combined the two proceedings into a single proceeding known as a “removal proceeding.” See 8 U.S.C. § 1229a (Supp. 1998); see also *Zadvydas*, 533 U.S. at 693 (relying on entry as critical dividing line for due process analysis).

¹⁶ This includes noncitizens in a wide array of different situations. As I have defined it, noncitizens abroad making an initial application to enter the United States are subject to exclusion as are noncitizens who entered the United States lawfully and have lived here for many years so long as they have not been admitted as permanent residents.

¹⁷ The Supreme Court has, at least once, recognized my distinction between expulsion and exclusion as the critical dividing line in assessing the constitutional rights of noncitizens. See

I utilize these categories to analyze the nature of removal proceedings for two independent reasons. First, these categories are necessary to resolve otherwise conflicting indicators in the historical evidence and in the current doctrine. In other words, I draw this line because this is where the relevant history has drawn the line between civil and criminal proceedings¹⁸ and because the factors relied upon in the current Supreme Court test to determine the civil or criminal nature of a proceeding provide clear guidance along this same dividing line.¹⁹ I recognize that this rationale is somewhat circular: the evidence supports my categories because the categories are drawn from the evidence. This does not, however, undermine the utility of this division in making the criminal/civil assessment.

Second, I draw the exclusion/expulsion line because it is a principled distinction upon which to grant some noncitizens greater rights than others and to impose the correlative restrictions upon government authority in some situations but not others. The well-founded recognition of permanent residents, and their precursor, denizens,²⁰ as “citizens” of a lesser status holding rights superior to other noncitizens justifies greater protection for this class of noncitizens.²¹ Permanent residents, as a class, have the greatest economic and familial connections and political allegiance to the United States.²² Functionally, the nature of the government’s interests in the two

Kwong Hai Chew v. Colding, 344 U.S. 590, 596, 600-01 (1953) (holding that the old statutory division between deportation and exclusion was not the critical constitutional dividing line and instead holding that permanent residents maintain their favored constitutional status even when seeking entry).

¹⁸ See discussion *infra* Part III.B.

¹⁹ See discussion *infra* Part III.C.

²⁰ As Sir William Blackstone described, “[a] denizen is an alien born, but who has obtained [] by gift of the king letters patent [to make him an English subject] A denizen is in a kind of middle state, between an alien and a natural born subject, and partakes of both of them.” 1 WILLIAM BLACKSTONE, COMMENTARIES 632; see also William McKay Bennett, *Reentering The Golden Door: Waiving Goodbye To Exclusion Grounds For Permanent Resident Aliens*, 69 WASH. L. REV. 1073, 1095 (1994) (analogizing permanent residents to denizens).

²¹ See *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (applying due process rights to permanent residents returning from abroad although no such rights are applicable to other noncitizens); *Mathews v. Diaz*, 426 U.S. 67, 82-83 (1976) (conferring greater rights upon noncitizens who had become lawful permanent residents); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (explaining that noncitizens acquire an “ascending scale of rights as [they] increase [their] identity with our society”); *Fong Yue Ting v. United States*, 149 U.S. 698, 736-37 (1893) (Brewer, J., dissenting) (arguing that expulsion of permanent residents is a criminal punishment because of their superior right to other noncitizens); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 147-48 (2002); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 8-9 (2006); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 131-33 (1996).

²² Permanent residents have duties and obligations to their communities, including but not limited to, paying taxes and compulsory military service. See *Ambach v. Norwick*, 441 U.S. 68, 81 n.14 (1979) (“[R]esident aliens pay taxes, serve in the Armed Forces, and have made significant contributions to our country in private and public endeavors.”); see also Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1219 (1993); Charles E. Roh, Jr. &

proceedings mitigates in favor of greater discretion in exclusion than in expulsion. The power to exclude is derived, at least in part, from the power to defend against aggression from abroad.²³ It is principally an outward-looking power through which a democratic government maintains self-determination over changes in the composition of the American society and the American polity.²⁴ The need for defense from outside aggression and self-determination justify the greater power of the government in the exclusion realm. Expulsion, by contrast, is principally a tool to protect against dangers from within society. The central purpose of expulsion is to incapacitate permanent residents who pose a danger to society.²⁵ This is the function that criminal law has always played and there is no reason that the limits on government power in this realm will inhibit its ability to provide this protection in the expulsion context.²⁶

Based on current Supreme Court doctrine designating all removal proceedings as civil, the full panoply of procedural rights inherent in criminal proceedings have not been extended to noncitizens in either type of removal proceeding.²⁷ For example, as a result of the civil designation of removal

Frank K. Upham, Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501, 508-09 (1972) (discussing application of military draft to LPRs). As of December 2004 there were 69,299 foreign-born individuals serving in the military, roughly fifty-seven percent of whom were naturalized citizens, while the remaining forty-three percent were not U.S. citizens. Margaret D. Stock, *Essential to the Fight: Immigrants in the Military, Five Years after 9/11*, 5 IMMIGR. POL'Y IN FOCUS, Nov. 2006, at 1, available at http://www.immigrationpolicy.org/images/file/infocus/Immigrants_in_the_military_stock_PDF.pdf. Of course, not all permanent residents have greater connections to the United States than all non-LPRs. Many undocumented immigrants who have lived in the United States for many years have connections that run much deeper than, for example, a permanent resident who only recently arrived. However, as discussed *infra* notes 238-239 and accompanying text, a civil or criminal classification cannot be reassessed in every individual case. We must predetermine at the outset which categories of proceedings are civil and which are criminal. Thus, we must consider how permanent residents as a class compare to other noncitizens.

²³ See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (locating power to deport as a part of war powers).

²⁴ See *MOTOMURA*, *supra* note 21 at 8-9 (explaining the concept of permanent residents as intending citizens).

²⁵ In *Kwong Hai Chew v. Colding*, the Court explained that limiting the government's removal power over permanent residents "does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status." 344 U.S. 590, 602 (1953).

²⁶ *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001) (recognizing that treatment of noncitizens within the United States does not implicate the need to "control entry into the United States" and, therefore, limits on governmental power over noncitizens within the nation "leave no 'unprotected spot in the Nation's armor'" (quoting *Kwong Hai Chew*, 344 U.S. at 602)).

²⁷ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); see, e.g., *Harisiades*, 342 U.S. at 594 (holding that the Ex Post Facto Clause does not apply to removal proceedings); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912) (holding that proceedings to enforce immigration regulations do not involve Sixth Amendment protections); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (holding revocation of fraudulently obtained citizenship does not require ex post facto protection); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (holding that the right to a jury trial and the prohibitions against unreasonable searches and seizures, and cruel and unusual punishments have no application in deportation cases); *Orehova v. Gonzales*, 417 F.3d 48 (1st Cir. 2005)

proceedings, Congress has been permitted to broaden the expulsion grounds to retroactively encompass decades-old minor criminal convictions without running afoul of the Ex Post Facto Clause, even when such convictions, when obtained, had no immigration consequences whatsoever.²⁸ Thus, even if a defendant pled guilty years ago in reliance on then correct advice that she would suffer no immigration consequences, this would not protect her from removal today based on subsequent changes in the federal immigration laws.²⁹ In addition, because of the civil label, respondents in removal cases have no right to appointed counsel and are therefore often left unaided to contend with what the Second Circuit has described as the “labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike.”³⁰ The inapplicability of these and other criminal procedural protections to removal proceedings is the most significant consequence of the civil label.

The relative lack of procedural protections in removal proceedings is, at times, disturbingly counterintuitive. The deprivation of liberty from a criminal conviction can pale in comparison to the liberty interest at stake in the

(holding there is no Sixth Amendment right to counsel in removal proceedings); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003) (“As deportation proceedings are civil in nature, aliens in such proceedings are not protected by the Sixth Amendment right to counsel.”); *Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) (holding that Eighth Amendment protection against cruel and unusual punishment is inapplicable in removal proceedings because they are civil); *Jolfa v. INS*, 76 F.3d 386 (9th Cir. 1996) (holding that prohibition against double jeopardy does not apply to removal proceedings because deportation is not punishment); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (holding that *Miranda* warnings are not required in deportation proceedings); *Rubio De Cachu v. INS*, 568 F.2d 625, 627-28 (9th Cir. 1977) (noting that since deportation is a civil rather than a criminal proceeding, a deportation provision cannot be characterized as a “bill of attainder”); *Chavez-Raya v. INS*, 519 F.2d 397, 402 (7th Cir. 1975) (holding that failure to give *Miranda* warnings during custodial interrogation does not render statement inadmissible in civil removal proceedings). See generally *Developments in the Law – Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1370, 1385 (1983) (enumerating the various ways in which “the government affords fewer procedural rights to aliens facing deportation than to criminal defendants”). *But cf.* *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (holding that noncitizens do get procedural due process protection in deportation proceedings).

²⁸ See Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.); IIRIRA, Pub. L. No. 104-208, Div. C, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546 (codified in scattered sections of 8 U.S.C.); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (holding that the retroactive application of the IIRIRA did not violate the Ex Post Facto Clause because removal was a civil action); *Perez v. Elwood*, 294 F.3d 552, 557 (3d Cir. 2002) (holding that the Ex Post Facto Clause does not apply to deportation statutes and that the IIRIRA applies retroactively); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000) (holding expansion of the definition of “aggravated felony” under the IIRIRA could be applied retroactively so as to render deportable an alien who pled guilty to an offense that was not an “aggravated felony” at the time of the plea). *But cf.* *INS v. St. Cyr*, 533 U.S. 289, 315-16 (2001) (noting that a law may not be applied retroactively absent a clear indication by Congress that it intended such result).

²⁹ See generally Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

³⁰ *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

removal proceeding that the conviction triggers. For example, a lawful permanent resident who is convicted of a misdemeanor marijuana offense may be sentenced to only a few days in jail.³¹ However, once in removal proceedings, federal law requires that the same permanent resident be subject to mandatory detention³² for the months or years it takes to complete the subsequent immigration case. She then may be permanently exiled from her home, livelihood, and family in the United States. The Supreme Court has compared this deprivation to a “loss of all that makes life worth living.”³³

The unsettling imbalance between the grave liberty interests at stake in removal proceedings and the relative dearth of procedural protections attaching thereto has sparked pointed criticism of the civil label. This criticism began from the moment the civil label was first invoked. Justice Brewer, writing in dissent in *Fong Yue Ting*, urged:

But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.³⁴

Over the years, Justice Brewer’s words have been echoed many times by other judges, all of whom either found themselves in the minority of their court³⁵ or, notwithstanding their own analysis, felt bound by the principle of *stare decisis*.³⁶

³¹ See, e.g., N.Y. PENAL LAW § 221.10 (2000) (classifying criminal possession of marijuana in the fifth degree as a B misdemeanor); N.Y. PENAL LAW § 70.15(2) (authorizing a sentence of up to three months for B misdemeanors). Notwithstanding the statutory maximum, people convicted of misdemeanor possession of marijuana usually serve no more than a few days, if they are incarcerated at all.

³² See INA § 236(c)(1)(B), 8 U.S.C. § 1226(c)(1)(B) (2000); INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (2000).

³³ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

³⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

³⁵ See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (asserting that it “cannot be doubted” that “deportation is a penalty—at times a most serious one”) (quoting *Bridges*, 326 U.S. at 154); *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (arguing that while deportation proceedings “technically are not criminal,” deportation is a “savage penalty” and functionally “a life sentence of exile”); *Fong Yue Ting*, 149 U.S. at 744-61 (Field, J., dissenting) (arguing emphatically that deportation is punishment); *Scheidemann v. INS*, 83 F.3d 1517, 1526-31 (3d Cir. 1996) (Sarokin, J., concurring) (characterizing the Supreme Court’s longstanding precedent that deportation is civil as “unrealistic” and arguing that the Supreme Court should “wipe the slate clean and admit to the long evident reality that deportation is punishment”).

³⁶ See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) (recognizing that “since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation” but ultimately adhering to precedent and upholding the removal order); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (calling the conclusion that deportation is a civil matter “debatable” but refusing to reconsider the settled law); *Yepes-Prado v. INS*, 10 F.3d 1363, 1369 n.11 (9th Cir. 1993) (characterizing deportation as punishment but

Scholarly criticisms of the civil designation and arguments in favor of the recharacterization of removal proceedings as criminal, or at least quasi-criminal, in nature have also persisted with surprising doggedness.³⁷ The arguments in favor of such reconceptualization have taken many forms. Some critics have argued that recent changes in the immigration laws, making removal a more automatic consequence of many criminal convictions, have fundamentally transformed the nature of such proceedings.³⁸ Others have argued that modern Supreme Court jurisprudence defining the boundaries of the civil-criminal divide requires a recharacterization of removal proceedings as criminal.³⁹ At least one scholar has advanced the position that the characterization of removal proceedings as civil was flawed from the outset because it failed to take account of the historically pervasive use of banishment as criminal punishment.⁴⁰ Still others, like Justice Brewer, appeal to a commonsense understanding of the nature of punishment.⁴¹ Despite the per-

noting that the court is bound by Supreme Court precedent declaring deportation to be civil); *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978) (noting that “[t]he deportation proceeding, despite the severe consequences, has consistently been classified as civil, rather than a criminal matter”); *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926) (L. Hand, J.) (noting that “deportation is to [Klonis] exile, a dreadful punishment, abandoned by the common consent of all civilized peoples”); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564-76 (1990) (giving a thorough explanation of how courts’ discomfort with their inability to apply standard constitutional scrutiny to removal cases has led them to use “phantom” constitutional norms to render purportedly subconstitutional decisions in favor of respondents); cf. *Trop v. Dulles*, 356 U.S. 86, 98 (1958) (characterizing the rule that deportation is not penal as “highly fictional”). *But see* *United States v. Soueiti*, 154 F.3d 1018, 1019 (9th Cir. 1998) (holding that deportation is a criminal punishment when it is ordered, pursuant to 8 U.S.C. § 1228(c)(1), by a federal judge sentencing a defendant for a criminal conviction).

³⁷ See, e.g., Javier Bleichmar, *Deportation As Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 116 (1999); Austin T. Fragomen, *The “Uncivil” Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34-35 (1978); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313 (2000); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT’L L. REV. 29, 32 (2003); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT’L L.J. 245, 261-73 (2004); Ethan Venner Torrey, *“The Dignity of Crimes”: Judicial Removal of Aliens and the Civil-Criminal Distinction*, 32 COLUM. J.L. & SOC. PROBS. 187, 188, 206 (1999); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1370, 1386 (1983).

³⁸ E.g., Bleichmar, *supra* note 37, at 118; Kanstroom, *supra* note 37, at 1891, 1893; Lisa Mendel, *The Court’s Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205 (2000); Pauw, *supra* note 37; Gregory L. Ryan, *Distinguishing Fong Yue Ting: Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation Under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY’S L.J. 989, 1010-12 (1997).

³⁹ E.g., Pinzon, *supra* note 37, at 62.

⁴⁰ E.g., Bleichmar, *supra* note 37, at 129, 134.

⁴¹ E.g., Kanstroom, *supra* note 37, at 1894; Salinas, *supra* note 37, at 269-71.

sistence and breadth of the scholarly criticism, these arguments have not provoked meaningful inquiry from the judiciary.

This article draws upon the important contributions of these critics to our evolving understanding of the nature of removal proceedings. Nonetheless, the critiques, like the decisions they criticize, suffer from one common and fatal flaw: they treat removal proceedings as monolithic and fail to appreciate the critical distinction between exclusion and expulsion proceedings.⁴² As a result, past critiques, which examined removal proceedings as single entities, have been unable to reconcile the contradictory guidance provided by the Supreme Court's modern approach to determining the civil or criminal nature of given proceedings, the historical evidence regarding the Framers' conception of the nature of removal proceedings, and the foundational justifications of the civil label relied upon by the Court.

Part II of this article consists of a review of Supreme Court jurisprudence declaring the civil nature of removal proceedings.⁴³ Part III explores the fundamental flaws in the Supreme Court's monolithic approach and argues that a bifurcated approach—with expulsion proceedings receiving a criminal label and exclusion proceedings receiving a civil label—is necessary to understand the true nature of these proceedings. In this section, I investigate the nature of exclusion and expulsion proceedings through three distinct lenses: (1) an examination of the justification explicitly relied upon by the Court in its original application of the civil label; (2) an examination of the historical evidence of how the Framers conceived of such proceedings; and (3) an application of the current Supreme Court doctrine delineating the civil-criminal divide.⁴⁴

Part IV assesses the practical implications of the bifurcated approach and demonstrates that criminal protections can apply in expulsion proceedings without fundamentally undermining the government's interest in those

⁴² One other author has suggested a need to move beyond the Court's monolithic approach but not by distinguishing between exclusion and expulsion. Rather, Daniel Kanstroom, in his essay *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, *supra* note 37, argues that "social control" removal laws must be analyzed separately from "border control" removal laws. In this thoughtful work, Kanstroom concludes that removal proceedings sanctioning post-entry misbehavior are social control laws analogous to criminal law, and therefore, such proceedings should receive some protections analogous to criminal proceedings. *Id.* at 1897, 1907, 1935; see also Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 787 (2000). Kanstroom's work is notable because it does not treat all removal proceedings as a single entity for the purpose of assessing their criminal or civil nature. While Kanstroom's distinction between social control and border control laws has significant appeal, I conclude the distinction is ultimately not supported by doctrine and history. Instead, the distinction between exclusion and expulsion is the critical dividing line. Moreover, I conclude, unlike Kanstroom, that expulsion proceedings are pure criminal proceedings—not simply analogous to criminal proceedings and therefore deserving of quasi-criminal treatment. I also endeavor herein to examine the practical implications of redesignating expulsion proceedings as criminal. In his article, Kanstroom sought to "reinvigorate the discussion of how best to understand the constitutional doctrine of deportation law." Kanstroom, *supra* note 37, at 1897. I hope in this article to answer that call.

⁴³ See discussion *infra* Part II.

⁴⁴ See discussion *infra* Part III.

proceedings.⁴⁵ Specifically, I explain how the protections of the Sixth Amendment right to counsel, the Ex Post Facto Clause, the exclusionary rule and other federal evidentiary rules, and criminal due process venue requirements could be applied in the expulsion context.

II. SUPREME COURT JURISPRUDENCE DECLARING THE CIVIL NATURE OF REMOVAL PROCEEDINGS

The purpose of this section is to set forth the development of the Supreme Court doctrine that I aim to critique. The focus, therefore, is on cases that grapple with the application of the civil or criminal label in the immigration context. The leading cases in this category were all heard in the final years of the nineteenth century. This review of precedent will focus on that period.

The Supreme Court's first significant consideration of the scope and nature of the modern federal immigration power⁴⁶ came in the 1889 Chinese Exclusion Case, *Chae Chan Ping v. United States*.⁴⁷ It is remarkable to note at the outset that, in sharp contrast to the pervasive presence of immigration cases on the current federal docket,⁴⁸ it took over 100 years of Supreme Court jurisprudence for the Court to make its first significant venture into this area of law.⁴⁹ The case involved a Chinese national who had resided

⁴⁵ See discussion *infra* Part IV.

⁴⁶ Prior immigration cases arose as challenges to state attempts to regulate immigration and, in those cases, the Court located the federal power over immigration as derived principally from the Foreign Commerce Clause. See, e.g., *Edye v. Robertson*, 112 U.S. 580 (1884); *Henderson v. Mayor of New York*, 92 U.S. 259 (1875); *Chy Lung v. Freeman*, 92 U.S. 75 (1875); *Smith v. Turner*, 48 U.S. 283 (1849). *Chae Chan Ping* was the first case in which the Supreme Court identified a free-standing federal immigration power. See generally 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, 106-12, 123-34 (2002).

⁴⁷ 130 U.S. 581 (1889); see also discussion *infra* note 49.

