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Introduction

The Statue of Liberty in New York Harbor has represented hope and freedom for many generations of immigrants. The image of Lady Justice, with her blindfold and scales, that is found in almost every courtroom of the United States has inspired many litigants' and jurists' hopes for an equitable meting out of justice. This book examines the intersection of two traditions in U.S. life and politics that are represented by those ubiquitous images: the country's legacy as a nation of immigrants and its commitment to provide equal treatment under the law. In this nation of immigrants, how have the two highest federal courts, the Supreme Court of the United States and the U.S. Courts of Appeals, treated aliens' petitions to enter or to remain in this country?[1]

The U.S. Supreme Court has a dubious track record when it comes to immigration. Historian Leonard Dinnerstein summarized the Court's behavior in immigration cases as follows: "In the land that proudly proclaims its immigration heritage, the Supreme Court, over the years, has consistently allowed Congress and the executive branch of the federal government the right to admit, exclude, or banish non-citizens on any basis they chose including race, sex, and ideology."[2] What explains this

[1] I am very aware that the term "alien" has a pejorative meaning attached to it. I use the term in this book only for the sake of consistency with the terminology used in government and legal documents. For better or worse, almost all U.S. government documents and federal legal opinions use this term. "Alien" is also a legal term of art that refers to one's legal immigration status and applies to those who have not obtained U.S. citizenship by birth on U.S. soil, through naturalization, or through derivative status through a relative.

[2] Leonard Dinnerstein, "The Supreme Court and the Rights of Aliens," reprinted from *This Constitution: A Bicentennial Chronicle*, published by Project '87 of the American

situation? For the Supreme Court to afford this degree of latitude and deference to the elected branches is unusual because the Court has in many other areas of law, such as criminal law, not hesitated to challenge or contradict the two other branches of government. The Supreme Court's perceived hostility toward aliens in exclusion and deportation cases is jarring when juxtaposed with the welcoming and hopeful symbolism of the images of the Statue of Liberty.

It would seem that it is not advantageous for aliens to follow through on the often-made, thoroughly American threat to "take their case all the way to the Supreme Court" if indeed that Court is hostile to aliens' immigration claims. But are the U.S. Courts of Appeals, the second highest level of appellate courts, any more welcoming of aliens' immigration claims than the Supreme Court? This question of whether the Supreme Court and the Courts of Appeals treat immigration cases in similar fashion is the empirical inquiry that drives this book. This investigation will also guide more than the theoretical examinations about the institutional development of these two courts over time. The purpose here is not to compare judicial decision making in immigration law with judicial decision making in another area of law. Rather, the goal is to examine vertically the different development paths followed by two different sorts of courts across time and in a single area of law.

As a political scientist, I study laws as products of political conflict mediated by institutional norms and structures. Legal institutions such as the Supreme Court and the Courts of Appeals, beyond being brick and mortar structures, can also be construed as institutions in the sense that they comprise stable sets of rules, procedures, and norms that are "regularities in political life [that] shape the expression and aggregation of political preferences."[3] Institutional settings and context directly influence judicial decision making by circumscribing the roles and missions of the institution, and "shap[ing] the interests, resources, and ultimately the conduct of political actors," including judges.[4] Similarly, American political development scholars Karen Orren and Stephen Skowronek have observed, "Institutions participate actively in politics: they shape interests and motives, configure social and economic relationships, promote as

Political Science Association and American Historical Association, Fall 1985 (available at www.apsa.com/imgtest/SupremeCourtAlienRight.pdf).

[3] Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, No. 4 (2003):697–712, 699.

[4] Rogers Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," *American Political Science Review*, 82, No. 1 (March 1988):89–108, 91.

well as inhibit political change."[5] Just as rules and conventions in a game such as baseball or football can circumscribe outcomes and shape the strategy of the players, the rules, procedures, norms, and structure of the federal judiciary (or of any government institution for that matter) shape how these institutions' occupants behave. A court's institutional setting signals how judges and justices should comport themselves and can limit those judges' and justices' perceptions of what is within the possible and proper range of actions when they decide cases.

