FOUNDATION PRESS

David A. Martin
Peter H. Schuck
Editors

Immigration Stories

Chae Chan Ping and Fong Yue Ting

Wong Wing v. United States

United States v. Wong Kim Ark

Harisiades v. Shaughnessy

The Carlos Marcello Cases

Afroyim v. Rusk

Kleindienst v. Mandel

Plyler v. Doe

Landon v. Plasencia

Abankwah v. INS and Matter of Kasinga

INS v. St. Cyr

Hoffman Plastic Compounds, Inc. v. NLRB

Demore v. Kim

Contributors

Gabriel J. Chin
Catherine L. Fisk
Kevin R. Johnson
Daniel Kanstroom
David A. Martin
Nancy Morawetz
Burt Neuborne
Gerald L. Neuman
Michael A. Olivas
Lucy Salyer
Peter H. Schuck
Peter J. Spiro
Margaret H. Taylor
Michael Wishnie

Immigration Stories by David A. Martin and Peter H. Schuck et. al

Immigration stories help shape how we conceive of ourselves as a nation. At the end of his noted history of multicultural America, Ronald Takaki reflects:

> As Americans, we originally came from many different shores, and our diversity has been at the center of the making of America. While our stories contain the memories of different communities, together they inscribe a larger narrative. Filled with what Walt Whitman celebrated as the "varied carols" of America, our history generously gives all of us our "mystic chords of memory."[1]

In an earlier generation, Oscar Handlin opened his Pulitzer Prize-winning book, *The Uprooted*, with these words: "Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants *were* America."[2]

Although the American immigration narrative is sometimes rendered as a pure tale of hope, grit, and triumph, a truthful account would include its share of stories of tragedy, shame, conflict, and failure (as Takaki's and Handlin's works make manifest). This mixed picture of success and setback holds whether viewed from the perspective of the individuals who migrate, the society that receives them, or the government that seeks to regulate the process. And of course this complex story is still unfolding. Since September 11, 2001, we have seen a remarkable reaffirmation of inclusiveness alongside an increased fear of aliens from certain regions associated with terrorist threats.

Given the centrality of immigration to American self-understanding, it is wholly fitting that *Immigration Stories* should join a new series of vital teaching materials augmenting law school casebooks. The *Stories* series tells the tales behind leading cases, anchoring them in their historical contexts, revealing the political and litigation strategies that drove them forward, and humanizing the individuals caught up in their toils. (Immigration stories are particularly rich in this human element, owing to the distinctive aspirations and struggles bound up with a decision to migrate.) The series also is meant to analyze the ongoing significance of each of the judicial decisions, as the polity accepts, rejects, or modifies their legal implications.

It is no easy task to select a baker's dozen of the most important, representative, or revealing immigration cases to include in such a volume. As editors, we knew, of course, that we would include cases that depict the Supreme Court's broad deference to the political branches in the immigration realm, the so-called "plenary power doctrine." But which cases should we choose – concerning that seminal doctrine as well as others – and how should we array them, given that many of the most important immigration cases address multiple themes? Ultimately, we decided to present those we selected in chronological order; one who reads from start to finish can gain some sense of the ebb and flow of the immigration case law.

Our book begins, naturally, with the Supreme Court's consideration of the Chinese Exclusion Acts of the 1880s and 1890s, the first sustained assertions of federal immigration control authority. Gabriel Chin describes the fascinating litigation context and the continuing

significance of the two cases – *Chae Chan Ping v. United States* (sometimes called the *Chinese Exclusion Case*) and *Fong Yue Ting v. United States* – that are regarded as the foundation stones for the plenary power doctrine. In later generations, it was usually war that tested the constitutional limits of the government's plenary power over immigration. We pick up that thread with the Cold War. In *Harisiades v. Shaughnessy*, in 1952, the government successfully relied on the doctrine to justify deportation of three former members of the Communist Party, all long-time lawful permanent residents, based on a retroactive application of a statute passed after all three had terminated their membership, at least formally. Burt Neuborne relates how various strategic decisions led to the Court's rejection of their constitutional claims under the Ex Post Facto and Due Process clauses and the First Amendment. Twenty years later, the Court in *Kleindienst v. Mandel* reaffirmed plenary power by overriding First Amendment challenges to the exclusion of a Marxist intellectual, despite the post-*Harisiades* liberalization of First Amendment doctrine. In recounting that litigation, Peter Schuck shows how the lower courts subsequently exploited a doctrinal loophole left by the Court, which helped give reformers the opening they needed to limit the government's visa-denying discretion. In the chapter on the 2003 case of *Demore v. Kim*, Margaret Taylor explains how elements of the plenary power doctrine – coupled with the national trauma created by September 11, 2001 – may have led the Court to countenance an unnecessarily harsh mandatory detention provision despite a precedent from only two years earlier (*Zadvydas v. Davis*) that seemed to presage a more forceful judicial defense of the liberty claims of detained aliens.