⁴⁸ In 2006, eighteen percent (11,911 out of 66,618) of appeals initiated in the United States Courts of Appeals were immigration removal cases. JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR, TABLE B-3. U.S. COURTS OF APPEALS—SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2002 THROUGH 2006, available at <http://www.uscourts.gov/judbus2006/appendices/b3.pdf> (last visited Mar. 13, 2008). In the Second Circuit the number was thirty-eight percent (2640 out of 7029), and in the Ninth Circuit, a full forty percent (5862 out of 14,636) of new appeals were immigration removal cases. *Id.*

⁴⁹ There were earlier cases that began to develop a notion of the federal government's immigration powers. These cases pertained primarily to the balance of power between the federal and state governments over the regulation of immigration. In *New York v. Miln*, a New York statute requiring that ships entering New York make a report of the passengers on board was upheld as being part of a state's police power and not a regulation of foreign commerce. 36 U.S. 102, 161 (1837). In *The Passenger Cases*, New York's and Massachusetts' taxes on incoming passengers were struck down as infringing upon the federal government's exclusive authority over immigration. 48 U.S. 283 (1849); see also *Edye*, 112 U.S. at 580; *Henderson*, 92 U.S. at 259; *Chy Lung*, 92 U.S. at 75. The Court had also previously issued some decisions pertaining to federal immigration matters, but those decisions failed to delve into the central issue of the nature of the government's immigration powers and the limits, if any, on Congress-

lawfully in the United States for over a decade. In 1887, Chae Chan Ping left the United States in possession of a valid reentry permit. Slightly over a year later he embarked on his return to the United States on board a ship from Hong Kong. While en route, a new law driven by virulent anti-Chinese xenophobia⁵⁰ was enacted, which purported, inter alia, to annul reentry permits granted to Chinese nationals and forbid their reentry.⁵¹ When Chae Chan Ping arrived in the United States, he was not permitted to enter and was detained on the ship he arrived upon. He filed a habeas petition claiming that he was being de facto expelled, as opposed to excluded, from the United States pursuant to the new law, which violated “rights vested in [him] under the [prior] laws of congress,”⁵² his right to due process of law, and the constitutional prohibition against ex post facto laws.⁵³

Announcing the unanimous decision of the Court, famously laced with overt anti-Asian racism, Justice Field declined to conceive of the case as an expulsion case and instead hung much of his analysis on the exclusion context in which the case arose.⁵⁴ He ignored the due process and ex post facto claims and instead focused exclusively on the nature and scope of Congress’s power to exclude noncitizens. Field identified the immigration power, for the first time, as an inherent power incident to national sovereignty because, inter alia, the power was necessary to protect against the “aggression and encroachment . . . from vast hordes of [a foreign nation’s] people crowding in upon us.”⁵⁵ While Field did not explicitly characterize the ex-

sional power. See, e.g., *Chew Heong v. United States*, 112 U.S. 536, 560 (1884) (interpreting statute requiring reentry permits for Chinese laborers not to apply retroactively to Chinese national who departed before such permits were in existence); *United States v. Jung Ah Lung*, 124 U.S. 621, 635 (1888) (holding that statute which stated that a reentry permit was the only competent proof of a Chinese national’s right to reenter did not apply retroactively to Chinese laborer who left with such permit but lost it to pirates).

⁵⁰ Prior to the passage of the Scott Act, which tightened restrictions on Chinese immigration by barring the return of all Chinese laborers, anti-Chinese sentiment was strong throughout the Western United States. MOTOMURA, *supra* note 21, at 15-16. When the transcontinental railroad was completed, some ten thousand Chinese workers were left unemployed, which depressed wages throughout the western states. *Id.* at 17. Chinese laborers who had been critical to the completion of the railroad were now viewed as unwelcome economic competition. *Id.* After a recession from 1873 to 1878, many in California and throughout the West blamed Chinese laborers for American joblessness. *Id.* The rising tide of anti-Chinese sentiment pervaded local politics in the West and seeped into national politics as well. *Id.*; see also Thomas E. Cavanagh, *Political Representation and Stratified Pluralism*, in IMMIGRATION AND RACE: NEW CHALLENGES FOR AMERICAN DEMOCRACY 163, 186 (Gerald D. Jaynes ed., 2000) (noting that the presence of Chinese contract laborers during the 1860s stirred up tremendous resentment from white laborers, prompting the passage of discriminatory laws by the California government beginning in 1872).

⁵¹ See Supplemental Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888).

⁵² *Chae Chan Ping*, 130 U.S. at 589.

⁵³ See *Fong Yue Ting v. United States*, 149 U.S. 698, 722 (1893) (explaining petitioner’s arguments in *Chae Chan Ping*). See generally Cleveland, *supra* note 46, at 123-34.

⁵⁴ *Chae Chan Ping*, 130 U.S. at 594-96. Prior to his appointment to the Court, Justice Field had himself participated in xenophobic efforts to restrict Chinese immigration. Kanstroon, *supra* note 37, at 1905; see also *Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting) (referring to “obnoxious Chinese”).

⁵⁵ *Chae Chan Ping*, 130 U.S. at 606.

clusion in this case as a civil action, his omission of any discussion of the petitioner's ex post facto claim, which would have had obvious merit if exclusion were a criminal punishment,⁵⁶ is a strong indication that the Court's analysis contained an implicit judgment that exclusion proceedings were civil. *Chae Chan Ping* marked the birth of the modern plenary powers doctrine in immigration law.⁵⁷

In the years immediately following its decision in *Chae Chan Ping*, the Court began to sketch out the boundaries of Congress's immigration power as pertaining to "[t]he supervision of the admission of aliens into the United States."⁵⁸ In *Nishimura Ekiu v. United States*, the Court upheld a law prohibiting the courts from reviewing the Executive's fact-finding in support of an exclusion determination.⁵⁹ In so holding, the Court relied on the "maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."⁶⁰ It found textual recognition of this inherent power in the Constitution's delegation of international relations powers to the political branches to regulate foreign commerce, including the "entrance of ships," the "importation of goods," and the "bringing of persons into the ports of the United States."⁶¹ This provides some evidence that, initially, the Court conceived of the immigration power as pertaining to the admission of people into the country and did not perceive it as pertaining to their expulsion.

That same year, the Court issued another decision, which, while on its face dealt only with statutory interpretation, again hinted at a limitation on Congress's power to regulate persons already admitted to the United States as permanent residents.⁶² This case, *Lau Ow Bew v. United States*, involved a statute requiring merchants from China to present a certificate issued by

⁵⁶ *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789) (establishing that the Ex Post Facto Clause applies to retroactive changes in criminal punishment).

⁵⁷ The plenary powers doctrine is the principle that restricts the judiciary from applying constitutional scrutiny to the substantive provisions of immigration law. See *infra* note 118 and accompanying text. There is considerable debate about whether the plenary powers doctrine is properly understood as a doctrine of deference to the political branches based on a theory of institutional competence (akin to the political question doctrine) or whether it is a more radical tenet that the political branches are unconstrained by the Constitution in their substantive immigration decisions. See generally ALEINIKOFF, *supra* note 21, at 154-74. For the purposes of this Article, it is not necessary to enter this debate.

⁵⁸ *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.* at 659 (emphasis added).

⁶¹ *Id.* (emphasis added). The Court also identified aspects of this power in the naturalization clause, *id.*, which pertains explicitly to the decision of who to allow to enter the national community, and the war powers provisions, *id.*, presumably insofar as they relate to the power to protect against the "aggression and encroachment" of foreign invaders. See also *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). These provisions similarly appear to be related to the power to prevent or invite entry into this country, not the power to expel people from within.

⁶² *Lau Ow Bew v. United States*, 144 U.S. 47 (1892).

China in order to enter the United States. A unanimous Court held that the requirement did not pertain to Chinese nationals who were permanent residents of the United States.⁶³ Just a year earlier, however, the Court had held that the same statute was clear and unambiguous and applied to “every Chinese person.”⁶⁴ These conflicting interpretations of the same statute appeared to evince a discomfort in the Court with congressional assertions of unlimited power over persons who the United States had already admitted into the national community.⁶⁵ Thus, in the few years immediately following the Chinese Exclusion Case, the Court appeared to be focused on the power to exclude, not expel, as the key component of the sovereign immigration power.

A year later, in *Fong Yue Ting v. United States*, the Court at last squarely faced the question of whether the Constitution requires criminal protections for noncitizen permanent residents facing expulsion.⁶⁶ *Fong Yue Ting* involved three noncitizen residents of the United States who were facing expulsion under an 1892 law that required all Chinese residents of the United States to register and obtain certificates attesting to their right to reside in the United States.⁶⁷ The law provided for the expulsion, through judicial determination, of any Chinese resident who failed to obtain such certificates without good cause.⁶⁸ The law explicitly placed the burden of proof on the Chinese resident in such proceedings and required that such burden could only be satisfied with the testimony of “at least one credible white witness.”⁶⁹ In upholding the constitutionality of the law, the Court explicitly declared that the criminal constitutional protections, including “the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual pun-

⁶³ *Id.* The Court referred to the petitioner in this case as a person “domiciled” in the United States, but the treaty under which the petitioner was admitted specifically permitted the entrance of Chinese nationals to the United States as “permanent residents.” *Id.* at 49 (citing Burlingame Treaty, U.S.-China, July 28, 1868, 16 St. 739). Thus, while no individualized determination was previously made by the United States to admit the petitioner as a permanent resident, the affirmative decision was made as to a class of persons including the petitioner. In later cases the Court explicitly referred to persons in the petitioner’s situation as “resident aliens.” *Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) (Brewer, J., dissenting).

⁶⁴ *Wan Shing v. United States*, 140 U.S. 424, 426 (1891) (emphasis added).

⁶⁵ This discomfort was expressed by reference to the “general [principle of] international law, [that] foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country.” *Lau Ow Bew*, 144 U.S. at 61-62. *But cf. Chae Chan Ping*, 130 U.S. at 609 (applying explicit retroactive exclusion law to Chinese laborer who had lived in the United States for twelve years and was abroad for sixteen months).

⁶⁶ 149 U.S. at 698.

⁶⁷ Chinese Deportation Act of May 6, 1892, ch. 60, 27 Stat. 25.

⁶⁸ *Id.*

⁶⁹ *Id.* § 6. Interestingly, the statute explicitly provided that the unlawful presence of non-permanent residents was a crime and that deportation in those instances would be enacted as punishment for criminal conviction. *See id.* §§ 2, 4; *see also Wong Wing v. United States*, 163 U.S. 228 (1896). Thus, counterintuitively, non-permanent residents facing deportation under the statute received the enhanced protections inherent in criminal law, but the long-term permanent residents, whom the government affirmatively invited into the United States, did not.

ishments, have no application.”⁷⁰ The majority’s reasoning relied upon its assertion that leading international law commentators had identified the right to expel foreigners as an inherent component of sovereign power and upon the historical claim that other countries, most importantly England, had asserted through legislative enactments the right to expel foreigners.⁷¹ The dissents offered a conflicting account of the history and scholarship.⁷²

What had previously appeared to be discomfort with congressional assertions of unlimited authority to expel permanent residents now displayed itself as a fracture in the Court. The six-Justice majority held that Congress’s plenary powers over exclusion proceedings extended with equal force to the expulsion context.⁷³ In so holding, the Court, for the first time, explicitly applied the civil label to expulsion, as well as exclusion.⁷⁴ Three Justices, including the authors of the *Chae Chan Ping* and *Lau Ow Bew* decisions, dissented vigorously and at length, arguing that expulsion, unlike exclusion, is a criminal punishment that must be accompanied by the appropriate constitutional protections.⁷⁵

The majority’s focus on explaining that the power to expel was a power inherent in sovereignty was, however, misplaced. Neither the dissent nor the petitioner contested the fact that the national government possessed the power to expel. The dispute instead was over the nature of that power: whether the power was civil or criminal. On this issue, the Court summarily concluded, without citation to authority, that expulsion was distinct from the acknowledged criminal punishment of transportation—the expulsion from a country as punishment for a crime—and that “[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.”⁷⁶

The two leading dissents in *Fong Yue Ting* approached the issue from opposite perspectives.⁷⁷ Justice Brewer conceived of the case as about the rights of noncitizen residents, whom he characterized as “denizens” who

⁷⁰ *Fong Yue Ting*, 149 U.S. at 730.

⁷¹ *Id.* at 707-09.

⁷² *Id.* at 756-57 (Field, J., dissenting); see also *infra* notes 75-80 and accompanying text.

⁷³ *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

⁷⁴ *Id.* at 730 (“The order of deportation is not a punishment for crime.”).

⁷⁵ *Id.* at 740 (Brewer, J., dissenting) (“Deportation is punishment.”); *id.* at 758-59 (Field, J., dissenting) (“His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment for his neglect, and that . . . can only be imposed after indictment, trial, and conviction.”); *id.* at 763 (Fuller, C.J., dissenting) (“As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard.”).

⁷⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 713 (1893) (majority opinion).

⁷⁷ The third dissent was by Chief Justice Fuller, who argued that the Act:

“occupy a middle state between an alien and a native.”⁷⁸ Justice Brewer equated expulsion with the criminal punishments of transportation or banishment and concluded that denizens may not be subject to such punishment without the application of full constitutional criminal protections.⁷⁹

Justice Field conceived of the case as being about the limits of Congress’s immigration power. Having authored the decision in *Chae Chan Ping*, Justice Field focused his dissent on drawing a line that distinguished the power to exclude, in *Chae Chan Ping*, from the power to expel at issue in *Fong Yue Ting*. Field asserted that, apart from the Alien and Sedition Acts of 1798 which he characterized as “universal[ly] condemn[ed],” never before had the government asserted the authority to expel noncitizen residents other than as punishment for a crime or as an act of war.⁸⁰

Fong Yue Ting remains both the first and last word on the civil nature of removal proceedings. In the century since *Fong Yue Ting*, the Court has never revisited its substantive inquiry into this issue.

In the final years of the nineteenth century and into the early part of the twentieth, the Court relied upon the civil label, at least in part, to expand the power of the political branches in the realm of immigration.⁸¹ During this period, the Court repeatedly refused to reopen the inquiry into whether removal proceedings were civil or criminal in nature and explicitly rejected attempts to distinguish *Fong Yue Ting*, even in situations where expulsion was triggered by a violation of a criminal law.⁸² The Court did establish some outer boundaries of Congress’s power over immigrants⁸³ but never called into question the ultimate holding of *Fong Yue Ting*. For example, in *Wong Wing v. United States*, the Supreme Court held that noncitizens subject to criminal punishment are entitled to full constitutional criminal protections.⁸⁴ In *The Japanese Immigrant Case*,⁸⁵ the Court held that persons in

directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. . . . It is, in effect, a legislative sentence of banishment, and, as such, absolutely void. Moreover, it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured.

Id. at 763 (Fuller, C.J., dissenting).

⁷⁸ *Id.* at 736 (Brewer, J., dissenting).

⁷⁹ *Id.* at 736-41.

⁸⁰ *Id.* at 750 (Field, J., dissenting); see also *infra* notes 225-228 and accompanying text.

⁸¹ See, e.g., *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (relying in part on civil label to permit the retroactive application of a law providing for the cancellation of fraudulently obtained naturalization certificates); see also *Lem Moon Sing v. United States*, 158 U.S. 538, 546-47 (1895) (relying in part on civil label to uphold jurisdiction-stripping provisions that insulated executive action in the immigration arena from judicial review).

⁸² *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

⁸³ See *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (deporting persons with non-frivolous claim to United States citizenship requires a judicial, not merely administrative, determination); see also *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

⁸⁴ 163 U.S. 228 (1896).

expulsion proceedings, unlike persons in exclusion proceedings, are entitled to due process of law under the Fifth Amendment—creating significant tension with the original rationale of *Fong Yue Ting* that exclusion and expulsion were two sides of the same coin.

Toward the middle of the twentieth century, the Court began to express some discomfort with the sometimes harsh consequences of the civil label in expulsion proceedings. During this period the Court repeatedly reversed expulsion orders, purportedly on statutory interpretation grounds.⁸⁶ In each instance, however, it displayed discomfort by noting that expulsion was a “drastic measure,”⁸⁷ by drawing attention to the “high and momentous”⁸⁸ stakes in expulsion proceedings, or by characterizing as a “great hardship”⁸⁹ the impact of an expulsion order.⁹⁰ At times, the Court was explicit about its uneasiness with the civil label. It held that the criminal “void for vagueness doctrine” would be applied to deportation statutes because of the “grave nature of deportation.”⁹¹ It also mused that, if it “were writing on a clean slate[,] . . . it might fairly be also said that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation.”⁹² Despite some dissenting voices,⁹³ the Court always stopped short of undertaking a substantive reexamination of the civil label applied to removal proceedings.⁹⁴

⁸⁵ *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903).

⁸⁶ *See also* *Motomura*, *supra* note 36 at 549 (explaining the Court’s use of sometimes strained statutory interpretation of immigration statutes to fill the void of minimal constitutional oversight created by the plenary powers doctrine).

⁸⁷ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

⁸⁸ *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

⁸⁹ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

⁹⁰ *See* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598-99 (1953) (interpreting the statutory term “excludable” in a regulation as having no application to legal permanent residents, since such a reading would have been questionable given “a resident alien’s constitutional right to due process”); *Fong Haw Tan*, 333 U.S. at 6 (reversing permanent resident’s deportation order by interpreting “sentenced more than once” to mean two separate prosecutions); *Delgadillo*, 332 U.S. at 388 (reversing long-time noncitizen resident’s order of deportation by interpreting “entry” not to include return from foreign soil after being rescued to that land from a ship that was torpedoed); *Bridges*, 326 U.S. at 135 (overturning deportation order based on agency’s incorrect interpretation of law providing for deportation of aliens “affiliated” with Communist Party).

⁹¹ *Jordan v. De George*, 341 U.S. 223, 231 (1951).

⁹² *Galvan v. Press*, 347 U.S. 522, 530-31 (1954).

⁹³ *See, e.g.,* *United States v. Spector*, 343 U.S. 169, 178 (1952) (Jackson, J., dissenting). Justice Jackson stated:

Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended.

Id.; *De George*, 341 U.S. at 232 (Jackson, J., dissenting) (referring to deportation based on a criminal conviction as an additional “punish[ment] with a life sentence of banishment”).

⁹⁴ Notably, during this period the cases that troubled the Court most consistently involved the *expulsion* of noncitizen residents. *See, e.g.,* *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)

The Court came closest to such reexamination in 1952 when it decided *Harisiades v. Shaughnessy*.⁹⁵ In *Harisiades*, the Court was asked to decide whether Congress was empowered to retroactively apply a law providing for the deportation of long-term legal permanent residents who had been members of the Communist Party notwithstanding the fact that their membership had terminated before the law's passage. The petitioners argued: (1) that Congress's power to expel permanent residents was subject to at least rational basis review by the federal courts; and (2) that the new law, as applied to them, violated the constitutional prohibition on ex post facto laws.⁹⁶ Despite recognizing that the first claim was "not founded in precedents of this Court,"⁹⁷ the Court went on to discuss the source and extent of congressional authority over immigration. It described the source of Congress's immigration power as principally derived from the war powers.⁹⁸ "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."⁹⁹ Accordingly, the Court reaffirmed its prior holdings that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."¹⁰⁰ In regard to the Ex Post Facto Clause argument, the Court called the civil designation of deportation "debatable" but refused to reconsider this settled aspect of law.¹⁰¹ Accordingly, the Court refused to apply the criminal Ex Post Facto Clause to the deportation statute at issue.¹⁰²

Through the 1950s, 1960s, and 1970s, the Court seemed repeatedly troubled by the harsh application of the civil label to lawful permanent residents, particularly in deportation proceedings, but at ease with this label in

("[O]nce an alien gains admission to our country and begins to develop ties that go with permanent residence, his constitutional status changes accordingly."); *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963) (noting an "innocent, casual, and brief excursion" by a noncitizen resident outside this country's borders does not subject him to the consequences of an "entry" upon his return); *Delgado*, 332 U.S. at 388 (holding noncitizen resident not subject to deportation when he did not voluntarily leave and reenter the United States). In contrast, during this same period the Court permitted the summary *exclusion* of other noncitizens without a hearing, holding that the "exclusion of aliens is a fundamental act of sovereignty" and that "[w]hatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff v. Shaughnessy*, 338 U.S. 537, 542-53 (1950).

⁹⁵ 342 U.S. 580 (1952).

⁹⁶ *Id.* at 584, 593. The petitioners also argued that the law violated the First Amendment. *Id.* at 591-92.

⁹⁷ *Id.* at 585.

⁹⁸ *Id.* at 587-88.

⁹⁹ *Id.*

¹⁰⁰ *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

¹⁰¹ *Id.* at 594.

¹⁰² *Id.* at 594-95. *But see id.* at 598, 600 (Douglas, J., dissenting) (calling deportation a punishment through banishment and a deprivation of "all that makes life worth while" and arguing that *Fong Yue Ting* should be overruled).

the exclusion context, particularly when the respondent was not a permanent resident.¹⁰³ In fact, the status of the respondent seemed at times more determinative than the status of the proceedings.¹⁰⁴ However, notwithstanding the Court's apparent discomfort with the civil label, it never undertook a substantive reevaluation of that label.

In the final decades of the twentieth century, as the Rehnquist Court began to confront the civil designation of removal proceedings, all apparent discomfort with that label seemed to vanish from the Court's opinions.¹⁰⁵ Most recently, the Court has seemed uninterested in undertaking a substantive inquiry into the sources of the powers to exclude and expel. It has noted a number of sources of constitutional authority pertaining to immigration generally, including the naturalization powers, the foreign relations powers, and the war powers.¹⁰⁶ The Court, however, has not independently articulated the relevance of these constitutional powers to the expulsion and exclusion powers individually. The Court's recent pronouncements are therefore of limited utility in assessing the civil or criminal nature of exclusion and expulsion.