I make three central arguments in this book. First, that the Supreme Court and the Courts of Appeals operate in decidedly different institutional contexts, and that each court's unique institutional context acts as a filtering mechanism that shapes the judges' perception of what they should be doing and how they should be doing it. Second, that the contexts of both courts have slowly changed over time and that neither the Supreme Court nor the circuit courts/U.S. Courts of Appeals have played a static role in the federal judicial system. Third, that the evolving institutional settings of the courts have consequences for the courts themselves, for the occupants of those institutions, and for the alien litigants who appear before the courts. Essentially, the evolved federal judiciary has taken a different form than the one envisioned by the founders, but this new form has simply redistributed the missions and duties of the judicial institution to its different segments. In the end, the federal judiciary may have wandered from the structural design intended by the founders, but the roles and missions that the founders wished the judiciary to serve in the political system are still being carried out.

Using the case study of judicial decision making in immigration cases, I explore the relationship between the U.S. Supreme Court and the U.S. Courts of Appeals' distinct institutional contexts and the judicial decision making processes on each court. Among the institutional attributes that constitute the setting of each court are the formal rules of operation and procedure, such as congressionally mandated acts prescribing the jurisdiction of federal courts over cases. Less formal rules of operation, as well as exogenous changes to the courts' institutional settings, will also be a focus of this study; Chapter 4 and 6 will show that changes occurring outside the federal courts can have ripple effects that eventually affect the courts themselves. Phenomena such as alien litigants' organized responses to legislative changes, or policy changes made by the elected branches to

[5] Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 78.

ratchet up or relax immigration enforcement, may also affect the number and nature of cases reaching the federal courts.

In the literal sense, judicial decision making in immigration cases is an important subject of inquiry because, in exclusion and deportation cases, either a Court of Appeals or the Supreme Court is the final arbiter of the fate of the aliens in these legal proceedings. In these cases, the courts are deciding whether or not aliens can enter or remain in the United States, and, especially with political asylum cases, these decisions may have life or death consequences. In exclusion cases, the courts must decide whether the federal government and its regulatory agencies have properly prevented an alien from entering U.S. territory. In deportation cases, the courts must determine whether the federal government and its administrative agencies have properly expelled or removed an alien from U.S. territory.[6] Although Congress may pass laws stipulating how many aliens may enter the United States, for what purpose, and how long they may remain, it falls to the federal courts to interpret these laws and apply them to individuals. It is therefore vital that one understand the ways in which the U.S. Supreme Court and the U.S. Courts of Appeals adjudicate immigration appeals.

There is also a normative component to the question of how the Supreme Court and the Courts of Appeals treat aliens. The manner in which our legal institutions and their occupants treat aliens is an indicator of whether our institutions have lived up to their constitutionally prescribed roles and is ultimately a bellwether of the vitality of our democratic system. In this government of separated powers, the framers envisioned that the judicial branch would perform a very specific function. In *Federalist 78*, Alexander Hamilton worried that the judicial branch would be the weakest branch because it "has no influence over either the sword or the purse." At the same time, he and the other federalists believed that "the courts of justice" as an independent judiciary, separate from the legislative and executive branches, "are to be considered bulwarks of a limited Constitution against legislative encroachments."[7] The framers so desired an independent judiciary that they determined that judges should serve for life in order to insulate them from political retaliation and electoral pressures. This arrangement would allow judges to check the excesses and errors of the elected branches of government.

[6] After congressional reforms in 1996, the previously distinct legal categories of exclusion and deportation were collapsed into one legal action called "removal."

[7] Alexander Hamilton, Federalist Papers No. 78. *The Federalist Papers*, ed. Clinton Rossiter (New York: Penguin, 1961), 465, 471.

Concomitantly, Hamilton and the framers also suggested a normative role for the federal judiciary to play in the government system – to make tough and sometimes unpopular decisions that the elected branches of government might be unable or unwilling to make.