Plenary power, however, is not the whole immigration law story. Perhaps influenced by the almost universal academic criticism of the doctrine, the Supreme Court has occasionally reined in the political branches, usually using a distinctively stingy form of statutory construction – what Hiroshi Motomura has labeled phantom constitutional norms[3] – to defeat the government's broadest claims. At other times, the Court has deployed the Constitution itself to protect aliens or their children against political branch overreaching. *INS v. St. Cyr*, recounted by Nancy Morawetz, reflects the former approach. Congress tried in 1996 to strip the courts of jurisdiction to consider challenges to removal filed by virtually any alien with a criminal conviction in the United States. The Supreme Court read the law quite narrowly, finding that it allowed the trial courts to entertain habeas corpus petitions filed by such aliens. The ruling resulted in thousands of new hearings.

The Court's use of constitutional provisions to protect immigrants, at least in some circumstances, actually began in the Chinese exclusion era. Not only did the Court apply a strong version of equal protection to shield resident Chinese merchants against discriminatory administration of a San Francisco ordinance in the great case of *Yick Wo v. Hopkins*[4] (a decision discussed briefly in several of the chapters in this book), but it also held unconstitutional a central provision of the federal Chinese exclusion laws themselves. In *Wong Wing v. United States*, analyzed here by Gerald Neuman, the Court ruled that Congress could not impose criminal punishment for immigration violations through summary procedures. Although the government had established the habeas corpus petitioners' unlawful presence, it could not imprison them at hard labor without affording them all the protections of the criminal justice process – a decision that the scholar Henry Hart lauded as "one of the bulwarks of the Constitution."[5]

The xenophobic impulse that produced the Chinese exclusion laws also found expression in a late 19th century effort – supported by prominent legal academics and ultimately the Solicitor General of the United States – to persuade the Supreme Court that children born in the United States to lawfully present Chinese were not entitled to automatic citizenship under the Fourteenth Amendment. Lucy Salyer recounts the litigation in *Wong Kim Ark v. United States* that led the Court to affirm a broad birthright citizenship rule. Peter Spiro tells the story of *Afroyim v. Rusk*, a 1967 decision that adopted an even more expansive reading of the Citizenship Clause of the Fourteenth Amendment. *Afroyim* and its progeny shield citizens from government attempts to enforce the loss of citizenship on the basis of such acts as voting in a foreign election or naturalizing elsewhere – unless the citizen actually intends to renounce that precious status.

Landon v. Plasencia presented the question of the procedural due process rights of lawful permanent residents, even if they were technically claiming admission at the border when returning to the United States after foreign travel. As Kevin Johnson details, the Court chose to apply a more protective line of precedents, reaffirming that rights should be measured based on the alien's true status and her stake in the decision, rather than lumping returning residents together with aliens seeking initial admission. The Court on one occasion has also protected those without legal status. *Plyler v. Doe* presented a challenge by undocumented children to a Texas statute that permitted local governments to charge them tuition for basic public schooling. Michael Olivas dissects the legal strategies that led the Court to apply equal protection doctrine to invalidate Texas' statute on behalf of this particularly vulnerable group.

The other three stories in this volume are harder to classify but nevertheless reveal the operations of our immigration enforcement system, and, in some cases, the difficulty of balancing the demands of enforcement against other important societal goals. Daniel Kanstroom provides a rich and compelling account of the organized crime leader Carlos Marcello, a lawful permanent resident since infancy, whom the government tried to deport for decades, without success. One of the key markers in Marcello's seemingly endless journey through the courts, *Marcello v. Bonds*, was an instance of plenary power-style deference that restricted procedural protections under the Constitution for persons facing deportation. Other rounds of the government's battles with Marcello and his extraordinarily resourceful lawyers led to changes in the laws governing judicial review – but not always with the impact that the government anticipated. David Martin's chapter addresses political asylum, an issue in an increasing percentage of modern removal cases. It is the only chapter that does not focus on Supreme Court rulings, but instead addresses a widely noted landmark decision of the Board of Immigration Appeals, *Matter of Kasinga*, which held that the customary practice the BIA called female genital mutilation (FGM) could form the basis for an asylum claim. It also considers an important follow-on FGM case, *Abankwah v. INS*, which illustrates the enforcement difficulties and dilemmas raised by this nation's asylum law. The *Abankwah* account also provides a close-up look at how cases unfold in immigration court. Finally, Catherine Fisk and Michael Wishnie, analyzing the 2002 decision in *Hoffman Plastic Compounds v. NLRB*, consider how the enforcement of the immigration laws should be balanced with other policy objectives (there, labor law's protection of workers, including the undocumented).

Specialists may find it odd that *Immigration Stories* does not include chapter-length treatment of the *Knauff* and *Mezei* cases.[6] These landmark plenary power decisions from the

early 1950s permitted the government to visit harsh consequences on two rather sympathetic prospective immigrants, based on secret information allegedly revealing their subversive character – information they had been wholly unable to challenge. Those stories, however, have been well told elsewhere, particularly in Charles Weisselberg's comprehensive account of the two cases, as well as in a book Ellen Knauff herself authored once she had won a full hearing and eventual admission through political intervention.[7] And those cases do receive some attention in this book, particularly in the chapters on *Demore v. Kim* and *Landon v. Plasencia*.