Thus, through more than 200 years of constitutional history, *Fong Yue Ting* remains the only case in which the Supreme Court has undertaken a serious inquiry into the civil or criminal nature of removal proceedings. That decision rested on contested historical evidence and upon an assertion, unsupported by any authority, that the power to exclude noncitizens and the

¹⁰³ Compare *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) ("We do not agree . . . that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."), and *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (construing immigration regulation permitting exclusion of aliens based on secret evidence inapplicable to a returning permanent resident alien because of the substantial constitutional concerns that such an application would present), with *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (upholding denial of temporary visa to non-permanent resident and sustaining Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)), and *Boutilier*, 387 U.S. at 123 (upholding law excluding homosexuals based on Congress's plenary power over admission and exclusion of aliens). See also *supra* note 94 and accompanying text; Morawetz, *supra* note 29, at 125 n.122 (discussing in general that the terminology of "plenary power" has rarely arisen in cases involving long term permanent residents).

¹⁰⁴ See *supra* notes 94, 103 and accompanying text.

¹⁰⁵ See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (explaining that deportation is not punishment because the noncitizen is "merely being held to the terms under which he was admitted"); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding that deportation is a "purely civil action" and refusing to apply the exclusionary rule to such proceedings).

¹⁰⁶ See, e.g., *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.") (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (locating the immigration power in, inter alia, the naturalization clause and the foreign commerce clause as well as the "broad authority over foreign affairs").

power to expel noncitizens are one and the same.¹⁰⁷ Moreover, because the Court has declined every subsequent invitation to reexamine that holding, it has never had the opportunity to apply its modern view of the civil-criminal divide in the immigration context.

III. A BIFURCATED ANALYSIS OF THE CRIMINAL OR CIVIL NATURE OF REMOVAL PROCEEDINGS

The majority's pronouncement in *Fong Yue Ting* that "[t]he power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power"¹⁰⁸ is the birth of what I call the Court's monolithic approach to removal proceedings. It is this statement that conflates the analysis of the civil or criminal nature of exclusion with the analysis of the civil or criminal nature of expulsion and obviates, for the Court, the need to independently justify the application of the civil label to each action. Because the Court believes that exclusion and expulsion are two sides of the same coin, any evidence that exclusion is civil in nature applies with equal force to expulsion. The majority made this pronouncement in *Fong Yue Ting* in the face of vigorous dissents and without citation to a single source of authority. It is this unsupported pronouncement, the validity of which the Court has never reexamined, that I propose is the Court's fundamental error.

In this section, I seek to reexamine the civil designation of removal proceedings and to subject the Court's monolithic approach to rigorous scrutiny. This Article uses three lenses to examine the nature of removal proceedings: (1) an examination of the rationale of the Court in *Fong Yue Ting* on its own terms—assessing the merits of the Court's claim that exclusion and expulsion are civil because they are part of the same extra-constitutional power inherent in sovereignty; (2) an historical analysis; and (3) an application of the Supreme Court's current test for evaluating the civil or criminal nature of proceedings. I conclude that each of these lenses reveals a flaw in the monolithic approach, and each instead supports a bifurcated approach to understanding the true nature of removal proceedings in which exclusion and expulsion are viewed separately. Collectively, the view through these three lenses reveals that removal proceedings straddle the civil-criminal divide, with exclusion falling on the civil side and expulsion on the criminal side.

Each of these three lenses tells us something important and different about the nature of removal proceedings. First, an examination of the Court's claims about the nature and source of the powers to exclude and expel is critical because the Court's reasoning in *Fong Yue Ting* rests primarily upon

¹⁰⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 713 (1893).

¹⁰⁸ *See id.* at 713.

its understanding of these powers. Moreover, since the Supreme Court has never undertaken a substantive reexamination of the issue in *Fong Yue Ting*, the justification presented therein remains the only clearly articulated rationale for the civil label that the Supreme Court has offered. I argue here that the Court misconstrued the nature and source of the power to expel because it failed to grapple with the division of authority among leading international law scholars and because it failed to adequately confront the possibility that the powers inherent in sovereignty had been limited by the Constitution. In addition, the Court's rationale has been roundly rejected by modern scholars, and the Supreme Court itself has demonstrated increasing discomfort with claims of extra-constitutional powers.

Second, the historical analysis is important primarily because it informs our understanding of the Framers' intent.¹⁰⁹ Remembering what is ultimately at stake in the criminal or civil designation—the meaning of the constitutional clauses imparting the enhanced protections in criminal proceedings—makes this analysis of whether the Framers conceived of exclusion and/or expulsion as a criminal penalty relevant. The historical treatment of removal proceedings reveals that the models most likely to influence the Framers—common-law England and colonial America—treated exclusion as a civil administrative matter but expulsion as a criminal penalty.¹¹⁰

Third, the modern civil/criminal test has never been used by the Supreme Court in the removal context. The test was developed in the latter half of the twentieth century, long after the Court pronounced all removal proceedings to be civil in *Fong Yue Ting*. I do not endeavor to critique this test. Instead, insofar as coherence and consistency are accepted virtues in a common-law system, I propose that application of the modern test is one important indicator of the nature of exclusion and expulsion proceedings. When applied, the modern test also supports the claim that exclusion is a civil action but expulsion is a criminal punishment.

¹⁰⁹ See Bleichmar, *supra* note 37. Bleichmar presents a useful analysis of the historical use of transportation as a criminal punishment and its influence on the Framers' conception of the criminal or civil nature of removal. He argues that all removal orders are criminal in nature because they are analogous to the eighteenth century, widespread practice of transportation. *Id.* at 116. Building upon Bleichmar's analysis, I argue below that expulsion, but not exclusion, is the modern day equivalent of the criminal punishment of transportation.

¹¹⁰ The Court in *Fong Yue Ting* recognized the relevance of a historical inquiry but asked the wrong historical question. 149 U.S. at 707. The Court focused on whether or not nations have historically had the power to expel or deport noncitizens. *Id.* at 707-11. No one was arguing that the United States lacked the power to expel or exclude. The real issue, which the Court sidestepped, was whether the powers of exclusion and/or expulsion had historically been criminal or civil. See discussion *infra* Part III.B.

A. *The Supreme Court's Foundational Rationale for the Civil Label:
The Inherent Powers Theory*

The Constitution does not explicitly mention the power to exclude or expel noncitizens. As a result, the source and nature of the federal government's authority to regulate immigration has been a subject of great debate from the earliest days of the Union.¹¹¹ In the years immediately preceding the Supreme Court's decision in *Chae Chan Ping*, the immigration powers were most commonly understood as a component of the powers delegated to Congress through the Foreign Commerce Clause.¹¹² *Chae Chan Ping* marked the birth of what has become known as the "inherent powers theory." As Justice Field explained the theory for the Court:

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.¹¹³

In *Fong Yue Ting*, the Court extended the inherent powers theory from the exclusion context to the expulsion context. As the Court explained, "[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and *inalienable* right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."¹¹⁴ The assertion that the powers to exclude and expel are inalienable "has come to stand for the idea of immigration control as an unenumerated, or even extra-constitutional, power inherent in nationhood."¹¹⁵ According to the Court, the civil label and the inapplicability of constitutional criminal procedural protections flowed naturally from the understanding of the immigration powers as inherent extra-constitutional powers.¹¹⁶

¹¹¹ See *supra* notes 46-48 and *infra* notes 224-227 and accompanying text.

¹¹² See Cleveland, *supra* note 46, at 81, 106-12. Cleveland provides an excellent and comprehensive historical examination of the origins of the doctrine of inherent powers over foreign affairs and the Supreme Court's ultimate ratification of that doctrine in its late nineteenth-century decisions.

¹¹³ *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (emphasis added).

¹¹⁴ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (emphasis added).

¹¹⁵ NEUMAN, *supra* note 21, at 122. Notwithstanding this common understanding of the inherent powers theory, the decision in *Fong Yue Ting* itself does not present a consistent picture of the relationship between the immigration powers and the Constitution. See, e.g., *Fong Yue Ting*, 149 U.S. at 712 (referring to the immigration powers as "committed by the constitution" to the political branches of government); *id.* at 730 (referring to the immigration powers as "constitutional authority").

¹¹⁶ *Fong Yue Ting*, 149 U.S. at 712-13. This logical leap is certainly ripe for scrutiny. See discussion *infra* Part III.A.1.

The inherent powers theory was therefore the underlying basis of the civil designation established in *Fong Yue Ting*.¹¹⁷ Thus, an analysis of the inherent powers theory is the natural starting point to reassess the civil designation of immigration removal proceedings. An inquiry into the nature and source of the immigration powers is primarily valuable to test the merits of the Supreme Court's rationale.¹¹⁸

The Supreme Court's adoption of the inherent powers theory in *Chae Chan Ping* and *Fong Yue Ting* was ostensibly based upon its reading of the international law scholarship of the day. I will therefore begin by examining the authority explicitly relied upon by the Court. I conclude that the Court

¹¹⁷ While the Supreme Court has demonstrated increasing discomfort with the theory of extra-constitutional powers over the last century, *see* discussion *infra* Part III.A.3, it has never directly overruled the inherent powers holding of *Fong Yue Ting*. To the contrary, in the first half of the twentieth century the Supreme Court reaffirmed the concept of inherent powers several times. *See, e.g.*, *Carlson v. Landon*, 342 U.S. 524, 534 (1952) (referring to the "sovereign right to determine what noncitizens shall be permitted to remain within our borders" and explaining that the "lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens"); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (asserting the federal authority over foreign relations is inherent in the United States' existence as an independent nation and exists independently from any constitutional delegation).

¹¹⁸ Before launching into this inquiry, it is worth pausing for a moment to address its relevance to the proverbial elephant in the room: the plenary powers doctrine. The birth of the plenary powers doctrine—the principle that restricts the judiciary from applying constitutional scrutiny to the substantive provisions of immigration law—can be traced, like the civil designation, to the Supreme Court's decisions in *Chae Chan Ping*, 130 U.S. 581 (1889), and *Fong Yue Ting*, 149 U.S. 698 (1893). More specifically, the plenary powers doctrine can be understood as an outgrowth of the inherent powers theory. Insofar as the power to regulate immigration is derived from the inalienable nature of sovereignty and is thus extra-constitutional in origin, substantive constitutional limits have no place—or so the theory goes. Thus, to the extent that my inquiry draws into question the inherent powers theory, it also has some implications for the viability of the plenary powers doctrine. Nonetheless, even if we were to discredit the inherent powers theory altogether, the plenary powers doctrine does not necessarily fall, as the doctrine has alternative possible justifications. *See supra* note 57 and accompanying text.

Moreover, the viability of the plenary powers doctrine is not necessarily determinative of the civil or criminal nature of removal proceedings. If the plenary powers doctrine were to fall and constitutional scrutiny were to be applied to immigration policy, the question of whether to apply criminal or civil constitutional protections would remain. In the alternative, if, as I propose, we were to redesignate expulsion as a criminal proceeding, this would not necessarily eviscerate the plenary powers doctrine. Plenary powers could in theory survive with regard to exclusion decisions or could even apply to criminal expulsion proceedings since the relevant constitutional protections are procedural, and by definition are not covered by the substantive plenary powers doctrine. *See* Motomura, *supra* note 36, at 550-60 (giving historical account of the plenary powers doctrine). Assessing the merits of the plenary powers doctrine is the subject of an extremely rich and voluminous body of scholarship and is beyond the scope of this piece. *See, e.g.*, ALENIKOFF, *supra* note 21; NEUMAN, *supra* note 21; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256; Motomura, *supra* note 36, at 606; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002). Accordingly, I cabin my analysis to the civil or criminal nature of removal proceedings and leave the issue of plenary powers to the renowned scholars who have spoken volumes on the issue.

failed to confront the division of opinion among leading international law scholars regarding the source and nature of the immigration power and further failed to give sufficient consideration to the unique limits that the American constitutional structure places upon whatever powers may be inherent in sovereignty. I then turn to contemporary conceptions of the nature of the immigration power and conclude that a consensus is emerging among leading scholars rejecting the inherent powers theory. Finally, returning to the Supreme Court's own analysis, I will examine recent Supreme Court decisions to assess whether the original rationale for the civil label remains coherent. I conclude that it does not.

1. *The Supreme Court's Original Rationale for the Inherent Powers Theory*

In *Fong Yue Ting*, the Supreme Court's primary support for the inherent powers theory¹¹⁹ was its claim that the "leading commentators on the law of nations" agreed that "the right [of a state] to expel from its territory persons who are dangerous to the peace of the state[] [is] too clearly within the essential attributes of sovereignty to be seriously contested."¹²⁰ In support of this claim, the Court quoted from the work of Emer de Vattel,¹²¹ Sir Robert Phillimore,¹²² Thèodore Ortolan,¹²³ and Ludwig von Bar¹²⁴ regarding the right of sovereign nations to expel "foreigners"¹²⁵ or "strangers."¹²⁶

While these leading commentators generally understood the power to exclude to be absolute,¹²⁷ no such consensus existed with regard to the power

¹¹⁹ The Supreme Court also relied to a lesser degree on English history, which it claimed demonstrated the existence of the power to expel. See *Fong Yue Ting*, 149 U.S. at 709-10. I do not, however, contest that both England and the United States possessed the power to expel noncitizens. Again, the issue is whether that power was criminal or civil in nature. None of the English history cited by the Supreme Court indicates that expulsion was exercised as a civil power. See *id.* at 709; see also W.F. Craies, *The Right of Aliens to Enter British Territory*, 6 L. Q. REV. 27, 34 (1890). To the contrary, a review of English history demonstrates that the power to expel was exercised as a criminal punishment. See Craies, *supra*, at 34; see also discussion *infra* Part III.B.1.

¹²⁰ 149 U.S. at 707 (internal quotation marks omitted) (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 607 (1889)).

¹²¹ EMER DE VATTEL, 1 THE LAW OF NATIONS (1853); see *Fong Yue Ting*, 149 U.S. at 707-08.

¹²² SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW (3d. ed., Butterworths 1879); see *Fong Yue Ting*, 149 U.S. at 708.

¹²³ ORTOLAN, DIPLOMATIE DE LA MER, (4th ed.); see *Fong Yue Ting*, 149 U.S. at 70.

¹²⁴ L. BAR, INTERNATIONAL LAW: PRIVATE AND CRIMINAL (G.R. Gillespie trans., Edinburgh, Lorimer and Gillies 1883); see *Fong Yue Ting*, 149 U.S. at 708-09.

¹²⁵ 1 VATTEL, *supra* note 121, §§ 230-31; ORTOLAN, *supra* note 123, at 297; see *Fong Yue Ting*, 149 U.S. at 707-08.

¹²⁶ BAR, *supra* note 124, at 708 n.2, 711; PHILLIMORE, *supra* note 122, at 347; see *Fong Yue Ting*, 149 U.S. at 708-09.

¹²⁷ See, e.g., 1 VATTEL, *supra* note 121, § 100 ("[T]he lord of the territory may forbid [foreigners] entrance into it, whenever he thinks proper, forbid its being entered [by foreigners].").

to expel.¹²⁸ Some of the leading commentators, notably Phillimore and Ortolan, applied an absolutist approach to the expulsion context as well.¹²⁹ Others, including most notably Vattel,¹³⁰ recognized limits on the power of a nation to expel certain persons.¹³¹

The Supreme Court failed to confront the complex positions of these leading scholars in three critical ways. First, it failed to recognize that their references to “foreigners” or “strangers” were not likely intended to include permanent residents, such as the litigant in *Fong Yue Ting*. As Vattel explained in his chapter on “Rules with Respect to Foreigners,” “foreigners” was understood to refer to noncitizens “who pass through or sojourn in a country,”¹³² as distinguished from “permanent residents,” who are noncitizens “who have received the right of perpetual residence,” whom he described as “a sort of citizen of a less privileged character.”¹³³ Many early international law scholars recognized that nations possess only limited power to expel permanent residents.¹³⁴ Thus, the passages upon which the Supreme Court relied, which all refer to “strangers” or “foreigners,” are of limited utility in assessing the nature of the power to expel permanent residents.¹³⁵

¹²⁸ See WILLIAM EVAN DAVIES, *THE ENGLISH LAW RELATED TO ALIENS* 110-12 (1931) (discussing international law scholars’ disputes about power to expel); see also Cleveland, *supra* note 46, at 83-87 (same); see also EDWARD S. CREASY, *FIRST PLATFORM OF INTERNATIONAL LAW* 201, at 196 (London, Taylor and Francis 1876) (same). Compare PHILLIMORE, *supra* note 122, at ch. XXI, § 363 (espousing an absolutist view of the power to expel), and ORTOLAN, *supra* note 123 at 297 (same), with 1 VATTEL, *supra* note 121, §§ 213, 228 (explaining the limits on the power of a state to expel some noncitizens), and THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* § 62, at 98-99 (3d ed. 1872).

¹²⁹ ORTOLAN, *supra* note 123 at 297; PHILLIMORE, *supra* note 122, at ch. XXI, § 363; Cleveland, *supra* note 46, at 87; see also NEUMAN, *supra* note 21, at 13 (discussing Vattel on exclusion).

¹³⁰ 1 VATTEL, *supra* note 121, §§ 213, 228. As Professor Neuman has explained, “Emer de Vattel’s *Law of Nations*, requires particular notice because of its great prestige in post-Revolutionary America, also reflected in these debates.” NEUMAN, *supra* note 21, at 9, 12.

¹³¹ WOOLSEY, *supra* note 127, at § 59, at 93. See generally Cleveland, *supra* note 46, at 85.

¹³² 1 VATTEL, *supra* note 121, § 99.

¹³³ *Id.* at bk. I, ch. XIX, § 213; see also PHILLIMORE, *supra* note 122, at ch. XVIII, § 321 (characterizing domiciled noncitizens as “*de facto* though not *de jure* citizens of the country of their domicile”).

¹³⁴ See, e.g., 1 VATTEL, *supra* note 121, §§ 213, 228 (distinguishing the banishment of permanent residents from aliens who “had had no settlement” in the nation); WOOLSEY, *supra* note 127, § 62, at 98-99; see also CREASY, *supra* note 127, at 201; Cleveland, *supra* note 46, at 86. James Madison concurred with this theory of a limited power to expel. “Even if the admission of friendly aliens was a matter of discretion under international law. . . once admitted to the country, the grant could not be rescinded. . . . [T]he original bestowal may have been discretionary, but could not be revoked without good reason.” Cleveland, *supra* note 46, at 94-95 (explaining Madison’s position).

¹³⁵ A closer look at one of these passages provides a clear example of the Court’s misapprehension of the position of the international law theorists. The Court claimed that Vattel’s pronouncement that “[e]very nation has the right to refuse to admit a *foreigner* into the country, . . . [t]hus, also, it has a right to send *them* elsewhere,” supported the absolute right. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-08 (1893) (quoting 1 VATTEL, *supra* note 120,

Second, even if we accept the proposition that the right to expel is inherent in the nature of sovereignty, the Court errs in proclaiming that application of the civil label is therefore self-evident. For example, even Phillimore, who believed in the absolute right of the sovereign to expel (at least strangers), accepted that to force one to change his domicile is a “punishment.”¹³⁶ Vattel spoke in even stronger terms: “exile . . . may be inflicted as a punishment [and] banishment is always [penal in character].”¹³⁷ Thus, the Court’s leap from its conclusion that the power to expel is an inherent power to its claim that expulsion is civil in nature was not the consensus position among scholars of the day. The Court simply failed to confront the possibility that the power to expel is both inherent and criminal.

Finally, and most importantly, the Court failed to put forth any support for its claim that the right, even if inherent, was “inalienable.”¹³⁸ Put another way, the Court failed to confront the possibility that, even if sovereigns generally possess absolute power to exclude and expel, the Constitution limits that inherent authority. The Court’s reliance on international law may have been a proper starting point but, as Professor Cleveland explains, it “simply had nothing to say about the extent to which domestic law might constrain governmental power.”¹³⁹ As Ortolan explained in the passage quoted in *Fong Yue Ting*, the power to expel “‘may be subjected, doubtless, to certain forms by the domestic laws of each country.’”¹⁴⁰ Two decades earlier, the Supreme Court seemed keenly aware of the limits that the Constitution places upon ostensibly inherent powers. In *Knox v. Lee*,¹⁴¹ the Court addressed the claim that the right to define legal tender was “inherent in every sovereignty”:

But upon what principle is it a necessary sovereign right?
True, it is a right which has been exercised by absolute sovereigns.
So has every other form of power and plunder. But that does not

§§ 230, 231) (emphasis added). What the Court failed to consider was to whom “them” referred. Read in context, “them” clearly did not refer to permanent residents. First, Vattel clearly distinguished between “foreigners” and “permanent residents.” Compare 1 VATTEL, *supra* note 121, § 99, with *id.* §§ 213, 228. Moreover, the sections from which the quote is drawn are entitled “Nature of *this right*,” *id.* § 230 (emphasis added) and “Duty of nations towards *them*,” *id.* § 231 (emphasis added). In order to understand what “this right” was and to whom “them” referred we must look back one section before the quoted text. Section 229 is entitled “The exile and [the] banished man have a right to live somewhere.” *Id.* § 229. Thus, “this right” referred to the right of displaced persons not to be rendered stateless and the corollary right of states to limit the *entrance* of displaced persons. “Them” referred to displaced persons attempting to make an initial entry into a nation, not permanent residents previously granted admission to the national community. See also *Fong Yue Ting v. United States* 149 U.S. 698, 756 (1893) (Field, J., dissenting) (explaining that the passage of Vattel quoted by the court also pertained only to exclusion).