In American history, the origins and the functions of judicial review were never clearly understood; the proper role of the federal judiciary in the political system is still contested today.[8] One view of judicial review is that the federal judiciary exists to protect the rights of vulnerable groups who, because of the absence of political power, cannot protect themselves, and whom the elected branches may not be willing to protect. There is evidence that the Supreme Court has, at least in some instances, embraced its expected role to make politically unpopular decisions that may benefit minority groups in our society. As evidenced by the now famous Footnote Four of the Supreme Court case *United States v. Carolene Products* (1938), the Court was conscious of its unique status among the other branches of government and it specifically stated that it would subject policies directed at politically unpopular "discrete and insular minorities" to "more searching scrutiny."[9] Indeed, in other areas of law, such as criminal law and equal protection jurisprudence, the Court has frequently and sometimes forcefully asserted itself as the protector of such groups. For example, during the Warren Court years, the Supreme Court played an instrumental role in facilitating a rights revolution by granting rights and protections to women, racial minorities, and criminal defendants. But this situation begs the question of whether aliens count as a "discrete and insular minorit[y]." In analyzing the impact of the famous Footnote Four pronouncement, legal scholar John Hart Ely has noted that aliens are an "easy case" when determining who is deserving of judicial protection against discrimination. He writes, "Aliens cannot vote in any state, which means that any representation

[8] See, e.g., Barry Friedman, "The Importance of Being Positive: The Nature and Function of Judicial Review" (The William H. Taft Lecture in Constitutional Law), 72 *University of Cincinnati Law Review* 1257 (2004); Barry Friedman, "Dialogue and Judicial Review," 91 *Michigan Law Review* 577 (1993); Michael Klarman, *From Civil Rights to Jim Crow: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2006); and Howard Gillman, *The Votes That Counted: How the Supreme Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2003).

[9] *United States v. Carolene Products,* 304 U.S. 144 (1938). In the famous Footnote Four of this case, the Supreme Court articulates its view of the proper role of the institution as being one that acts as the guardian of politically weak "discrete and insular minorities." The Court understood its role as requiring the justices to submit policies that affect such minority groups to "more searching judicial inquiry."

they receive will be exclusively 'virtual.'"[10] Lacking suffrage, aliens have few avenues of recourse in the political system except the federal courts. But have the U.S. Supreme Court and U.S. Courts of Appeals come to the same conclusion as Ely, and even if they have, do they actually treat aliens as deserving of judicial protection against discrimination? One cannot answer this question without empirically assessing how the two courts treat immigration appeals.

Although their expectations of the role that the federal judiciary was to play in the American political system was clear, the framers were very vague as to what form the judiciary, and especially the lower federal courts, should take. All that Article III Section I of the Constitution states is that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." It was evident that there was to be one Supreme Court that would be the highest national court at the apex of the federal judiciary hierarchy, which would also complete the tripartite design of the federal government along with the Congress and the presidency. But what about the structure, size, and design of the lower federal courts, which were also known as the "inferior courts?" Both the Constitution and the *Federalist Papers* refer repeatedly to "the judiciary" or "the judicial branch," implying that the institution would be monolithic and consistent at all of its levels. Perhaps this is understandable given that the Constitution was drafted at a time when conceptualizations of the form and functions of the federal judicial system were vague and uncertain. As this book will show, in certain types of immigration cases, namely exclusion and deportation or removal cases, the Supreme Court appears not to have been the best friend of the hapless alien. Instead, it has often fallen to the U.S. Courts of Appeals to protect this politically vulnerable group from errors or abuses of power committed by the immigration bureaucracy. One way to make sense of this situation is to examine how the two courts treat aliens' appeals in light of their distinctive institutional contexts.

At first glance, it may seem odd to use immigration law as a lens to study judicial decision making because aliens, as outsiders in every sense of the word, are legally entitled to so few rights. This is especially true of challenges to their right to enter or to stay in the United States. As immigration law scholar Peter Schuck has written, "In a legal firmament

[10] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 160–61.

transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith and individual entitlement is at the nadir."[11] Indeed, the scenario Schuck describes plays out at the Supreme Court level where, by virtue of its implications for and close connection to national security and national sovereignty, the Court has not only adopted a deferential attitude toward executive branch action on immigration but has also repeatedly recognized congressional plenary power over this subject. In this sense, judicial decision making in immigration law, particularly in exclusion and deportation decisions, is the hardest test case of the notion that the two courts are distinct. Schuck further noted, "In a constitutional system marked by an extraordinary degree of political, institutional and social fragmentation, manifestations of solidarity and nationhood can exercise a potent hold over the judicial, as well as the lay, imagination."[12] One would expect that all the federal courts would be marching in lock step in immigration law.