¹³⁶ ROBERT PHILLIMORE, *THE LAW OF DOMICIL* 25 (1847).

¹³⁷ 1 VATTEL, *supra* note 121, § 228.

¹³⁸ *Fong Yue Ting*, 149 U.S. at 711.

¹³⁹ Cleveland, *supra* note 46, at 253; see also NEUMAN, *supra* note 21, at 121.

¹⁴⁰ *Fong Yue Ting*, 149 U.S. at 708 (quoting ORTOLAN, *supra* note 123, at 297).

¹⁴¹ 79 U.S. 457 (1870).

make it a necessary right in a limited constitutional government established to maintain justice. . . .

It is a mistake to suppose that the framers of this government, or the people who ratified their work, intended that all powers of government should be vested either in the Federal or the State governments. On the contrary, this was an artificial government; not the result of gradual growth, but formed by the union of independent States; not formed for the benefit of any family, or ruler, or person, but formed to secure certain ends for those who thus united. What those ends were, the framers of the government took care to declare. Far from requiring that the new government should possess all the powers usual to sovereigns, they expressly forbade some most sovereign powers, and refused to grant others.¹⁴²

On its own terms, the Court's rationale for the inherent powers theory and the resultant civil label is unpersuasive. The Court overstated the positions of the leading international law commentators it relied upon and failed to appreciate the complexity of their positions individually and the diversity of their opinions collectively. The positions of the leading international law scholars at the time do not compel a conclusion one way or another regarding the civil or criminal nature of the immigration powers.

2. *Contemporary Scholarly Views of the Inherent Powers Theory*

The *Fong Yue Ting* Court's failure to appreciate the diversity of opinion among the leading international law scholars of its time is particularly problematic in light of the emerging consensus among the leading modern scholars disavowing the extra-constitutional inherent powers theory.¹⁴³ These

¹⁴² See *id.* at 491-92.

¹⁴³ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 19-20 (1996) (explaining that the notion that "the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates."); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990) (summarizing the "withering criticism" of the inherent powers theory); NEUMAN, *supra* note 21, at 121 ("Thus, the external sovereignty argument for unlimited power over immigration was flawed to begin with and carries even less persuasive force today."); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 21 (1998) (noting of the pervasive critique of the extra-constitutional theory of immigration law that "[m]any have commented upon its persistence and almost all have vigorously condemned it"); Cleveland, *supra* note 46, at 253 ("But the Court's doctrinal justifications for the holdings ultimately are unsatisfying as an explanation for the resort to inherent powers. . . . International law simply had nothing to say about the extent to which domestic law might constrain governmental power."); see also ALEINIKOFF, *supra* note 21, at 152; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987); Legomsky, *supra* note 118; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992); Motomura, *supra* note 36.

modern scholars have offered several different rationales for their repudiation of the inherent powers theory.

Some scholars believe that the inherent powers theory was derived from the Court's inability to look beyond federalism concerns.¹⁴⁴ The Court implicitly reasoned that since immigration was an outward-looking power it did not risk infringing upon the states and thus, it concluded, was not limited by the Constitution. The Court failed to fully appreciate the fact that the Constitution imposed limits on the federal government not just to protect the states but also to protect "the people."¹⁴⁵

Other modern scholars believe that the inherent powers theory is founded on a mistaken concept of institutional competency and deference to political branches¹⁴⁶ or claim that the rationale for the theory—the need for absolute control over the movement of persons in the national territory—has eroded over time¹⁴⁷ or critique the inherent powers theory as driven more by nativist instincts than by doctrine.¹⁴⁸

For our purposes, the most important critiques of the inherent powers theory are those driven by an analysis based upon contemporary notions of membership theory and the special status of permanent residents.¹⁴⁹ The Court's inherent powers analysis simply failed to account for the special status and rights of permanent residents and the necessary limits on state power flowing therefrom. The rationale for the inherent powers theory—the right to self-preservation and the resultant power to protect against foreign invasion and, as the Supreme Court stated, "vast hordes of . . . people crowding in upon us"¹⁵⁰—is simply not relevant when considering a group of people (permanent residents) who have been affirmatively granted the right to live and work in the United States permanently.¹⁵¹

These contemporary critiques of the inherent powers theory do not resolve the issue of whether exclusion or expulsion is properly conceived of as civil or criminal, but they largely reject the Supreme Court's rationale for applying a blanket civil label.

¹⁴⁴ See, e.g., NEUMAN, *supra* note 21, at 121; Cleveland, *supra* note 43, at 268.

¹⁴⁵ E.g., U.S. CONST. amend. X ("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."); see also Cleveland, *supra* note 46, at 274-75.

¹⁴⁶ See, e.g., ALEINIKOFF, *supra* note 21, at 159-65.

¹⁴⁷ See NEUMAN, *supra* note 21, at 121, 123.

¹⁴⁸ See Cleveland, *supra* note 46, at 256.

¹⁴⁹ See, e.g., ALEINIKOFF, *supra* note 21, at 147-48, 167-74; Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1058 (1994).

¹⁵⁰ *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

¹⁵¹ ALEINIKOFF, *supra* note 21, at 156; NEUMAN, *supra* note 21, at 131-34; Bennett, *supra* note 20, at 1095 (analogizing LPRs to denizens).

3. *The Supreme Court's Evolving Understanding of the Nature of the Immigration Powers and the Inherent Powers Theory*

The inherent powers theory, though originally developed in *Chae Chan Ping* and *Fong Yue Ting*, has over time come to be associated most directly with the Supreme Court's decision, some four decades later, in *United States v. Curtiss-Wright Export Corp.*¹⁵² In *Curtiss-Wright*, the Supreme Court passed upon the constitutionality of a congressional resolution that made it a crime to sell arms to certain foreign nations if the President proclaimed that such prohibition would "contribute to the reestablishment of peace."¹⁵³ The central issue was whether the resolution represented an unconstitutional delegation of legislative powers to the executive.¹⁵⁴ The Court held that it did not because the power exercised was an external power and thus, it asserted, not derived from the Constitution.¹⁵⁵

Writing for the Court, Justice Sutherland explained that the "whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs."¹⁵⁶ He then explained that only "domestic or internal affairs" were subject to the well-established concept that the federal government is one of limited, delegated, constitutionally enumerated powers.¹⁵⁷ He reasoned:

[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.¹⁵⁸

Sutherland went on to explain that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," but rather was transmitted from England to the federal government via extra-constitutional means.¹⁵⁹ In dicta,

¹⁵² 299 U.S. 304 (1936).

¹⁵³ *Id.* at 312.

¹⁵⁴ *Id.* at 314.

¹⁵⁵ *Id.* at 318-20.

¹⁵⁶ *Id.* at 315.

¹⁵⁷ *Id.* at 315-16.

¹⁵⁸ *Curtiss-Wright*, 299 U.S. at 316 (emphasis in original) (citation omitted). *But see* Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 17 (1973) (critiquing Court's historical account in *Curtiss-Wright*).

¹⁵⁹ *Curtiss-Wright*, 299 U.S. at 316-18 (1936); *see also* *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88 (1952) (characterizing the power to expel as "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."). *But cf.* *Curtiss-Wright*, 299 U.S. at 320 (Justice Sutherland's caveat that external powers, "like every

Sutherland cited *Fong Yue Ting* and claimed specifically that the “power to expel undesirable aliens” was one of the extra-constitutional external sovereign powers possessed by the federal government.¹⁶⁰

Since the middle of the twentieth century, however, the Supreme Court has demonstrated a growing unease with the inherent powers theory. The Supreme Court has never explicitly overruled *Fong Yue Ting* or *Curtiss-Wright*,¹⁶¹ but over the last fifty years, it has abandoned the central claim of extra-constitutional powers.¹⁶² The Court first rejected the inherent powers theory in *Reid v. Covert*.¹⁶³ Speaking for a four-Justice plurality, Justice Black explained that “[t]he United States is entirely a creature of the Constitution. *Its power and authority have no other source.* It can only act in accordance with all the limitations imposed by the Constitution.”¹⁶⁴ In a concurring opinion Justice Harlan stated that “[t]he powers of Congress, unlike those of the English Parliament, are constitutionally circumscribed. Under the Constitution, Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers.”¹⁶⁵ Together, Justice Black’s plurality opinion and Justice Harlan’s concurring opinion represent five votes rejecting the inherent powers theory and holding that all powers of the federal government are constitutionally derived.¹⁶⁶

A decade after *Reid*, the Supreme Court again made clear its rejection of the inherent powers theory.¹⁶⁷ In *Afroyim v. Rusk*, the Supreme Court overruled a prior decision in which it had held that Congress had the inher-

other governmental power, must be exercised in subordination to the applicable provisions of the Constitution”). Justice Sutherland’s claim has been challenged as historically inaccurate. See Lofgren, *supra* note 158, at 18.

¹⁶⁰ *Curtiss-Wright*, 299 U.S. at 318.

¹⁶¹ *But cf.* *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998) (questioning Justice Sutherland’s rationale in *Curtiss-Wright* as “quite possibly incorrect[]”), *vacated in part on other grounds*, 165 F.3d 593 (7th Cir. 1999).

¹⁶² See *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *id.* at 66 (Harlan, J., concurring).

¹⁶³ 354 U.S. 1 (1957).

¹⁶⁴ *Id.* at 5-6 (plurality opinion) (emphasis added) (citation omitted).

¹⁶⁵ *Id.* at 66 (Harlan, J., concurring).

¹⁶⁶ See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (“I take it to be correct, as the plurality opinion in *Reid v. Covert* sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”) (citation omitted). As Professor Neuman has explained:

Since *Reid v. Covert*, it has generally been recognized that the Constitution as such “applies” wherever the government of the United States may act, and provides the source of the federal government’s authority to act there—the disputable question is whether a particular constitutional limitation on the government’s authority to act should be regarded as including within its prohibitions unusual categories of places or persons.

NEUMAN, *supra* note 21, at 5.

¹⁶⁷ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

ent power to expatriate citizens who vote in foreign elections.¹⁶⁸ In so holding, the Court explained:

[W]e reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.¹⁶⁹

Apart from the decision overruled by *Afroyim*, the Supreme Court has never cited¹⁷⁰ *Curtiss-Wright* for either of its inherent powers claims: (1) "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs;"¹⁷¹ or (2) "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."¹⁷² While *Curtiss-Wright* is still frequently cited to support the proposition that broad deference is due to the political branches in matters of foreign affairs,¹⁷³ the Supreme Court seems to have long ago abandoned the inherent

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 257.

¹⁷⁰ A Westlaw Keycite search of Supreme Court cases citing *Curtiss-Wright* for these two holdings results in only two cases: (1) *Perez*—the case overruled by *Afroyim*; and (2) *Perpich v. Department of Defense*, 496 U.S. 334 (1990). Upon reading *Perpich*, however, it becomes clear that the Supreme Court was not affirmatively agreeing with either of these two holdings from *Curtiss-Wright*. *Perpich* involved a challenge by the Governor of Minnesota to the peacetime deployment of state National Guard troops abroad under the Militia Clauses of the Constitution. *Id.* at 336-38. The Court's citation in *Perpich* was in footnote dicta, in support of its musing that, "[w]ere it not for the Militia Clauses, it might be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia." *Id.* at 353-54.

¹⁷¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936).

¹⁷² *Id.* at 318.

¹⁷³ *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is 'the sole organ of the federal government in the field of international relations'" (quoting *Curtiss-Wright*, 299 U.S. at 320)); *Haig v. Agee*, 453 U.S. 280, 291 (1981) (quoting *Curtiss-Wright*, 299 U.S. at 319); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.") (citation omitted).

powers theory,¹⁷⁴ leaving its earlier conclusion based upon that theory—that all removal proceedings are civil—without articulated justification.¹⁷⁵

This examination demonstrates that the Supreme Court misconstrued the international law literature upon which it relied in affixing the civil label to removal proceedings and incorrectly concluded that international law theorists were in agreement regarding the inherent and civil nature of the power to expel permanent residents. The Court further failed to properly consider the limited relevance of inherent powers in the context of a limited government of constitutionally delegated powers. Over time, leading scholars and the Supreme Court itself have come to recognize the significant flaws in the genesis of the inherent powers theory.

Rejecting the inherent powers theory directly undermines the Court's rationale for the civil label.¹⁷⁶ It does not, however, provide clear guidance

¹⁷⁴ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (“[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”); see also *Reid v. Covert*, 354 U.S. 1, 5-6 (1957); NEUMAN, *supra* note 21, at 5, 123. In the immigration realm we sometimes still see references to the powers inherent in sovereignty, but they are almost always accompanied by references to the constitutional sources of immigration powers. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (locating the immigration power in, *inter alia*, the naturalization clause and the foreign commerce clause as well as the “broad authority over foreign relations”). *But cf.* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

¹⁷⁵ Moreover, even if we were to view *Curtiss-Wright*'s holding that external powers are extra-constitutional as good law, there is reason to question the designation of expulsion as an external power. Unlike the issue in *Curtiss-Wright*, expulsion of a long-term permanent resident can hardly be characterized as “entirely external.” *Curtiss-Wright*, 299 U.S. at 315. In rare, isolated cases, an individual's expulsion can have profound international implications. See, e.g., Abby Goodnough & Marc Lacey, *Legal Victory by Militant Cuban Exile in U.S. Brings Both Glee and Rage*, N.Y. TIMES, May 10, 2007, at A20 (detailing the plight of a Cuban national facing deportation who was wanted by both Cuban and Venezuelan governments for alleged involvement in a terrorist bombing). However, the vast majority of expulsion cases have more significant domestic effects. When permanent residents are deported, they are separated from their homes and property in the United States; their families—often United States citizens—are either abandoned in the United States or uprooted; their employers are left looking for replacements, and the government, both local and federal, is deprived of the tax revenue they generate. The collective effects of expulsion on our internal domestic affairs are profound and one can make a good case that expulsion is more properly characterized as an internal power. *Cf.* Gerald Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 325 (“It is in the area of admission and exclusion of aliens that the government's need for flexibility is greatest.”).

¹⁷⁶ Rejecting the inherent powers theory as the source of the exclusion and expulsion powers necessarily raises the question: From what constitutional source then are these powers derived? This inquiry is beyond the scope of this article and has been the subject of much scholarly work. See, e.g., Christopher G. Blood, *The ‘True’ Source of the Immigration Power and its Proper Consideration in the Elian Gonzalez Matter*, 18 B.U. INT'L L.J. 215 (2000). Consistent with the bifurcated approach I propose, I believe that attempting to locate a singular source of constitutional power to justify both exclusion and expulsion is futile. The decision to admit or exclude someone is closely related to the naturalization power, U.S. CONST. art. 1, § 8 cl. 4—the power to include someone in our national community—and the war power, U.S. CONST. art. 1, § 8 cl. 11—the power to defend against outside invasion. But these powers do not fit the expulsion context as well. The confusion regarding the source of the government's

regarding the proper civil or criminal designation of exclusion and expulsion proceedings. Accordingly, I now turn to the historical record regarding the civil or criminal treatment of such proceedings and then to the current doctrinal mechanisms for distinguishing criminal from civil matters generally.

*B. Historical Analysis of the Civil or Criminal Nature
of Removal Proceedings*

Since the utility of the historical lens is primarily the window it provides into the Framers' understanding of the nature of exclusion and expulsion, I focus here on the historical models most likely relied upon by the Framers: eighteenth century England and colonial America.¹⁷⁷

1. The History of Exclusion and Expulsion in England

Legal historians generally agree about the early nature and source of the power to exclude foreigners from entering England.¹⁷⁸ No such agreement exists, however, regarding the early power to expel noncitizens from within England.¹⁷⁹

The power to grant admission or exclude foreigners from England was shared by the King and Parliament. The King had complete control over the physical entrance of noncitizens into England.¹⁸⁰ He could exercise this power to prevent foreigners from entering England whenever and however he saw fit.¹⁸¹ In contrast to the power over physical entry, the political power to admit or deny admittance to the English national community was shared by the King and Parliament. Parliament had the power to naturalize foreigners; that is, to grant them English citizenship.¹⁸² The King, while impotent to naturalize foreigners, could grant foreigners denizen status, making them

power to expel, I propose, arises because of a United States constitutional peculiarity—the lack of a federal police power. Historically, expulsion has been an exercise of police powers. See discussion *infra* Part III.B. The absence of that freestanding power in the federal government and the obvious problems with locating expulsion power within the states' police powers has created significant confusion. There are several possible resolutions to this riddle. Ultimately, though, the riddle is not unique to the expulsion context, but rather is the issue about which volumes have been written: what constitutional power supplies the authority to create and enforce federal crimes?

¹⁷⁷ While I do not consider myself an originalist, I do think that the Framers' original understanding of the Constitution is one important factor to consider. Insofar as I am claiming that the Framers understood broader application of constitutional protections than our system currently recognizes, their understanding is critical.

¹⁷⁸ See DAVIES, *supra* note 128, at 110.

¹⁷⁹ *Id.* at 112.

¹⁸⁰ BLACKSTONE, *supra* note 20, at *259.

¹⁸¹ *Id.* But see Craies, *supra* note 119, at 36-37 (“It may be [] true that in international law independent states are entitled . . . to exclude or expel alien friends . . . subject to [] treaties But this determines nothing as to the existence of any constitutional power in a perfectly independent state to exclude or expel strangers.”).

¹⁸² BLACKSTONE, *supra* note 20, at *374.

English subjects.¹⁸³ “A denizen is an alien born, but who has obtained . . . by gift of the king letters patent to make him an English subject . . . A denizen is in a kind of middle state, between an alien and a natural born subject, and partakes of both of them.”¹⁸⁴ Denizen status, which was widely used in the fifteenth and sixteenth centuries,¹⁸⁵ has been recognized as a precursor to the modern lawful permanent resident status.¹⁸⁶ The power to grant or deny physical admission and the power to grant or deny political admission to the national community, whether exercised by the King or Parliament, were conceived of as the power to bestow a benefit and were, therefore, civil administrative powers unrelated to criminal punishment.

There is no such scholarly consensus regarding the nature and source of the power to expel noncitizens from within England. Some commentators maintain that, as with exclusion, the King had unfettered power to expel noncitizens whenever and however he saw fit.¹⁸⁷ Other legal historians view the power to expel as a punishment that could only be meted out for violations of the criminal laws of Parliament with all the procedural protections attaching thereto.¹⁸⁸ Thus, the disagreement as to the civil or criminal nature of the expulsion power has often taken the form of a debate about whether the power to expel lay with the King or with Parliament.¹⁸⁹ In light of the disagreements regarding the theoretical nature of the expulsion power in common-law England, we are forced to focus our inquiry instead on how this power was actually exercised. Investigating the mechanisms through which expulsion was realized in early England will help us understand how the American constitutional Framers likely conceived of this power.¹⁹⁰

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 373.

¹⁸⁵ See 7 THE WORKS OF FRANCIS BACON 648-49 (James Spedding et al. eds., Garrett Press 1968) (1868).

¹⁸⁶ See *Fong Yue Ting v. United States*, 149 U.S. 698, 736-38 (1893) (Brewer, J., dissenting).

¹⁸⁷ See, e.g., BLACKSTONE, *supra* note 20, at *259-60 (“[Foreigners] are under the king’s protection; though liable to be sent home whenever the king sees occasion.”). Though Blackstone’s words have been interpreted to mean he saw the Crown as empowered to expel noncitizens, I do not believe Blackstone intended these words to apply to denizens, or their modern corollary—permanent residents—since he conceived of denizens as being “in a kind of middle state, between an alien and a natural-born subject, and partakes of both of them.” *Id.* at 373.

¹⁸⁸ See, e.g., *Alien Law of England*, 42 EDINBURGH REV. 99, 99 (1825) (arguing that “expulsion” is a “punishment on conviction in a court of justice, for certain offenses, where as a natural born subject might be left to work out his penalty at home” and that the “punishment” must be subject to the “several odious necessities of criminal law”); Craies, *supra* note 119, at 34-35 (“England was a complete asylum to foreigners who did not offend against English law.”). Notably, the text of the Magna Carta itself provides some support for this view insofar as it guarantees that “No Freeman shall be . . . exiled . . . but by lawful Judgment of his Peers, or by Law of the Land.” Magna Carta, Article 39 (1215).

¹⁸⁹ See, e.g., *Alien Law of England*, *supra* note 188, at 99; Craies, *supra* note 119, at 35; see also *Fong Yue Ting*, 149 U.S. 698, 709 (1892) (recognizing the debate over whether the Crown or Parliament had the power to expel).

¹⁹⁰ In *Fong Yue Ting*, the Supreme Court relied, in part, on English assertions of the power to expel. 149 U.S. at 709-10. The English history cited by the Court is not relevant to our analysis here because (1) all of the history cited post-dated the drafting of the Constitution and,

There is very little historical evidence of England preventing noncitizens from entering its realm or expelling them from within prior to the seventeenth century.¹⁹¹ That is not to say that prior to the seventeenth century no one was expelled from England. To the contrary, banishment had been recognized and used as a criminal punishment imposed on foreigners and subjects alike since ancient times.¹⁹² Abjuration of the realm, a type of banishment whereby a criminal defendant could escape prosecution by seeking the assistance of clergy, confessing, and promising to voluntarily leave the realm and not return upon pain of death, became a common form of criminal punishment in England as early as the thirteenth century.¹⁹³

The seventeenth century saw a significant increase in levels of immigration to England and with it, rising xenophobia and concerns about economic competition.¹⁹⁴ In response, a commission was formed to consider how to compel noncitizens within England to bind themselves to the laws of England or leave.¹⁹⁵ The commission's mission was apparently driven by a concern that, without such voluntary submission, England would have no legal authority to enforce its laws against noncitizens.¹⁹⁶ Since the requirement that noncitizens bind themselves to English law appears unrelated to criminal law, it may be viewed as an early assertion of a civil power to deport noncitizens. However, two factors significantly undermine the likely influence that this historical episode had on the Framers' conception of the power to expel. First, the commission's work did not, in reality, lead to the expulsion of any noncitizens from England.¹⁹⁷ Second, insofar as the commission asserted a civil power to expel noncitizens, that power did not extend to noncitizens who had been invited into the national community since denizens were all bound to obey the laws of England.¹⁹⁸ Meanwhile,

therefore, does not reflect the intent of the Framers; and (2) the history was cited merely in support of the Court's assertion that the federal government possessed the power to expel and not in regard to its conclusion that the nature of the power was civil.

¹⁹¹ Craies, *supra* note 119, at 33-34 (explaining that the examples from sixteenth century England of the exclusion or expulsion of aliens are virtually non-existent). The expulsion of Jews from England in 1290 is not properly understood as an early example of the expulsion of noncitizens because most of the people expelled were native born and their expulsion was justified not by their immigration status but rather because they were considered serfs rather than freemen. *Id.* at 30. The rights of Jews in England did "not depend on common law, but upon the will of their lord the king," as Jews were considered chattels of the king. *Id.* at 31.

¹⁹² William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 455, 459-61 (1998) (citing examples of banishment as a criminal punishment in various societies dating back to 2285 B.C.).

¹⁹³ W.F. Craies, *The Compulsion of Subjects to Leave the Realm*, 6 *L. Q. REV.* 390, 393-96 (1890); see also Snider, *supra* note 192, at 461 (explaining the widespread use of abjuration in England between the thirteenth and sixteenth centuries).

¹⁹⁴ Craies, *supra* note 119, at 34.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ As subjects, denizens were already bound to obey the laws of England. BLACKSTONE, *supra* note 20, at *374. Insofar as the commission's work is an example of the civil power to expel noncitizens who have not been admitted to the national community, this comports with

throughout the early portion of the seventeenth century, abjuration of the realm continued to be used as a criminal punishment for noncitizens and subjects alike. This punishment was, however, perceived to be losing its deterrent effect, and in 1623 the criminal punishment of abjuration of the realm was abolished.¹⁹⁹

The eighteenth century saw the rise to prominence of transportation—another form of banishment—which was likely the dominant historical expulsion model for the Framers.²⁰⁰ Transportation was a form of criminal punishment whereby convicts would be sentenced to indentured servitude in or banished to the colonies.²⁰¹ Transportation, originally administered on a haphazard basis, depended upon entrepreneurial ship captains to transport and sell those sentenced to transportation as indentured servants in America.²⁰² Like its precursor, abjuration of the realm, transportation was imposed upon citizens and noncitizens alike.²⁰³ In 1718, sparked by rising crime rates and the haphazard and uneven enforcement of transportation orders, the English Parliament passed the Transportation Act.²⁰⁴ This act provided, for the first time, public funding to send people sentenced to transportation to the American colonies.²⁰⁵

As a result of the Transportation Act, transportation became the most common form of punishment in felony cases in England during the eighteenth century.²⁰⁶ It was the only significant form of punishment short of death utilized during this period²⁰⁷ and was the only method by which England expelled either subjects or citizens.²⁰⁸ Between the passage of the Transportation Act in 1718 and the end of transportation to the Americas in 1775, one quarter of all British immigrants to America, approximately 50,000 people, were sent as a result of being sentenced to transportation as punishment for a crime.²⁰⁹ The prevalence of this phenomenon was not lost

my assertion that expulsion from the national community is criminal whereas physical removal of noncitizens who have not been admitted to the national community is properly understood to be a civil decision not to admit a noncitizen to the national community. Other commentators have also expressed the opinion that the Crown may possess a power to expel only those noncitizens who have not been invited into the national community as denizens. *Alien Law of England*, *supra* note 188, at 132 (quoting an opinion of Sir Ed Nothey that the Queen may compel “aliens, not made denizens, or naturalized . . . to depart”).

¹⁹⁹ Bleichmar, *supra* note 37, at 121.

²⁰⁰ For an excellent review of the historical phenomenon of criminal transportation, see Bleichmar, *supra* note 37, at 120-30.

²⁰¹ Craies, *supra* note 193, at 396.

²⁰² Bleichmar, *supra* note 37, at 123-24.

²⁰³ In *Fong Yue Ting v. United States*, the Supreme Court implicitly acknowledged that transportation was a punishment imposed on both citizens and noncitizens. See 149 U.S. 698, 709 (1893); see also Kanstroom, *supra* note 37, at 1901.

²⁰⁴ Transportation Act of 1718, 4 Geo. I, c. 11; see also Bleichmar, *supra* note 36, at 124.

²⁰⁵ Bleichmar, *supra* note 37, at 125-26.

²⁰⁶ Some scholars estimate that as many as seventy percent of felons were sentenced to transportation during the height of its use in the eighteenth century. *Id.* at 126.

²⁰⁷ *Id.* at 121.

²⁰⁸ *Id.* at 129.

²⁰⁹ *Id.* at 127.

on the colonists, who grew increasingly displeased with the practice.²¹⁰ In 1775, with the outbreak of the American Revolution, transportation to America came to an abrupt halt.²¹¹

In contrast to the accepted civil power to admit or exclude noncitizens and the prevalent and extremely visible model of expulsion as a criminal punishment for citizens and noncitizens alike, there was no practice of civil expulsion of noncitizens in England that would have shaped the Framers' understanding of expulsion.²¹² Thus, the English model, and its likely influence on the Framers, lends some support to the notion that they viewed the power to expel, in contrast to the power to exclude, as a criminal punishment.

2. *The History of Exclusion and Expulsion in Colonial America*

The history of expulsion and exclusion laws and practices in colonial America echoes the English model. Initially, the colonies were primarily interested in encouraging immigration and, as a result, neither the exclusion nor the expulsion of noncitizens was a significant feature of the colonies' immigration laws.²¹³ In fact, there was considerable competition among the colonies for new immigrants.²¹⁴ Several factors drove this competition, including the need for labor, the fear of being outnumbered in armed conflicts with Indian nations, the abundance of unconquered land, and the drive of colonial powers to establish stable and significant colonies.²¹⁵

It was not long, however, before the open arms of the colonies began to close to some immigrants. As Emberson Edward Proper detailed in his authoritative study of colonial immigration laws, in the second century of English colonization the various colonies began to enact numerous and varied exclusion laws.²¹⁶ While exclusion laws were pervasive throughout the colonies, the details of who was excluded varied greatly from colony to colony. Some exclusion laws erected bars to admission based on religion, indigence,

²¹⁰ *Id.* at 128-29. A "vigorous protest went up from the colonists" in response to the transportation system. EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 20 (W.S. Hein 2003) (1900). Benjamin Franklin famously suggested that the colonists send King George III rattlesnakes in return for the transported criminals. *Id.* The colonists attempted to enact laws barring transportation but all were overridden by the English authorities. *Id.*; see also MALDWINY ALLEN JONES, *AMERICAN IMMIGRATION* 43, 61, 65 (1960).

²¹¹ Bleichmar, *supra* note 37, at 128.

²¹² See *Fong Yue Ting v. United States*, 149 U.S. 698, 756 (1893) (Field, J., dissenting) (noting that "deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities"); Craies, *supra* note 119, at 34-35; see also PROPER, *supra* note 210, at 19 (referring to transportation as a "system of deportation of criminals").

²¹³ EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY* 389 (1981); PROPER, *supra* note 210, at 13-16.

²¹⁴ HUTCHINSON, *supra* note 212, at 389; PROPER, *supra* note 210, at 13-16.

²¹⁵ PROPER, *supra* note 210, at 17.

²¹⁶ *Id.* at 17-72.

national origin, criminal status, or race.²¹⁷ These exclusion laws were undeniably administrative and civil in nature and did not implicate the criminal process in any way.

The efforts of the American colonies to exclude various classes of immigrants had only limited effect on the overall flow of immigrants into the colonies. Two reasons underlie their limited influence. First, the diversity in the laws meant that an immigrant unwelcome in one colony was likely to be welcomed into another. Thus, while these laws played a role in developing the distinct characters of the colonies, they largely served to divert immigrants from one colony to another.²¹⁸ Second, England ultimately held a veto power over the colonies' efforts to exclude certain immigrants and exercised that power to strike admission barriers that did not suit its interests.²¹⁹ The most notable example of England's use of this power was its rebuff to colonial efforts to cease the practice of transporting convicted criminals to the American colonies.²²⁰

In sharp contrast to the well-established civil administrative power to exclude undesirable immigrants, American colonial history is devoid of any civil laws used to expel noncitizens after admission.²²¹ The only mechanism to expel persons from the colonies was banishment—a criminal punishment imposed after completion of the criminal process with all the relevant procedures and protections attached thereto.²²² Thus, insofar as the Framers' conception of deportation or expulsion was likely shaped by the historical models of the American colonies and common-law England, both models drew a pronounced line between the civil administrative power to exclude noncitizens and the criminal power to expel those already present.

While obviously not reference points for the Framers, the early immigration laws following the framing of the Constitution are nevertheless useful in understanding the Framers' concept of deportation because these early laws are likely reflections of the common notions of the day. For the first hundred years of the United States, regulation of immigration was largely left to the states.²²³ In the early state immigration regulations, we again see

²¹⁷ *Id.*; HUTCHINSON, *supra* note 213, at 388-96; JONES, *supra* note 210, at 43; NEUMAN, *supra* note 21, at 21-22.

²¹⁸ PROPER, *supra* note 210, at 89.

²¹⁹ *Id.* at 16.

²²⁰ *Id.* at 20, 61; *see also supra* notes 198, 208 and accompanying text.

²²¹ *See* JONES, *supra* note 210, at 43; NEUMAN, *supra* note 21, at 22; PROPER, *supra* note 210, at 25, 26; Kanstroom, *supra* note 37, at 1908 ("Colonial and state laws, which often focused on the *exclusion* of convicted criminals, seem never to have focused on the deportation of noncitizens for post-entry criminal conduct.").

²²² *See* NEUMAN, *supra* note 21, at 22-23 ("To the best of my knowledge, no state statutes singled out aliens for expulsion from the state or the United States as punishment for serious crime, but aliens were subject to these generally applicable sanctions."); PROPER, *supra* note 210, at 25-26, 33, 37.

²²³ *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993) (reviewing the state immigration laws during this period); *see also* HUTCHINSON, *supra* note 213, at 396-404.

the same divide: the states had civil exclusion laws based on grounds that were similar to the colonial laws, but expulsion could be achieved only as punishment for a serious crime.²²⁴

One notable exception to the early state domination of immigration regulation is the Alien Act of 1798, which purported to grant the President discretion to summarily expel even friendly “aliens.”²²⁵ This aspect of the Act expired in 1800 and was never enforced and thus was never subject to judicial scrutiny. The Act is now widely believed to have been unconstitutional.²²⁶ The debate surrounding the passage of the Alien Act is, nevertheless, of some utility because, unlike the records of the Constitutional Convention, this debate contained clear statements by several of the Framers regarding their conception of the power to expel. Madison and Jefferson were clear in their opposition to the Act, arguing forcefully in resolutions adopted by Virginia and Kentucky that the Constitution granted the government no power to effect the civil administrative removal of “alien friends” and that such “aliens” could only be expelled pursuant to a criminal proceeding with all the constitutional protections attaching thereto.²²⁷ This was

²²⁴ See Neuman, *supra* note 223, at 1841, 1844.

²²⁵ For an excellent and detailed history of the Alien Act, see Cleveland, *supra* note 3, at 87-98.

²²⁶ In 1832, then-Vice President John C. Calhoun “asserted that the unconstitutionality of the Alien and Sedition laws was ‘settled.’” Cleveland, *supra* note 46, at 98 (quoting Letter of Aug. 28, 1832 from Vice President Calhoun to Governor Hamilton). *But cf. id.* at 98 n.664 (noting some disagreement with Calhoun). Some opponents of the Act specifically argued that, at the time of its passage, the expulsion of alien friends must proceed through the same criminal process applicable to citizens. See 8 Annals of Cong. 2005, 2012 (1798) Edward Livingston stated:

It is an acknowledged principle . . . that alien friends, . . . residing among us, are entitled to the protection of our laws, and that during their residence, they owe a temporary allegiance to our Government. If they are accused of violating this allegiance, the same laws which interpose in the case of a citizen must determine the truth of the accusation, and if found guilty they are liable to the same punishment.

Id.; see also Cleveland, *supra* note 46, at 97 n.662.

²²⁷ James Madison argued:

Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only. . . . This argument also, by referring the alien-act to the power of Congress to define and *punish* offences against the law of nations, yields the point that the act is of a *penal*, not merely of a preventive operation. . . . And if it be a penal act, the punishment it inflicts, must be justified by some offence that deserves it. . . . [A]nd the punishment must be conducted according to the municipal law, not according to the law of nations.

James Madison, *Report of 1799 to the Virginia House of Delegates*, http://www.constitution.org/rf/vr_1799.htm (last visited Mar. 13, 2008). Thomas Jefferson argued:

‘An Act concerning aliens’ is contrary to the Constitution, one amendment to which has provided that ‘no person shall be deprived of liberty without due progress of law’; and that another having provided that ‘in all criminal prosecutions the accused shall enjoy the right to public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance

by no means, however, a consensus position among the Framers. The Alien Act was, after all, sponsored by the Adams administration, which believed that citizens “could not be disenfranchised other than following conviction by a jury trial” but that aliens “could be removed ‘merely . . . from motives’ of policy or security. Their removal was not a punishment, but the withdrawal ‘of an indulgence.’”²²⁸ Since we have no conclusive direct evidence of the Framers’ conception of the nature of expulsion proceedings, the historical evidence we have compiled regarding the colonial and common-law English treatment of such proceedings is the best evidence available of the Framers’ intent.

The historical evidence gives us an important window into how the Framers conceived of the power to expel and, more specifically, whether they conceived of it as a criminal punishment. In the jurisdictions most likely to influence the Framers, common-law England and colonial America, the evidence is quite consistent. The only historical precedents for expelling persons from within the nation were transportation, banishment, abjuration of the realm, and conditional pardons²²⁹—all of which were imposed *only* as criminal punishments. The modern notion of civil deportation was a foreign concept to the Framers. In contrast, England, the colonies, and the early states all had civil administrative laws concerning the exclusion of certain immigrants.

*C. Applying the Supreme Court’s Contemporary Civil-Criminal Divide
Test to Determine the Nature of Exclusion
and Expulsion Proceedings*

In earlier days, criminal law was understood to involve public offenses against society, and civil law was understood to govern private disputes be-

of counsel for his defense;’ the same act, undertaking to authorize the President to remove a person out of the United States, who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him, without hearing [sic] witnesses in his favor, without defense, without counsel, is contrary to the provision also of the Constitution, is therefore not law, but utterly void, and of no force.

Thomas Jefferson, *The Kentucky Resolutions of 1798*, <http://www.constitution.org/cons/kent1798.htm> (last visited Mar. 13, 2008).

²²⁸ Cleveland, *supra* note 46, at 93 (quoting Report of the select committee of the House of Representatives, made to the House of Representatives on Feb. 21, 1799, 9 *Annals of Cong.* 2986, 2987 (1799)) (citations omitted).

²²⁹ Conditional pardons were granted to people facing criminal prosecution who agreed to be expelled from the nation. See Bleichmar, *supra* note 37, at 125. Abjuration of the realm was the precursor of banishment in medieval England. See WILLIAM HOLDSWORTH, 3 *A HISTORY OF ENGLISH LAW* 303 (1923). After committing a crime, the person could flee for refuge or sanctuary to the church; if she confessed to the crime and pledged to leave the kingdom and not return without the permission of the Crown, she would receive safe passage to a port from which they could depart from the kingdom. See Bleichmar, *supra* note 37, at 120-21; Wayne A. Logan, *Criminal Law Sanctuaries*, 38 *HARV. C.R.-C.L. L. REV.* 321, 327-28 (2003).

tween individuals.²³⁰ But this simplistic formulation of the boundary between civil and criminal law has become antiquated in the age of the administrative state. Now, innumerable civil administrative matters can more fairly be characterized as offenses against society than as private disputes.²³¹ The rise of the administrative state thus necessitated a new model for explaining the boundary between civil and criminal proceedings.

The Supreme Court responded to this necessity in *Kennedy v. Mendoza-Martinez*²³² and *United States v. Ward*.²³³ Together, these two cases define the modern boundary between civil and criminal proceedings.²³⁴ The test requires us first to examine “whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label.”²³⁵ If Congress intended to create a criminal penalty, that is the end of the inquiry, and the Court will give effect to Congress’s intention. If, however, Congress intended to create a civil sanction, then we must examine whether there is the “clearest proof” that “the statutory scheme was so punitive either in purpose or effect as to negate that intention.”²³⁶ The Court has developed a non-exhaustive list of relevant factors to consider when evaluating the second prong of the test:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . .²³⁷

²³⁰ See BLACKSTONE, *supra* note 20, at *1489.

²³¹ Proceedings to enforce civil environmental regulations and tax regulations are but two examples.

²³² 372 U.S. 144 (1963).

²³³ 448 U.S. 242 (1980).

²³⁴ For a brief period between 1989 and 1997, the Supreme Court employed an alternative test to determine the civil or criminal nature of proceedings in certain circumstances. See *Austin v. United States*, 509 U.S. 602, 621-22 (1993) (applying alternative test in analyzing claim under the Excessive Fines Clause of the Eighth Amendment); *United States v. Halper*, 490 U.S. 435, 449 (1989) (applying alternative test in analyzing double jeopardy claim). Under the alternative test, the inquiry centered on whether the sanction was punitive, not whether it was criminal. *Halper*, 490 U.S. at 448. Thus, the relevant constitutional protections would apply to any sanction that could not “fairly be said solely to serve a remedial purpose, but rather [could] only be explained as also serving either retributive or deterrent purposes.” *Id.* This alternative test was abandoned in 1997 when the Supreme Court explicitly overruled *Halper*. See *Hudson v. United States*, 522 U.S. 93, 101-02 (1997).

²³⁵ *Ward*, 448 U.S. at 248.

²³⁶ *Id.* at 248-49.

²³⁷ *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

In making this assessment, we must look categorically at the type of proceeding.²³⁸ In a given exclusion case, the factors may point to a criminal designation and, in a given expulsion case, the factors may point to a civil designation. But a case-by-case assessment of the civil or criminal nature of a proceeding “would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive.”²³⁹ Thus, we must analyze the characteristics of a proceeding in general, recognizing that in some individual cases the application of the general label may seem counterintuitive.