In addition, strong and unequivocal doctrinal directives issued by the Supreme Court characterize this area of law. Through a series of cases that cite congressional plenary power over immigration, the Supreme Court has repeatedly deferred to Congress and declined to closely scrutinize government actions for compliance with the Constitution. For instance, the Court wrote in *Oceanic Steam Navigation Company v. Stranahan* (1909), "Over no conceivable subject is the legislative power of Congress more complete."[13] Furthermore, the Court has also stated that in exclusion and deportation cases it will not require the government to provide due process protections that would be required in other areas of law, such as criminal law. The Court's infamous statement in *United States ex rel. Knauff v. Shaughnessy* (1950) is an example of its view of the extent of due process that should be provided: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[14]

One would think that these doctrinal directives would facilitate consistency in treatment of immigration cases throughout the federal court system. Given the hierarchical nature of the federal judiciary and the

[11] Peter Schuck, "The Transformation of Immigration Law," 84 *Columbia Law Review* 1 (1984).
[12] Ibid. at 17.
[13] 214 U.S. 320 at 339. The phrase was subsequently cited affirmatively in *Fiallo v. Bell* (1977), 430 U.S. 787 at 792 and other immigration cases.
[14] 338 U.S. 537 at 543.

long-established norm of *stare decisis* (following precedent), one would expect the U.S. Courts of Appeals simply to toe the line, apply the U.S. Supreme Court doctrine, and defer to congressional intent in the majority of cases. In exclusion and deportation cases, it would be unlikely for judges at any level of the federal judiciary to find in favor of the alien, and therefore alien victories in any level of the federal courts should be very rare. Moreover, one would not expect the lower federal courts to reach pro-alien outcomes that seemed to contravene established legal precedent or congressional intent. Instead, the data collected for this study show numerous and varied instances when judges of the Courts of Appeals engaged in seemingly purposive behavior to either shirk existing precedent or congressional intent in order to find in favor of the alien. Why are the U.S. Courts of Appeals behaving this way and what is motivating their behavior? The exclusion and deportation cases in this study, then, are not just discrete legal decisions about anonymous foreigners; the procedures and processes by which the aliens' cases are adjudicated provide insight into the institutional incentives that shape and channel judicial decision making.

From an institutional development perspective, the federal courts in immigration law present a fascinating study of the effect of institutional context on decision making because this area of law embodies a tension in the institutional expectations of the judges. One element of an institution's context is the role, mission, and purpose of that institution, which also prescribes expectations of how institutional occupants should behave. Martin Shapiro has taught us that the Supreme Court can play multiple roles in our political system, often in the same area of law.[15] Yet immigration cases illustrate a different permutation of institutional role. Aliens can be considered a politically unpopular "discrete and insular" minority group deserving of special protection by the federal courts. On the one hand, this protection calls upon judges, as members of an independent third branch of government, to check the abuses and excesses of the elected branches' exercise of government power over individuals. On the other hand, immigration as a policy area is similar to foreign policy, where the belief is that decisions should be confined to one body that can take decisive action. Because immigration decisions also have implications for visions of national identity and sometimes national security, it is also a policy area where the nation should ideally speak with one voice

[15] Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (London: The Free Press of Glencoe, 1964). See, especially, Chapter 5 on the Supreme Court's multiple roles in reapportionment law.

through one of the elected branches of government rather than through a cacophony of different voices from multiple government institutions and actors. This area of law therefore embodies the conflicting expectations of the federal courts to live up to their institutionally prescribed role as an independent adjudicator separate from the elected branches of government (its *Carolene Products* Footnote Four role) and its politically prescribed role to defer to the elected branches of government. Within immigration law, one finds a collision of the Supreme Court's dual role as a policy court and as a court of law.