While the Court’s approach has been the subject of significant criticism,²⁴⁰ evaluating the merits of the Court’s approach is beyond the scope of this project. Starting from the premise that coherence and consistency are accepted virtues in a common-law system, application of the Court’s modern approach to defining the civil-criminal divide is an important lens through which to evaluate the civil or criminal nature of removal proceedings regardless of any critiques that that approach may warrant. Because this modern approach was developed decades after the Supreme Court originally held that all removal proceedings are civil, and because the Court has never undertaken a substantive reevaluation of that holding, the modern definition of the boundary between civil and criminal proceedings has never been applied by any court in the immigration context. The application of the modern test provides compelling support for the bifurcated approach: exclusion is civil and expulsion is criminal.²⁴¹

1. Congress Intended to Create a Civil Scheme for Removal Proceedings

Congress clearly intended to create a civil scheme for all removal proceedings.²⁴² While Congress has not expressly applied the civil label to re-

²³⁸ *Seling v. Young*, 531 U.S. 250, 262 (2001).

²³⁹ *Id.* at 263.

²⁴⁰ See, e.g., Gregory Y. Porter, *Uncivil Punishment: The Supreme Court’s Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517, 523 (1997); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781-82 (1997); see also *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting) (“No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me . . .”).

²⁴¹ While courts have yet to apply the modern test to the immigration context, scholars have engaged in such analysis. See, e.g., Bleichmar, *supra* note 37, at 148-60; Pinzon, *supra* note 37. Thus, the value of applying the current civil-criminal divide jurisprudence to the immigration context has been recognized by others and is not novel. The analysis in this section owes a debt to these scholars. The bifurcated approach to this analysis is what I seek to contribute to the existing literature.

²⁴² While the congressional record contains significant evidence that Congress was motivated, at least in part, by a punitive purpose such as retribution, see *infra* note 285 and accompanying text, that inquiry is irrelevant to the first step of the analysis. The first question in the *Mendoza-Martinez/Ward* test is whether Congress intended to create a criminal scheme with

removal proceedings, its implicit application of that label is beyond dispute. The procedures Congress created for removal proceedings are consistent with the civil label and would be impermissible in the criminal context.²⁴³ Moreover, when Congress intended to create a criminal immigration offense, it explicitly labeled such offense as “criminal” or as “punishment.”²⁴⁴ The absence of such designation for the grounds of removability²⁴⁵ indicates, by contrast, Congress’s intention to attach a civil label to those sections.²⁴⁶ Since congressional intent to apply the civil label is clear, expulsion and/or exclusion proceedings can only be characterized as criminal if we find the “clear-est proof” that “the statutory scheme was so punitive either in purpose or effect as to negate that intention.”²⁴⁷

2. *Assessing the Mendoza-Martinez Factors*

I undertake this analysis by looking at the various factors individually, though I recognize the inherent deficiencies in this approach—namely that a factor-by-factor analysis is of only limited utility in a complex scheme such as the *Mendoza-Martinez* test, where the relative weight of each factor may vary from case to case. I attempt to compensate for this deficiency by paying particular attention to the relative weight assigned to the various factors.

a. *Whether the Sanction Involves an Affirmative or Negative Disability or Restraint*

The application of this factor is fairly straightforward. The expulsion of a person previously admitted to this country as a permanent resident is a paradigmatic affirmative disability. The person is not only affirmatively removed from the political community of the United States but is likewise

all the rights attaching thereto. The plain language of the INA makes clear that Congress did not intend to create a criminal scheme.

²⁴³ See, e.g., INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (Supp. 1998) (prohibiting the appointment of counsel at government expense); INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2) (Supp. 1998) (placing the burden of proof on the noncitizen to prove admissibility); INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (Supp. 1998) (establishing the burden of proof on a charge of deportability to be “by clear and convincing evidence,” not beyond a reasonable doubt). See generally *United States v. Ursery*, 518 U.S. 267, 288-89 (1996) (same); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363-64 (1984) (relying on the procedural mechanisms Congress established as evidence of intent to apply the civil label).

²⁴⁴ See, e.g., INA § 274, 8 U.S.C. § 1324 (2000) (criminal penalties for transporting and harboring unauthorized entrants); INA § 274A(f), 8 U.S.C. § 1324a(f) (2000) (criminal penalties for engaging in a pattern or practice of hiring unauthorized workers); INA § 274C(e), 8 U.S.C. § 1324c(e) (2000) (criminal penalties for failure to disclose role in preparing fraudulent applications).

²⁴⁵ See generally INA § 212, 8 U.S.C. § 1182; INA § 237, 8 U.S.C. § 1227 (2000).

²⁴⁶ While every word included in a statute is presumed to have been included for a purpose, “it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.” NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:6 (6th ed. 2000); see, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 665 (1978).

²⁴⁷ *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

physically removed from the territory of the nation. In contrast, the exclusion of a person seeking admission to the United States is an equally paradigmatic negative restraint. If the person is excluded, the status quo is maintained—the person is not part of the national political community.

Two realities slightly complicate the analysis of this factor with respect to exclusion. First, many people subject to exclusion, as I have defined it, are physically removed from the United States (though the majority are simply denied admission from abroad).²⁴⁸ For example, a person who comes to this country as a visitor, marries a citizen, applies for adjustment of status to become a permanent resident, but is adjudged to be inadmissible, will be physically removed from the territory. Thus, while the status quo may be maintained for such people in the political sense—they were never granted admission to the political community—the experience of exclusion may feel very much like an affirmative disability.²⁴⁹

Second, a person subject to either exclusion or expulsion proceedings may be detained during the pendency of the removal proceedings.²⁵⁰ Physical detention is an affirmative restraint²⁵¹—people once free to move about are taken into physical custody. While the ultimate goal of the proceedings is not detention, it may be useful to conceive of the detention incident to such proceedings as part of the sanction envisioned by the statutory scheme.²⁵²

Thus, while this first factor unambiguously cuts in favor of characterizing expulsion proceedings as criminal, the influence of this factor on the analysis of exclusion is less clear. In regard to exclusion, we must, however, consider that the majority of people excluded are simply denied visas from abroad and thus are neither physically removed nor detained and, therefore, are only subject to a negative restraint. Moreover, if we envision exclusion and expulsion as principally political acts—deciding whom to admit into the political community and whom to expel from that community—then exclusion is best understood as a negative disability and this factor alone may make it impossible to establish the “clearest proof” that exclusion is so pu-

²⁴⁸ “Approximately 700,000 aliens apply for visas abroad each year.” Guido S. Weber, *Unresolved Issues on Controlling the Tuberculosis Epidemic Among the Foreign-Born in the United States*, 22 AM. J.L. & MED. 503, 515 n.114 (1996) (citing *National Action Plan to Combat Multidrug-Resistant Tuberculosis*, 41 MORBIDITY & MORTALITY WKLY. REP. No. RR-11, at 18 (1992)). That is double the amount of people placed in removal proceedings in 2006, which includes people subject to both exclusion and expulsion. See U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, 2006 STATISTICAL YEARBOOK B2 (2006); see also *supra* notes 14-16 and accompanying text.

²⁴⁹ *C.f.* *State v. C.M.*, 746 So. 2d 410, 415-20 (Ala. Crim. App. 1999) (recognizing displacement from one’s home as an affirmative disability).

²⁵⁰ INA § 236, 8 U.S.C. § 1226 (2000).

²⁵¹ See *Smith v. Doe*, 538 U.S. 84, 100 (2003) (commenting that “the punishment of imprisonment . . . is the paradigmatic affirmative disability or restraint”); *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (recognizing that civil commitment of persons with mental disorders was an affirmative restraint but holding that such commitment was civil because this factor was outweighed by others).

²⁵² See *infra* note 285 and accompanying text.

nitive either in purpose or effect as to negate the intention of Congress to label it as civil.²⁵³

b. Whether the Sanction Has Historically Been Regarded as a Punishment

The Supreme Court has recognized the particular importance of historical evidence to the analysis of the civil or criminal nature of a proceeding and has frequently relied on this factor in making its determination.²⁵⁴ We need not revisit the historical evidence reviewed in Part IV.B. Strong historical evidence supports the conclusion that expulsion is the modern-day equivalent of the criminal sanctions of banishment, transportation, and abjuration of the realm.²⁵⁵ The history of colonial America, common-law England, and the first hundred years of the United States are all devoid of any civil mechanism utilized to expel persons previously granted admission to the political community.²⁵⁶ Moreover, purportedly civil sanctions that resemble the historical punishment of banishment much less closely than expulsion have been found, under the *Mendoza-Martinez/Ward* test, to be so punitive in nature as to negate the legislature's intention to create a civil sanction, in large part because of their historical similarity.²⁵⁷ In sharp contrast, the power to exclude unwanted foreigners has always been exercised as a civil administrative power.²⁵⁸ Accordingly, this factor cuts sharply in favor of characterizing expulsion as criminal and exclusion as civil.

c. Whether the Sanction Requires a Finding of Scienter and Whether the Regulated Behavior Is Already Criminal

We consider these two factors together here because, in many instances, the finding of scienter that triggers removal is the scienter of the underlying crime that forms the basis of a removal charge.

²⁵³ See, e.g., *Hudson v. United States*, 522 U.S. 93, 104 (1997) (relying in part on the fact that disbarment is not an affirmative disability to hold that such sanction is civil); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (holding that a statute disentitling persons who are deported from receiving social security benefits is not punitive because it is not an "affirmative disability or restraint").

²⁵⁴ See *Smith*, 538 U.S. at 97-99; *Hudson*, 522 U.S. at 104; *United States v. Ursery*, 518 U.S. 267, 291 (1996); *Austin v. United States*, 509 U.S. 602 (1993).

²⁵⁵ See discussion *supra* Part III.B.1.

²⁵⁶ See discussion *supra* Part III.B.

²⁵⁷ See, e.g., *Does v. City of Indianapolis*, No. 06-865, 2006 WL 2927598, *8-9 (S.D. Ind. Oct. 5, 2006) (holding that an ordinance restricting child sex offenders from traveling within 1000 feet of public playgrounds, recreation centers, swimming and wading pools, sports fields, and facilities violates the Ex Post Facto Clause); *Johnson v. City of Cincinnati*, 119 F. Supp. 2d 735, 747-49 (S.D. Ohio 2000) (holding that an ordinance banning convicted drug users from traveling through "drug exclusion zones" violates Double Jeopardy Clause), *aff'd on other grounds*, 310 F.3d 484 (6th Cir. 2002) (not reaching the criminal vs. civil issue); cf. *Smith*, 538 U.S. 84, 98 (recognizing expulsion from community as traditional punishment).

²⁵⁸ See discussion *supra* Part III.B.1, 2, notes 182-187, 217-221 and accompanying text.

The Immigration and Nationality Act (“INA”) contains numerous criminal grounds of removability applicable to permanent residents,²⁵⁹ which collectively cover the vast majority of crimes in most penal codes, including virtually all theft crimes, violent crimes, sex crimes, gun crimes, fraud crimes, and drug crimes. In a vast majority of expulsion cases—cases where the government seeks to deport a permanent resident—the act which triggers the removal charge is a criminal conviction.²⁶⁰ Thus, in the vast majority of expulsion cases the behavior being sanctioned is necessarily already criminal since the conviction of a crime is the basis of the removal charge. In such cases, the finding of scienter in the underlying criminal conviction is obviously then required for expulsion. As discussed below, those rare instances where a strict liability offense triggers expulsion, with no scienter requirement, do not significantly alter this analysis.

Even in those rare instances where the government seeks to expel a permanent resident for something other than a criminal conviction, the sanctioned conduct is almost always otherwise punishable under criminal law. For example, deportability charges that do not require a formal conviction, such as alien smuggling,²⁶¹ marriage fraud,²⁶² document fraud,²⁶³ terrorism or espionage,²⁶⁴ drug abuse,²⁶⁵ falsely claiming citizenship,²⁶⁶ failure to report a change of address,²⁶⁷ violation of a protection order,²⁶⁸ and unlawful vot-

²⁵⁹ INA § 237(a) sets forth the classes of “deportability” which are applicable to any noncitizen “in and admitted to the United States.” 8 U.S.C. § 1227(a) (2000). This includes all permanent residents in the United States and various other noncitizens admitted in nonimmigrant statuses, including visitors, students, etc. Noncitizens attempting to enter the United States or who entered the country illegally are subject to the grounds of inadmissibility set forth in INA § 212(a), 8 U.S.C. § 1182(a) (2000).

²⁶⁰ A 2006 Congressional Research Service report detailed the percentage breakdown of the various reasons for removals. Immigration Enforcement Within the United States, CRS Report (Apr. 6, 2006), available at <http://www.fas.org/sgp/crs/misc/RL33351.pdf>. Excluding the reasons that would be inapplicable to the expulsion of a permanent resident (“Not In Status”, “Attempted Entry”, and “Previously Removed”), 92.5% of removals were based on criminal charges in fiscal year 2004—the most recent year reported. *Id.* at CRS-17. That percentage is likely to be skewed toward minimizing the number of expulsions based on criminal charges since the remaining 7.5% includes both permanent residents and non-permanent residents who are significantly more likely to be charged with the miscellaneous less common grounds of removal, such as document fraud, see INA § 237(a)(3), 8 U.S.C. § 1227(a)(3) (2006).

²⁶¹ See INA § 237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (2000) (deportability ground); 8 U.S.C. § 1324(a)(1)(A) (2000) (criminal charge).

²⁶² See INA § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (deportability ground); 8 U.S.C. § 1325(c) (2000) (criminal charge).

²⁶³ See INA § 237(a)(3)(C), 8 U.S.C. § 1227(a)(3)(C) (deportability ground); 18 U.S.C. § 371 (criminal charge).

²⁶⁴ See INA § 237(a)(4)(A), (B), 8 U.S.C. § 1227(a)(4)(A), (B) (deportability grounds); 18 U.S.C. §§ 2331 - 2339D (2000) (criminal charges).

²⁶⁵ See INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (deportability ground); 21 U.S.C. § 844 (2000) (criminal charge).

²⁶⁶ See INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D) (deportability ground); 18 U.S.C. § 911 (2000) (criminal charge).

²⁶⁷ See INA § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A) (deportability charge); INA § 266(b) (criminal charge).

ing,²⁶⁹ nevertheless proscribe activity that is already criminalized. In cases based on such charges, a finding of scienter similar to the criminal charge is required.

On the other hand, of the twenty-five separately enumerated statutory grounds upon which someone could be ordered expelled, only three²⁷⁰ charges have no direct criminal corollary: (1) becoming a public charge within five years of entry from a cause not arising after admission;²⁷¹ (2) presence or activity that has serious adverse foreign policy consequences;²⁷² and (3) inadmissibility at the time of admission.²⁷³ The first two are virtually never used.²⁷⁴ In addition, the public charge and inadmissible at time of admission grounds each have an implicit fraud element and thus a de facto scienter requirement. Noncitizens seeking admission are required to affirmatively demonstrate that they are admissible and will not become a public charge. Thus, people charged with either of these two charges are often also accused of having been untruthful in their initial applications for admission. However, this is not always the case as one can be charged with either of these two grounds based upon innocent mistakes made at the time of admission. In addition, the foreign policy ground is devoid of both a criminal corollary and a scienter requirement, but this ground has been used so infrequently as to make its impact on the analysis negligible.²⁷⁵ So, while the vast majority of expulsion cases involve a finding of scienter and also sanction conduct that is already criminal, that is not the case in a very, very small minority of cases. This does not, however, seem inconsistent with the criminal label since criminal law also generally requires a finding of scienter but a

²⁶⁸ See INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii) (2000) (deportability ground); see, e.g., N.Y. PENAL LAW § 215.50(3) (criminal charge).

²⁶⁹ See INA § 237(a)(6), 8 U.S.C. § 1227(a)(6) (deportability ground); 18 U.S.C. § 611 (2000) (criminal charge).

²⁷⁰ A few other deportability charges have no criminal corollary, but none of these are applicable to permanent residents and thus they are not relevant to the expulsion analysis as I have defined it. See INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (unlawful presence); INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (violation of nonimmigrant status); INA § 237(a)(1)(D), 8 U.S.C. § 1227(a)(1)(D) (termination of conditional residence).

²⁷¹ See INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

²⁷² See INA § 237(a)(4)(C), 8 U.S.C. § 1227(a)(4)(C).

²⁷³ See INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).

²⁷⁴ A Westlaw search of the Board of Immigration Appeals database and the database containing all federal cases revealed not a single case in which the government charged a noncitizen under the foreign policy deportation ground, INA § 237(a)(4)(C), 8 U.S.C. § 1227(a)(4)(C) (2006), and only one case where a noncitizen was charged under the public charge deportation ground, INA § 237(a)(5), 8 U.S.C. § 1227(a)(5) (2006). Moreover, data obtained by the author from the Executive Office of Immigration Review through the Freedom of Information Act reveals that of the 417,986 cases received by the federal immigration courts over fiscal years 2002-2007, which charged a ground of deportability, only thirty-four cases (or 0.000081%) involved a charge under § 237(a)(5) (becoming a public charge) and only three cases (0.000007%) involved a charge under § 237(a)(4)(C) (foreign policy deportation ground). (FOIA data is on file with the author).

²⁷⁵ See *id.*

small minority of crimes are strict liability offenses with no scienter requirement.

The contrast with exclusion is sharp. People seeking admission to the United States can be denied entry for virtually any reason.²⁷⁶ The INA contains enumerated grounds of inadmissibility that will necessarily trigger exclusion.²⁷⁷ Some of these grounds, like the charges for expulsion, are based on criminal convictions or conduct that is otherwise criminal;²⁷⁸ however, many inadmissibility grounds have nothing to do with criminal activity and have no scienter requirement.²⁷⁹ For example, indigency and infection with certain communicable diseases are statutory barriers to admission.²⁸⁰ Moreover, even if a noncitizen does not fall within one of the enumerated inadmissibility grounds, she will nonetheless be excluded if she does not have the necessary family ties or other avenue to obtain a visa for entry.²⁸¹

Accordingly, this factor militates in favor of characterizing expulsion as criminal but exclusion as civil. We must be careful, however, not to overstate the importance of this factor in concluding that expulsion is criminal. The Supreme Court has, at times, discounted the import of this factor in noting that “Congress may impose both a criminal and a civil sanction in respect to the same act or omission.”²⁸² Moreover, the Court has deemed some sanctions with an even closer nexus to criminal activity than expulsion to be civil. In *Smith v. Doe*, for example, the Supreme Court ruled that a sex offender registration law was civil notwithstanding the fact that the sanction was “imposed upon convicted sex offenders and no one else.”²⁸³ Nevertheless, the fact that a sanction, such as expulsion, is conditioned on commission of a crime in virtually all cases must be considered as at least some evidence of that sanction’s criminal nature.²⁸⁴

²⁷⁶ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *United States v. Shaughnessy*, 338 U.S. 537, 544 (1950) (commenting that the decision whether to admit a noncitizen into the United States has been committed by Congress to the discretion of the Attorney General). See generally Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (discussing the structure of rules and discretion in immigration policy).

²⁷⁷ See INA § 212(a), 8 U.S.C. § 1182(a) (2000).

²⁷⁸ See, e.g., INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (enumerating criminal grounds of inadmissibility); INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (terrorism ground of inadmissibility).

²⁷⁹ See, e.g., INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (health related grounds); INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (public charge grounds); INA § 212(a)(5), 8 U.S.C. § 1182(a)(5) (labor certification grounds).

²⁸⁰ See INA § 212(a)(4) (public charge ground); INA § 212(a)(1) (health related grounds).

²⁸¹ See INA § 212, 8 U.S.C. § 1182 (2004); INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

²⁸² *United States v. Ward*, 448 U.S. 242, 250 (1980).

²⁸³ *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).

²⁸⁴ See, e.g., *Desimone v. State*, 116 Nev. 195, 204-05 (2000) (holding that a tax, which “hinges on the commission of a crime and realistically, will normally be exacted only after the taxpayer is apprehended and subject to arrest for the same conduct giving rise to the tax obli-

d. Whether the Sanction Promotes Traditional Aims of Punishment

The two traditional aims of punishment recognized in this inquiry are deterrence and retribution.²⁸⁵ Our increasingly harsh immigration laws clearly have both the purpose and effect of deterring the sanctioned behavior. But the Supreme Court has cautioned that civil sanctions often also have the purpose and effect of deterring the targeted behavior.²⁸⁶ Thus, the probative value of the deterrent effect and purpose is minimal.

Removal laws are retributive *in purpose* to the extent Congress intended to visit hardship upon noncitizens because of their perceived misdeeds. This requires an inquiry into legislative intent. The congressional record contains ample evidence that grounds triggering expulsion have grown increasingly harsh, driven, in part, by a retributive desire to punish noncitizens who engage in criminal activity. For example, various members of Congress have described the purpose of expulsion laws as to “punish those who engage in terrorism,”²⁸⁷ to “punish criminal aliens,”²⁸⁸ “to advance anti-immigrant attitudes,”²⁸⁹ and to “re-punish them” for past crime.²⁹⁰ The weight of this factor is not diluted because alternative non-penal purposes or effects also exist. That consideration is provided for in the remaining *Mendoza-Martinez* factors, outlined below.

While exclusion grounds have been similarly expanded, and while some of the congressional rhetoric surrounding those expansions are tainted by a similar anti-immigrant virulence, it is important not to confuse xenophobic instincts with a retributive purpose. That is to say, when Congress has sought to tighten the borders against those seeking to immigrate to the United States, it is difficult to conceive of that as a response to *past* misdeeds as much as it is a response to fear, driven either by sound policy or by irrational xenophobia, of misdeeds that will be committed in the *future*. Thus, while there may be some retributive rhetoric with regard to exclusion

gation,” is a criminal sanction for double jeopardy purposes); *Comm’r v. Mullins*, 428 Mass. 406, 409-16 (1998) (holding that a controlled substance tax conditioned on the commission of a crime is a criminal punishment for double jeopardy purposes).

²⁸⁵ It is difficult to offer a principled defense of the Court’s focus on these two aims of punishment to the exclusion of other traditional aims of punishment such as incapacitation and rehabilitation. Nonetheless, since the utility of applying the modern civil-criminal divide test to the removal context is to promote consistency and coherence within our legal doctrine, I do not here seek to critique the doctrine. Rather, I am merely applying the doctrine as is.

²⁸⁶ *Smith*, 538 U.S. at 102.

²⁸⁷ H.R. REP. NO. 104-383, at 37 (1995) (statement of Rep. Henry J. Hyde, Chairman, House Judiciary Comm.).

²⁸⁸ 141 CONG. REC. S7803-01 (1995) (statement of Sen. Kennedy).

²⁸⁹ 142 CONG. REC. E646 (daily ed. Apr. 25, 1996) (statement of Rep. Mink).

²⁹⁰ 146 CONG. REC. S9381-05, *S9388 (Sept. 27, 2000) (statement of Sen. Graham); *see also* Ryan, *supra* note 38, at 1012 (collecting legislative history quotes demonstrating retributive intent); Bleichmar, *supra* note 37, at 150 n.204 (“Members of Congress viewed a criminally convicted alien as abusing the invitation extended to aliens by the United States to enter and to reside within its territory.”).

of people with criminal convictions, it is difficult to conceive of exclusion laws generally as driven by a retributive purpose.

Removal laws are retributive *in effect* to the extent that persons subject to those laws are ostracized and perceived as deserving of hardship in reaction to their perceived misdeeds. To examine this retributive “effect,” if any, we must look to the societal treatment of deportees where they live. Many deportees, especially those deported as the result of criminal convictions, continue to suffer serious reprisals after they are returned to their country of origin. Some countries publicly shame deportees by publishing their photos in newspapers; others restrict deportees’ access to work and subject them to routine police harassment; and some countries even subject deportees to prolonged detention upon their return.²⁹¹ While this factor has not been afforded considerable weight, it too cuts in favor of characterizing expulsion as criminal and exclusion as civil.

e. Whether There Is Any Rational, Alternative, Nonpunitive Purpose or Whether the Sanction Is Excessive in Relation to That Purpose

I combine the final two *Mendoza-Martinez* factors here because, while these factors were originally introduced as distinct indicators, they are now understood as mutually exclusive alternatives. As the Supreme Court recently explained, either the sanction “has a rational connection to a nonpunitive purpose; or [it] is excessive with respect to this purpose.”²⁹² The Court has described this inquiry as the “most significant factor” in the criminal-civil analysis.

The first difficulty with this factor is that the Court has defined “nonpunitive purpose” so broadly that virtually any section of any penal code could be deemed to serve a nonpunitive purpose. For example, incapacitation and promoting public safety are frequently cited as nonpunitive purposes, though virtually every criminal statute seeks to promote these aims.²⁹³ Accordingly, the real focus of the inquiry is on whether the sanction is excessive in relation to the nonpunitive purpose.

Clearly, expulsion can serve the nonpunitive purpose of permanently incapacitating people who have committed crimes (at least with regard to their capacity to do harm in the United States) and thereby promoting public safety. However, expulsion laws are excessive in relation to that purpose in two ways. First, the criminal grounds of deportation are so vast that they are

²⁹¹ See Bryan Lonegan, *Forced to Go Home Again*, N.Y. TIMES, Feb. 27, 2005, § 14, at 11.

²⁹² *Smith*, 538 U.S. at 97 (2003) (emphasis added).

²⁹³ See, e.g., *id.* at 87 (concluding that the “Act has a rational connection to a legitimate nonpunitive purpose, public safety, which is advanced by alerting the public to the risk of sex offenders in their community”); *State v. Walls*, 558 S.E.2d 524, 526 (S.C. 2002) (concluding that in creating a sex offender registry, the Assembly intended “to create a nonpunitive act,” as it “did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may reoffend and to aid law enforcement in solving sex crimes”).

imposed on people convicted of the most minor offenses, who pose no realistic threat to public safety. For example, a person a state deems to be a good candidate for full rehabilitation, and who is spared a criminal conviction in favor of some diversionary program, can nonetheless be considered “convicted” under federal immigration law and expelled.²⁹⁴ In addition, extremely minor offenses with no significant public safety implication, like jumping a turnstile twice in New York, will subject a permanent resident who has lived in the United States since childhood to a lifetime of exile from his home, family, and livelihood.²⁹⁵ It is difficult to envision how a sanction that has been described by the Supreme Court as “the loss of all that makes life worth living”²⁹⁶ can be anything but excessive when imposed upon someone whom a state deems a good candidate for rehabilitation, not even worthy of a conviction, or upon someone convicted of an offense as minor as turnstile jumping.

Second, expulsion laws are excessive in relation to the goal of promoting public safety insofar as they prohibit an individualized assessment of future dangerousness. In *Smith v. Doe*, the Supreme Court specifically considered whether a lack of individualized assessment of future dangerousness made a sanction excessive in relation to the non-penal goal of promoting public safety.²⁹⁷ In that case the sanction was the inclusion of all persons convicted of sex crimes on a sex offender registry.²⁹⁸ The Court held that the “State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment.”²⁹⁹ Nonetheless, the Court’s rationale was explicitly reliant upon the fact that it viewed sex offender registration as a “minor” sanction and that the “risk of recidivism posed by sex offenders is frighteningly high.”³⁰⁰ In contrast, the Court remarked, when

²⁹⁴ INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996); *In re Roldan-Santoyo*, 22 I. & N. Dec. 512, 521 (BIA 1999), *vacated sub nom.*, *Lujan-Armenariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

²⁹⁵ See N.Y. PENAL LAW § 165.15 (2000) (theft of services); see also INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2000) (authorizing deportation for noncitizens convicted of two crimes involving moral turpitude); *Ancheta v. Gonzales*, 216 Fed.App’x. 667 (9th Cir. 2007) (upholding removal order based on finding that theft of service is a crime involving moral turpitude); *Salgado v. Gonzales*, 169 Fed.App’x. 373 (5th Cir. 2006) (same); *Yesil v. Reno*, 973 F. Supp. 372, 376 n.2 (S.D.N.Y. 1997) (noting that theft of service in New York is a crime involving moral turpitude).

²⁹⁶ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

²⁹⁷ *Smith v. Doe*, 538 U.S. 84, 103-04 (2003).

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 104.

³⁰⁰ *Id.* at 103-04 (internal quotations omitted). Compare *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (requiring individualized assessment of dangerousness for grave sanction of civil commitment), and *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (permitting blanket application of relatively minor sanction of prohibition on felons serving as officers or agents of a union), with *Hawker v. New York*, 170 U.S. 189, 197 (1898) (permitting blanket application of relatively minor sanction of prohibition on felons practicing medicine), and *Does v. City of Indianapolis*, No. 06-865, 2006 WL 2927598, *8-9 (S.D. Ind. Oct 5, 2006) (striking down

involuntary confinement was the sanction, “the magnitude of the sanction made individual assessment appropriate.”³⁰¹

In the expulsion system, the statutory scheme denies many individualized assessments necessary to determine whether the sanction is required to satisfy the state’s interest at two critical junctures: (a) the bond determination and (b) the removal decision. The majority of all permanent residents charged in removal proceedings are subject to mandatory detention during the pendency of their proceedings.³⁰² This detention can last weeks, months, and in some cases years. The mandatory detention scheme is purportedly intended to serve the non-penal interests of protecting society from future crimes committed by the respondents and of assuring that they do not abscond during the proceedings. However, unlike *Smith*, the sanction here— involuntary confinement—is not minor and, unlike *Smith*, the respondents covered by mandatory detention—some convicted of the most minor offenses—are not as a group necessarily at significant risk of recidivism or flight.³⁰³ Under these circumstances, the lack of any individualized assess-

sanctions involving restriction on the freedom of movement, significantly less harsh than expulsion, as being excessive because they were broader than necessary to protect the public). *But see Smith*, 538 U.S. at 116-17 (Ginsburg, J., dissenting) (contesting the characterization of sex offender registration as minor).

³⁰¹ *Smith*, 538 U.S. at 104 (citing *Kansas v. Hendricks*, 521 U.S. 346 (1977)).

³⁰² See INA § 236(c), 8 U.S.C. § 1226(c) (2000); see also *Demore v. Kim*, 538 U.S. 510, 528 (2003) (holding that mandatory detention provisions of INA do not violate the Due Process Clause, but not considering whether such sanction is criminal or civil). Section 236(c) applies to most criminal grounds of deportability, which, as discussed *supra* note 260, comprise the vast majority of expulsion cases.

³⁰³ In fact, recent studies demonstrate that non-citizens have significantly lower rates of incarceration than the general population. See Kristin Butcher and Anne Morrison Piehl, *Crime, Correction and California: What Does Immigration Have to Do With It?*, 9 CALIFORNIA COUNTS, Num. 3 (Feb. 2008) (relying upon data from California); cf. Michael Kiefer, *Migrant Rate of Crime Even with Numbers*, THE ARIZONA REPUBLIC, (Feb. 25, 2008) (reporting that a review of criminal justice statistics in Maricopa County, which includes Phoenix, suggested that undocumented immigrants are charged with criminal activity at the same rate as the general population). When focusing on men ages eighteen to forty, the population that is disproportionately likely to be engaged in criminal activity, U.S. born men have incarceration rates ten times higher than those of foreign-born men. Butcher & Piel, *supra* note 303, at 2, 10. Moreover, immigrants in this age group with characteristics that are positively correlated with criminal activity, such as the lack of a high school diploma, have lower rates of incarceration than U.S. born men. *Id.* at 19 (finding that U.S. born men with these characteristics are incarcerated at a rate of 13.4% compared to only 0.5% for similarly situated foreign born men). While these studies do not focus specifically on the issue of recidivism for non-citizens who have violated immigration laws, a related study has recently demonstrated that there is no difference in the rearrest rates for non-citizens with immigration violations as compared with the general non-citizen population. Laura Hickman and Marika J. Suttorp, *Are Deportable Aliens A Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Alien*, 7 CRIMINOLOGY AND PUBLIC POLICY, Num. 1 (2008) (relying upon data from Los Angeles County). Taken together, these various recent studies demonstrate that immigrants in removal proceedings are not at any greater risk of recidivism than the general population.

ment of future dangerousness and risk of flight appears excessive in relation to the non-penal goals.³⁰⁴

More troubling still is the ever-expanding category of permanent residents subject to mandatory deportation. Mandatory deportation means that a respondent will be ordered deported because of her criminal conviction without any consideration of her positive equities, no matter how extraordinary. For example, under a mandatory deportation scheme a court cannot consider a respondent's decades of residency in the United States, the harsh impact on her citizen children or spouse, her honorable United States military service, the fact that her crime occurred decades ago, the risk of her persecution in her country of origin, or even compelling evidence of her rehabilitation. Permanent residents convicted of "aggravated felonies" are subject to mandatory deportation.³⁰⁵ At first blush, this class of respondents may seem analogous to the sex offender class, for which the Court in *Smith* held it reasonable to forego an individualized assessment because of the class's high risk of recidivism. But, the definition of aggravated felony has been expanded to sweep so broadly that now a crime does not need to be either aggravated or a felony to fall within the statutory definition of an "aggravated felony." For example, a person convicted of shoplifting, who does not spend one day in jail but is given a suspended sentence of one year is an aggravated felon subject to mandatory deportation.³⁰⁶ As Justice Souter explained:

The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.³⁰⁷

In light of the expansive definition of aggravated felony, aggravated felons as a class cannot reasonably be described as being at a particularly high risk of recidivism or as necessarily posing a future risk to public safety. There-

³⁰⁴ Cf. *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (upholding pretrial detention as non-punitive, relying upon the fact that pretrial detainees have a bail hearing to evaluate their risk of flight and future dangerousness).

³⁰⁵ See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000) (defining aggravated felony); INA § 240A(a), 8 U.S.C. § 1229b(a) (2000) (making permanent residents convicted of aggravated felonies ineligible for cancellation of removal).

³⁰⁶ See INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2000) (stating that any theft crime with a sentence of a year or more is an aggravated felony); INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2000) ("Any reference to a term of imprisonment or a sentence . . . is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

³⁰⁷ *Smith*, 538 U.S. at 109 (Souter, J., concurring).

fore, given the gravity of the sanction involved in expulsion, mandatory deportation is excessive in relation to the non-penal interest of protecting public safety.

In regard to exclusion, the government has several non-penal interests other than protecting public safety. The government has an obvious interest, for example, in protecting society against the importation of health hazards and in assessing the economic impact of an applicant's immigration. Most importantly, insofar as the nation is unwilling to open its borders to all comers, the government must decide how to allocate the scarce resource of immigrant visas. Moreover, the sanction involved in exclusion is often, at least for people applying from abroad, the maintenance of the status quo and is accordingly significantly less harsh than expulsion. While the exclusion system is doubtlessly flawed, it, unlike the expulsion system, seems reasonably related to the government's non-penal interests.

The Court has, in deference to the legislature, required that only the "clearest proof" that "the statutory scheme was so punitive either in purpose or effect" will override the stated intention of Congress to create a civil scheme.³⁰⁸ It is a high threshold to meet, and while some of the *Mendoza-Martinez* factors arguably militate in favor of considering exclusion as criminal, the evidence in that regard is far from the "clearest proof" required to override Congress's intent to create a civil scheme. In the expulsion context, however, the *Mendoza-Martinez* factors point uniformly toward a criminal scheme. Moreover, the two factors that seem to be most central to the Court's analysis, history and evaluation of the non-penal purpose, strongly support the criminal label.

Maintaining well-established precedent is always a significant judicial interest, and precedent designating all removal proceedings as civil is more than a century old. Nonetheless, the Court's reliance on *stare decisis* here is unwarranted because the original justification for that civil label has been repudiated by scholars and abandoned by the Court and because a fresh look is necessary to create coherence and consistency with the modern civil-criminal divide jurisprudence. The dissonance justifies a reassessment. Application of the modern civil-criminal divide jurisprudence militates in favor of deferring to the legislature's civil label for exclusion proceedings, but such application also establishes the "clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [Congress's] intention" to create a civil scheme.³⁰⁹ This finding comports with the Framers' likely conception, as evidenced by the historical record, that expulsion but not exclusion is a criminal punishment. Accordingly, the bifurcated approach provides compelling reason to redesignate expulsion as a criminal punishment.

³⁰⁸ United States v. Ward, 448 U.S. 242, 248-49 (1980).

³⁰⁹ *Id.*

IV. CRIMINAL EXPULSION IN PRACTICE

I propose that, despite the courts' frequent reliance upon it, the principle of *stare decisis*³¹⁰ is not the most significant obstacle inhibiting courts from reexamining the criminal or civil nature of removal proceedings. Rather, I suspect that courts are inhibited more by (1) their adherence to the monolithic approach and their resultant difficulty in reconciling the conflicting indicators of the nature of removal proceedings; (2) their inability to conceive of how criminal exclusion proceedings would operate; and (3) their fear that the application of constitutional criminal protections would undermine the government's fundamental interests in such proceedings. The first obstacle can be resolved by the bifurcated analysis proposed above.³¹¹ In this section, I address the other two obstacles.

A. *The Formal Structure of Criminal Expulsion Proceedings*

If expulsion proceedings were recharacterized as criminal, defendants in such proceedings would be entitled to the full panoply of criminal procedural protections provided for in the Constitution.³¹² The structure I set forth here is not intended to contain a comprehensive set of procedures for criminal expulsion proceedings, nor is it the only possible structure for such proceedings.³¹³ Rather, my intention is merely to offer the outline of one possible model toward the aim of demonstrating the workability of such a scheme.

1. *Expulsion Triggered by Federal Crimes*

If the government desires to expel a permanent resident for violating a federal criminal law, a statutory scheme is already in place to make the expulsion decision part of the federal criminal process.³¹⁴ The current procedure allows the United States Attorney to request that the federal judge conduct the defendant's immigration removal proceedings together with the sentencing hearing in the criminal case.³¹⁵ At least one court has recognized that when expulsion is ordered through this mechanism, it is a criminal sanction.³¹⁶

³¹⁰ See *supra* note 36 and accompanying text.

³¹¹ See discussion *supra* Part III.

³¹² *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that noncitizens in criminal proceedings get full constitutional protections).

³¹³ See Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1175-84 (2002) (offering a thoughtful alternative structure to incorporate removal proceedings into criminal proceedings but not treating removal as a criminal punishment).

³¹⁴ See INA § 238(c), 8 U.S.C. § 1228(c).

³¹⁵ INA § 238(c)(1), (2)(A), 8 U.S.C. § 1228(c)(1), (2)(A).

³¹⁶ *United States v. Soueiti*, 154 F.3d 1018, 1019 (9th Cir.), *amended on other grounds*, 162 F.3d 1035 (9th Cir. 1998) ("The procedure for sentencing a criminal defendant is criminal,

The procedures provided for by this statute would need only slight modification to make them constitutionally permissible to enforce *criminal* expulsion. Section 237 of the Immigration and Nationality Act, which sets forth the grounds of deportability, could be amended or read to create a crime, the elements of which are (1) being a noncitizen³¹⁷ and (2) engaging in one of the proscribed activities described in § 237. In any criminal prosecution against a permanent resident where the government wished to expel the defendant, it would simply add an additional count to the indictment charging the defendant with violating § 237.³¹⁸ For example, if the federal government prosecuted a permanent resident for distributing a controlled substance,³¹⁹ the government would need to add a second count to the indictment charging the defendant under § 237(a)(2)(B)—the section which authorizes a sentence of expulsion for noncitizens convicted of drug crimes.³²⁰ This would add only the smallest additional component to the determination of guilt. Assuming the government could prove the elements of the distribution charge, the defendant could be found guilty of the § 237 charge if a jury found or if a defendant admits that he or she is a noncitizen.³²¹ This finding or admission would then justify a finding of guilt under § 237 and would authorize the judge to impose a sentence of expulsion in addition to whatever other criminal sanctions she sees fit to impose for the underlying crime.

The finding of guilt would not, however, mean an automatic sentence of expulsion. The various waivers of deportation could be read as proper bases upon which a judge could suspend a sentence of expulsion.³²² The

regardless of whether some portions of the judgment, such as deportation or restitution, might also be imposed in a civil proceeding.”)

³¹⁷ Being a noncitizen is already an element of several federal and state crimes. *See, e.g.*, N.Y. PENAL LAW § 265.01 (“A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses any dangerous or deadly weapon *and is not a citizen of the United States.*”) (emphasis added); *see also* INA § 275(a), 8 U.S.C. § 1325(a) (2000) (illegal entry). *See generally* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) (detailing various firearms laws that target noncitizens).

³¹⁸ As to the very small percentage of expulsion cases that are not triggered by criminal activity, *see* discussion *supra* Part III.C.2.c, the government would have to initiate a freestanding § 237 prosecution.

³¹⁹ 21 U.S.C. § 841 (2000).

³²⁰ Such a defendant could also be charged with violating INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), pertaining to aggravated felonies. *See* INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2000) (classifying illicit trafficking in a controlled substance as an aggravated felony).

³²¹ *See* United States v. Booker, 543 U.S. 220, 221 (2005) (affirming the holding in *Blakely* that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*”) (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

³²² *See, e.g.*, INA § 240A(a), 8 U.S.C. § 1229b(a) (2000) (granting discretion to Attorney General to cancel the removal of certain lawful permanent residents).

current procedures for making the discretionary determination whether to grant one of the statutory waivers are very similar to a federal sentencing hearing. Letters, affidavits, documentary evidence, and testimony are introduced by the respondent in a relatively informal hearing before the judge. The prosecution is free to put forth evidence of negative equities and both parties are free to challenge each other's evidence and cross-examine witnesses. Federal judges are accustomed to making these types of equitable determinations in the sentencing context and incorporating this determination into a federal criminal sentencing hearing would not dramatically alter the nature or magnitude of that proceeding.