Despite this enduring tension in the role of the Supreme Court in immigration cases, the role of the federal courts in immigration has been largely ignored by social scientists. This situation results from the prevailing assumption that the courts defer to Congress and to the executive branch on immigration issues. It is true that many of the Supreme Court's opinions cite the plenary power of Congress, as the Supreme Court in particular, and with few exceptions, refuses to scrutinize federal policy toward aliens for constitutional violations. In a long line of legal doctrine citing first national sovereignty and then congressional plenary power over immigration, the Supreme Court has consistently and systematically deferred to Congress in immigration appeals and declined to hold its actions to significant limitation.[16] Social scientists' research agendas, with few exceptions, focus overwhelmingly on the cultural, economic, and political impact of immigrants in American life, and on the demographic trends of immigrants – not on immigration law.[17] In

[16] See, e.g., the long line of plenary power cases that begin with the national sovereignty cases; these laid the foundation for the plenary power doctrine. This line of cases includes *Wong Wing v. United States* (1896), in which the Court wrote, "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein." 163 U.S. 228, 237. This theme can be found more recently in Justice Scalia's concurrence in *Miller v. Albright,* 523 U.S. 420, 456 (1997) and the majority opinion in *Zadvydas v. Davis*, U.S. 678, 695 (2001).

[17] However, two law professors (McClain and Haney-Lopez) and one historian (Salyer) have produced excellent studies on this very subject. Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: The University of Carolina Press,1995); and Ian Haney-Lopez, *White by Law: the Legal Construction of Race* (New York: New York University Press, 1995); although Haney-Lopez, too, is a law professor. Two more recent studies by David S. Law provide an example of research on immigration law that combines legal, empirical, and institutionally based analysis: "Strategic Judicial Lawmaking: Ideology, and Publication in

political science, there are many excellent and valuable studies on various aspects of immigration, but the subject of immigration law has been largely overlooked.[18] Instead, the study of immigration law has largely been the province of law professors such as T. Alexander Aleinikoff, Stephen Legomsky, David Martin, Hiroshi Motomura, Peter Schuck, and a growing group of legal scholars who publish primarily, although not exclusively, in American law reviews.[19] As legal scholars, their theoretical interests and methodological approaches are necessarily different from those of social scientists. Because of contrasting and distinct disciplinary conventions, law professors do not bring the same analytical frames to their analysis, such as a focus on institutional contexts and development that political scientists can bring.

Political science research on law and courts also has its blind spots. The subfields of public law and judicial politics engage in the study of law and courts, but the subfields still disproportionately focus on the Supreme Court to the exclusion of the lower courts.[20] Although there are now growing numbers of studies being done on the U.S. Courts of

the Ninth Circuit Asylum Cases," *University of Cincinnati Law Review* 73:817 (2005) and "Judicial Ideology and the Decision to Publish: Voting and Publication Patterns in the Ninth Circuit Asylum Cases," *Judicature* 89:212 (2006).

[18] Recent political science studies of immigration, including Daniel Tichenor, *Dividing Lines: The Politics of American Immigration Reform* (Princeton, NJ: Princeton University Press, 2001); Wayne Cornelius et al., *Controlling Immigration: A Global Perspective* (Stanford, CA: Stanford University Press, 2004); Peter Andreas, *Border Games: Policing the United States/Mexico Divide* (Ithaca, NY: Cornell University Press, 2001); Desmond King, *The Liberty of Strangers: The Making of the American Nation* (Oxford: Oxford University Press, 2004); and Aristide Zolberg, *A Nation By Design: Immigration Policy in the Fashioning of America (*New York: Harvard University Press, 2006), pay scant attention to the legal and judicial aspects of immigration policy in the United States.

[19] See, e.g., Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power," *The Supreme Court Review* 255 (1985); Hiroshi Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation," 100 *Yale Law Journal* 545 (1990); Peter H. Schuck, "The Transformation of Immigration Law," *Columbia Law Review* 84:1 (1984); and Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (Cambridge, MA: Harvard University Press, 2007). An example of several empirical studies undertaken by law professors include Stephen Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (New York: Oxford University Press, Clarendon, 1987); Peter Schuck and Theodore Hsien Wang, "Continuity and Change: Patterns of Litigation in Immigration, 1979–1990," 45 *Stanford Law Review* 115 (November 1992); and Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," *Stanford Law Review* 295 (2007).

[20] A search for articles in political science journals in the JSTOR database with "Supreme Court" in the title, between the years 1980 and 2008, returned 168 articles. (This search