Congress has already recognized the workability of this scheme in regard to federal convictions. In addition, handling the expulsion and the underlying criminal cases together in a single proceeding would also have the added benefit of enhancing efficiency.³²³

2. *Expulsion Triggered by State Crimes*

If the government desired to expel a permanent resident for violation of a state criminal law, a separate subsequent³²⁴ federal criminal prosecution would be required.³²⁵ Again, the elements of the federal prosecution would be (1) that the defendant is not a citizen and (2) that she engaged in one of the proscribed activities described in § 237. While this would impose some additional burden on the United States Attorneys' offices and on the federal

³²³ See Taylor, *supra* note 313 (discussing the efficiencies of a closer integration of criminal and immigration adjudications).

³²⁴ The Double Jeopardy Clause would not be any obstacle to this second prosecution because the dual sovereignty exception to the double jeopardy analysis permits prosecution by a state and by the federal government for the same misdeed. See Heath v. Alabama, 474 U.S. 82, 88 (1985); United States v. Lanza, 260 U.S. 377, 382 (1922).

³²⁵ Capturing the efficiency of combining a state criminal prosecution with a removal proceeding would be impossible because states cannot order expulsion. The federal government has prevented state action by occupying the entire field of expulsion law. De Canas v. Bica, 424 U.S. 351, 354 (1976) (holding that regulating immigration is an exclusively federal power); Graham v. Richardson, 403 U.S. 365, 374, 378 (1971) (holding that state laws that restrict eligibility of aliens for welfare benefits merely because of their alienage conflict with overriding national policies in an area constitutionally entrusted to federal government); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) ("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. . . . If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."); United States v. Jalilian, 896 F.2d 447, 449 (10th Cir. 1990) (stating that states are preempted from banishment). See generally NEUMAN, *supra* note 21, at 45, 48 (explaining development of the exclusive nature of federal power of immigration). In addition, states lack the power to order persons excluded from sister states, and it would be constitutionally problematic for them to order exclusion only as to their individual state. Moreover, there would be substantial adverse policy implications of involving state officials in expulsion matters. See generally Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004). *But cf.* Taylor, *supra* note 313 (recognizing policy problems with state enforcement but arguing in favor of a limited role for states in removal proceedings).

judiciary, this additional burden would be offset by the reduced burden on the Immigration and Customs Enforcement agency, which currently prosecutes expulsion cases, and the Executive Office of Immigration Review, which currently adjudicates such cases.

Moreover, while a significant number of these prosecutions would be required, each prosecution would be relatively simple in nature. The only circumstances in which one of these cases could go to a jury would be when a contested issue of fact existed as to whether the defendant was a citizen of the United States. Since the government possesses an “alien file” or “A-file” on every permanent resident containing proof of his or her nationality, jury determinations would be required in only highly unusual scenarios. In regard to the second element, the factual issue would usually be whether the defendant was convicted of a particular state crime.³²⁶ The prosecution could establish this fact easily through submission of a state court certificate of disposition and the court would be empowered to make the determination of the existence of a prior conviction independent of the jury.³²⁷ Accordingly, the substance of these cases would usually entail the adjudication of any legal arguments that a particular state conviction falls within a deportability ground and the adjudication, at the sentencing hearing, of any claim for a waiver of expulsion. Both tasks are well within the expertise and experience of the federal judiciary.

This type of freestanding, simple criminal immigration prosecution is not without precedent. The proceedings I propose would be very similar to the current scheme for prosecuting noncitizens for illegal reentry.³²⁸ In such prosecutions, the government need establish only that the defendant is a noncitizen, was removed, and is present.³²⁹

B. Application of Constitutional Criminal Protections Would Not Undermine the Government's Fundamental Interests in Expulsion Cases

While the formal structure of criminal expulsion proceedings would not require a radical departure from current practice, the shift in the rights enjoyed by respondents/defendants in such proceedings would be dramatic. In particular, the application of the Sixth Amendment right to counsel, the Ex Post Facto Clause, the exclusionary rule and other federal evidentiary rules, and the criminal due process requirement that a prosecution occur in the district in which the charged crime allegedly took place would collectively create a sea change in the level of procedural protections applied in expul-

³²⁶ See discussion *supra* Part III.C.2.b.

³²⁷ See *Apprendi*, 530 U.S. at 490 (“*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”) (emphasis added).

³²⁸ INA § 276(a), 8 U.S.C. § 1326(a) (2000).

³²⁹ *Id.*

sion proceedings.³³⁰ While these changes would inevitably make the prosecution of these cases somewhat more cumbersome than the current administrative procedures, they would not fundamentally undermine the government's ability to expel those permanent residents who truly pose a significant continuing danger to society. Moreover, the criminal label would help resolve the current unsettling disparity between the severity of the sanction involved and the relatively meek procedural protections in civil removal proceedings.

Undoubtedly, the Sixth Amendment would require the appointment of counsel to indigent defendants in criminal expulsion cases. In *Scott v. Illinois*,³³¹ the Supreme Court clarified that counsel must be appointed to indigent defendants in any case that “‘actually leads to imprisonment’” because “incarceration [is] so severe a sanction that it should not be imposed . . . unless an indigent defendant [has] been offered appointed counsel to assist in his defense, regardless of the cost.”³³² The Court reasoned that such appointment is constitutionally required because “deprivation of liberty is a serious matter,” and therefore, “actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment,” which do not require appointment of counsel.³³³ Expulsion, which the Court has characterized as a “great hardship” that “may result in the loss of all that makes life worth living,”³³⁴ is a serious deprivation of liberty more analogous to incarceration than to a mere fine. As such, appointment of counsel would be required. This would impose a significant expense on the government; however, as the Court has recognized, the United States Constitution requires such protection “regardless of the cost.”³³⁵

The application of the Ex Post Facto Clause would prohibit the government from retroactively expanding the grounds upon which someone can be expelled.³³⁶ As the law currently stands, a defendant in a state criminal pro-

³³⁰ I exclude the Eighth Amendment from this list because the Supreme Court's most recent pronouncements on the proportionality analysis lead me to believe that such analysis is likely to have very little impact in the expulsion context. *See, e.g., Riggs v. California*, 525 U.S. 1114, 1114 (1999) (denying writ of certiorari in case challenging “three strikes” law on proportionality grounds); *Harmelin v. Michigan*, 501 U.S. 957, 1001-09 (1991) (holding that mandatory sentence of life without parole for drug possession did not violate Eighth Amendment). I also exclude the Double Jeopardy Clause for the reasons set forth *supra* note 324 and accompanying text.

³³¹ 440 U.S. 367 (1979).

³³² *Id.* at 372-73 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972)).

³³³ *Id.* at 373.

³³⁴ *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (internal quotation marks omitted); *see also Woodby v. INS*, 385 U.S. 276, 285 (1966) (characterizing expulsion as “drastic deprivations”); *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”) (internal quotation marks omitted); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952) (“That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities.”); *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J., dissenting) (characterizing expulsion as “a life sentence of banishment”).

³³⁵ *Scott*, 440 U.S. at 373.

³³⁶ *See generally Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1789).

ceeding can plead guilty to a minor offense explicitly because such a plea will not have any immigration consequences. Thereafter, Congress is free, under current doctrine, to change the rules of the game and transform the same conviction into a deportable offense.³³⁷ This is not a hypothetical scenario. The vast expansions of the grounds of removability over the past two decades have been routinely applied to persons convicted before their enactment.³³⁸ As the Supreme Court has explained, such retroactive application creates “a sense of harsh incongruity” which may “shock the sense of fair play.”³³⁹ Application of the Ex Post Facto Clause would restore a sense of fair play to the expulsion system.³⁴⁰ Moreover, Congress would still be free to alter its judgment regarding which offenses warrant the punishment of expulsion though it could only do so prospectively.

Currently, the exclusionary rule does not apply in expulsion proceedings unless there has been an “egregious violation[] of [the] Fourth Amendment,”³⁴¹ and the federal rules of evidence are not binding.³⁴² The only binding evidentiary rule in civil removal proceedings is that evidence must be “material and relevant.”³⁴³ Thus, for example, hearsay is generally admissible in expulsion proceedings.³⁴⁴ At first glance, application of the exclusionary rule and other federal evidentiary rules would appear to impose significant additional obstacles to the government in expulsion proceedings. However, since the government’s burden in such cases will almost always be limited to proving the defendant’s noncitizen status and the existence of a previous conviction,³⁴⁵ the government will be largely unencumbered in establishing such facts. In almost all cases, the government can establish these facts by submission of government records³⁴⁶ or through the defendant’s own admissions.³⁴⁷ The vast majority of the documentary and testimonial evidence in expulsion proceedings pertains to the factors relevant to establishing eligibility for a waiver of expulsion and to the positive and negative

³³⁷ See *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that Congress may retroactively change removal grounds so long as it clearly expresses its desire to do so).

³³⁸ See Morawetz, *supra* note 29, at 154-56.

³³⁹ *Galvan*, 347 U.S. at 530.

³⁴⁰ See generally Morawetz, *supra* note 29.

³⁴¹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

³⁴² See *Matter of D-*, 20 I. & N. Dec. 827, 831 (BIA 1994).

³⁴³ 8 C.F.R. § 1240.1(c); see also *Matter of D-*, 20 I. & N. Dec. at 830 (“[A]n immigration judge may receive in evidence any oral or written statement which is material and relevant. . . .” (quoting 8 C.F.R. § 242.14(c) (1994)) (internal quotation marks omitted).

³⁴⁴ See *Matter of Grijalva*, 19 I. & N. Dec. 713, 722 (BIA 1988).

³⁴⁵ Or the elements of a separate count in the indictment. See discussion *supra* notes 317-321 and accompanying text.

³⁴⁶ FED. R. EVID. 803(8) (public records exception to hearsay). For example, to establish a prior conviction, the government need only offer a certified record of conviction and in order to establish noncitizen status, the government need only offer the defendant’s birth certificate or other documents from the defendant’s “alien file.”

³⁴⁷ FED. R. EVID. 801(d)(2). For example, in order to establish the defendant’s noncitizen status the government need only submit a copy of the defendant’s application for permanent resident status from defendant’s “alien file,” in which the defendant will necessarily admit to being born abroad.

equities relevant thereto. Since this would be a sentencing issue, the court could “consider relevant information without regard to its admissibility under the rules of evidence applicable at trial.”³⁴⁸ Thus, application of the criminal label would not significantly alter the government’s evidentiary burden in such cases.³⁴⁹

Finally, application of the criminal due process venue requirements would provide important protections for defendants in criminal expulsion cases but would not impose a significant burden on the government. In normal criminal cases, due process and the Federal Rules of Criminal Procedure require that “the government must prosecute an offense in a district where the offense was committed.”³⁵⁰ In contrast, the government is free to commence a respondent’s civil removal proceedings in any immigration court in the nation.³⁵¹ The most obvious consequence of this discretion in the immigration context is that detained respondents often have their removal pro-

³⁴⁸ U.S.S.G. § 6A1.3(a) (1998). As the Supreme Court explained in *United States v. Watts*:

“We begin our analysis with 18 U.S.C. § 3661 (2000), which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. The statute states: ‘No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.’”

519 U.S. 148, 151 (1997) (internal citations omitted); *see also* 18 U.S.C. § 3661 (2000); *United States v. Johnson*, 489 F.3d 794, 96-97 (7th Cir. 2007).

³⁴⁹ Moreover, the criminal label would not dramatically alter the burden of proof in expulsion cases. Currently, the government must prove deportability by clear and convincing evidence. INA § 240(c)(3)(A), 8 U.S.C. § 1229b(c)(3)(A) (2000); *see also* *Woodby v. INS*, 385 U.S. 276, 277 (1966) (“We have concluded that it is incumbent upon the Government in such proceedings to establish the facts supporting deportability by clear, unequivocal, and convincing evidence.”). The criminal label would require the higher proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361 (1970), but as discussed at *supra* notes 346-347 and accompanying text, establishing the required elements of a criminal expulsion case would not be overly burdensome. In regard to waivers of deportation, respondents currently must carry the burden of proof and that would remain true in criminal exclusion cases. *Compare* *United States v. Joaquin*, 326 F.3d 1287, 1293 (D.C. Cir. 2003) (recognizing that defendant bears burden of proof to justify a downward departure), *and* *United States v. Chavez-Chavez*, 213 F.3d 420, 422 (7th Cir. 2000) (“When seeking a downward departure the defendant bears the burden.”), *with* *In re S-H-*, 23 I. & N. Dec. 462 (BIA 2002) (recognizing that respondent bears burden of proof to justify waiver of deportation), *and* *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (BIA 2001) (same).

³⁵⁰ FED. R. CRIM. P. 18; *see also* *United States v. Smith*, 452 F.3d 323, 334 (4th Cir. 2006) (“Our Constitution sets forth the basic parameters for venue in a criminal case . . . [which] protect criminal defendants from the inconvenience and prejudice of prosecution in a far-flung district bearing no connection to their offenses.”); *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982) (“The right of criminal defendants to be tried in the state and judicial district in which the alleged crime occurred is guaranteed by article III of and the sixth amendment to the United States Constitution.”).

³⁵¹ 8 C.F.R. § 1003.14 (granting government discretion to initiate removal proceedings in any immigration court); 8 C.F.R. § 1003.20(a) (stating that venue is proper in the immigration court where the proceeding was commenced); 8 C.F.R. § 1003.20(b) (stating that venue may only be changed upon a showing of good cause); *Matter of Seren*, 15 I. & N. Dec. 590, 591 (BIA 1976) (holding that the Service may decide in the first instance where a removal hearing should be held).

ceedings thousands of miles away from their families, witnesses, and attorneys.³⁵²

Another less obvious but equally disturbing consequence of the government's broad discretion over venue in civil removal cases is the inability of the respondents to predict what law will be applied. An immigration judge is bound by the decisions of the circuit court having jurisdiction over the physical place where the judge sits.³⁵³ When a noncitizen in a state criminal case is deciding whether to plead guilty to a particular charge, that noncitizen has no way to accurately assess the immigration consequence of that charge because she cannot predict where any subsequent removal proceedings will take place and thus which circuit's law will eventually be applied.³⁵⁴ If expulsion proceedings were recharacterized as criminal, venue would lie where the underlying criminal prosecution took place, and thus there would be no uncertainty as to what circuit law would be applied. In addition, this change would eliminate the current incentive for the government to forum shop and defendants would be more likely to be prosecuted near critical witnesses, family members, and their attorneys. The only additional cost to the government would be the administrative inconvenience of having to hold a proceeding in a particular judicial district rather than in the district of its choice.

³⁵² See *Angeles v. District Dir.*, 729 F. Supp. 479, 484-85 (D. Md. 1990) (holding no denial of due process when Immigration Judge denied motion to change venue for resident alien in exclusion proceedings who was "wrongfully detained" by the INS in Seattle and sought to have the hearing moved to Maryland, where she resided); *In re Rahman*, 20 I. & N. Dec. 480 (BIA 1992) (holding a grant of change of venue on the grounds that detained alien had retained counsel at a new location was an abuse of the immigration judge's discretion when "there [was] no evidence of any long-standing attorney-client relationship"); see also Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 16 n.16 (2005); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1674 n.97 (1997) ("[A]llegations that a detained alien's counsel of choice and witnesses would be available in another location, standing alone, do not establish 'good cause' sufficient to overcome the Service's opposition to a requested venue change.") (citing *In re Rahman*, 20 I. & N. Dec. 480 (BIA 1992));

³⁵³ *Peters v. Ashcroft*, 383 F.3d 302, 306 (5th Cir. 2004); see also 8 U.S.C. § 1252(b)(2) (2000) (requiring that a petition for review of removal proceedings "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings").

³⁵⁴ For example, under Ninth Circuit law, a person sentenced for a drug offense under a first offender treatment program is not considered convicted for immigration purposes. *Lujan-Armendariz v. INS*, 222 F.3d 728, 735 (9th Cir. 2000). However, outside the Ninth Circuit, the Board of Immigration Appeals decision in *In re Roldan*, 22 I. & N. Dec. 512, 521 (BIA 1999), controls. That decision holds that a person sentenced for a drug offense under a first offender treatment program is convicted for immigration purposes. Accordingly, if a permanent resident is arrested in California on drug possession and is offered a first offender treatment if he pleads guilty, his attorney may correctly advise him that the plea will not be a conviction for immigration purposes under the controlling Ninth Circuit law and, therefore, he will not be deportable. See INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2000) (requiring a formal conviction to deport someone for a controlled substance offense). However, if the federal immigration authorities initiate removal proceedings against him outside the Ninth Circuit, *In re Roldan* will control and he will be deportable and could even be subject to mandatory deportation. There is simply no way to give correct, definitive advice to a client when an attorney cannot predict which law will be applied.

There would, of course, be costs associated with recharacterizing expulsion proceedings as criminal. The most significant cost would be the expense of providing assigned counsel to indigent defendants in expulsion cases. These costs would not, however, undermine the government's critical interest in these proceedings: permanently incapacitating noncitizens who pose a significant danger of future harm. The formal structure of criminal expulsion proceedings is analogous to current provisions in the federal law, and the additional protections noncitizens would obtain in such proceedings would not impose an unwarranted burden on the government.

V. CONCLUSION

The increased entanglement of criminal and immigration law is arguably the most significant and disturbing development in immigration law over the past three decades.³⁵⁵ In the past thirty years, we have seen an explosion in the criminal grounds of removability, in the number of immigrants facing removal because of their involvement in criminal proceedings, and in public perception conflating immigrants with criminals. However, this trend has failed to provoke courts to reexamine the long-standing rule that immigration removal proceedings are purely civil in nature. The reason for courts' inertia goes beyond their frequent invocation of the principle of *stare decisis*. Courts are unwilling to reexamine whether the civil or criminal label should be applied to immigration removal proceedings because it is an impossible task. All relevant indicators provide contradictory guidance and it is impossible to construct an intellectually honest and persuasive argument for attaching either the civil or criminal label to *all* removal proceedings. Both courts and scholars have failed to appreciate that "immigration removal proceedings" are an ill-conceived category that embodies two distinct proceedings—exclusion and expulsion—the true nature of which can only be ascertained if each is analyzed independently. The bifurcated approach I propose offers courts an avenue out of the paralysis—a practical and workable method by which to reconcile the otherwise contradictory guidance of history and the modern *Mendoza-Martinez/Ward* doctrine.

It is somewhat counterintuitive that redesignating expulsion proceedings as criminal would do anything to address the problematic aspects of the criminalization of immigration law. To the contrary, being saddled with a criminal record carries a host of significant collateral consequences in a range of civil arenas, including housing, employment, and public benefits

³⁵⁵ See Nora v. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" On Terrorism?*, 51 EMORY L.J. 1059, 1059-61, 1073, 1093 (2002); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82-84 (2005); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006); *But cf.* Taylor, *supra* note 313 (arguing for the closer integration of criminal and immigration adjudications).

disabilities.³⁵⁶ People in criminal expulsion proceedings would, in theory, face the same range of consequences. However, many of these common and often devastating collateral consequences would be simply inapplicable to people expelled from the nation. The more problematic consequences of the criminal label for people in expulsion proceedings would be the political and social implications of the criminal label. The social stigma of the criminal conviction would likely follow people who are expelled back to their countries of origin. The political marginalization caused by the criminal label would mean that efforts to reform criminal expulsion laws would likely meet with significant political obstacles. The reality is, however, that there is already significant social stigma associated with being deported and immigrants facing deportation are among the most politically marginalized groups in American society. So, the current situation is the worst of all worlds: people in removal proceedings suffer similar social and political consequences to people in criminal proceedings but fail to receive any of the constitutional protections designed to shelter criminal defendants.

In addition to the general virtue of bringing consistency and coherence to a currently indefensible doctrine, the bifurcated approach would, on balance, represent a significant step forward for immigrants facing both exclusion and expulsion. Currently both groups suffer by association with the other. Immigrants in expulsion proceedings suffer because, being grouped together with noncitizens facing exclusion, the proceedings are mischaracterized as civil and thus the respondents do not receive the critical criminal constitutional protection. Noncitizens facing exclusion suffer because, being grouped together with noncitizens facing expulsion, they are subject to the popular conception of immigrants in removal proceedings as criminals and are subject to unwarrantedly harsh treatment as a result thereof. Thus, the bifurcated approach would significantly improve both the integrity of the doctrine and the lived experience of immigrants facing exclusion and expulsion proceedings.

³⁵⁶ See, e.g., THE BRONX DEFENDERS, CIVIL ACTION PROJECT, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE (2007), available at <http://www.reentry.net/public2/library/attachment.108661>.