The reader will learn here that many of the stories did not end once the Supreme Court issued a decision decreeing judicial deference to a harsh congressional policy or executive branch ruling. *Marcello v. Bonds,* for example, blessed an administrative deportation process that would mix the roles of prosecutor and judge, and seemed to allow for other departures from standard due process requirements. Yet administrative needs and enlightened management led to an evolution over the next two decades toward exactly the kind of trial-type procedures that Marcello's lawyers had advocated. *Kleindienst v. Mandel* approved ideological exclusion of those who gave merely intellectual support to Marxist ideas, but within two decades Congress had removed those provisions from the statute books. *Plyler v. Doe* seemed to leave the door open to restricting the access of undocumented children to our schools if Congress explicitly blessed such a state-law policy. But when certain members of Congress pushed for such a law in 1996, they were beaten back by a concerted political effort. As Margaret Taylor explains, some lower courts have interpreted *Demore* in ways that narrow the categorical mandatory detention that the Court upheld. And of course (in a development not addressed here), Congress finally cleansed our laws of the national-origins quota system in 1965, even though numerous court decisions had previously upheld it against constitutional challenge.

In short, even in those areas where the plenary power doctrine reigns, the polity is not saddled forever with objectionable laws or practices. The doctrine is an invitation to roll up one's sleeves and become active in the political arena in order to amend bad laws or defend good ones against amendments that would erode the hard-won gains of earlier campaigns. There is room in these stories to find both worry and inspiration at a time when many propose to trim protections in the name of the war on terror. The long struggle to assure fair process and sound substantive law continues.

Endnotes

1 Ronald Takaki, A Different Mirror: A History of Multicultural America 428 (1992), quoting from Whitman's *The Leaves of Grass* 38 (Signet ed. 1958) ("I Hear America Singing") and Abraham Lincoln's First Inaugural Address.

2 Oscar Handlin, The Uprooted: The Epic Story of the Great Migrations That Made the American People 3 (1st ed. 1951). See also Oscar Handlin, The Americans: A New History of the People of the United States ix-x (1963).

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

4 118 U.S. 356 (1886).

5 Henry Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1387 (1952).

6 United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

7 Charles D. Weisselberg, The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei, 143 U.Pa. L. Rev. 933 (1995); Ellen Knauff, The Ellen Knauff Story (1952).

About The Editors

David A. Martin is Warner-Booker Distinguished Professor of International Law at the University of Virginia, where he teaches immigration and refugee law, constitutional law, and international law. He is a graduate of DePauw University and the Yale Law School. Following clerkships with Judge J. Skelly Wright and Justice Lewis F. Powell, Jr., and a period of private practice in Washington, D.C., he served from 1978 to 1980 as special assistant in the human rights bureau of the U.S. Department of State. There he participated in drafting the Refugee Act of 1980. Since joining the Virginia faculty in 1980, he has published numerous works on immigration, refugees, international human rights, and constitutional law, including a leading casebook on U.S. immigration and citizenship law (coauthored with T. Alexander Aleinikoff and Hiroshi Motomura, Thomson West, 5th ed. 2003). He has served as Vice President of the American Society of International Law and is a member of the Board of Editors of the American Journal of International Law. As a consultant to the Department of Justice in 1993 he helped design major reforms for the U.S. political asylum system, and in 2003-2004 he prepared a lengthy report for the Department of State on reforms for the overseas refugee admissions program. From August 1995 to January 1998, he served as General Counsel of the Immigration and Naturalization Service.

Peter H. Schuck is the Simeon E. Baldwin Professor of Law at Yale University, where he has taught since 1979. His major fields of teaching and research are torts, immigration, citizenship, and refugee law, and administrative law, and he has written on a broad range of public policy topics. His most recent books include *Meditations of a Militant Moderate: Cool Views on Hot Issues* (in press, 2005); *Foundations of Administrative Law* (editor, 2d ed., 2004); *Diversity in America: Keeping Government at a Safe Distance* (Harvard/Belknap, 2003); *The Limits of Law: Essays on Democratic Governance* (2000); *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998); and *Paths to Inclusion: The Integration of Migrants in the United States and Germany* (co-editor, 1998). Earlier books include *Suing Government: Citizen Remedies for Official Wrongs* (1983); *Citizenship Without Consent: Illegal Aliens in the American Policy* (with Rogers M. Smith, 1985); *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (1987); *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* (editor, 1991); and *The Judiciary Committees* (1974). He was awarded a Harvard Graduate Prize Fellowship (1968-70), a Guggenheim Fellowship (1984-85), and a Fulbright Senior Fellowship to lecture in India (2004). Prior to joining the Yale faculty, he was Principal Deputy Assistant Secretary for Planning and Evaluation in the U.S. Department of Health, Education, and Welfare (1977-79), Director of the Washington Office of Consumers Union (1972-77), and consultant to the Center for Study of Responsive Law (1971-72). He also practiced law in New York City (1965-68) and holds degrees from Cornell (B.A. 1962), Harvard Law School (J.D. 1965), N.Y.U. Law School (Ll.M. 1966), and Harvard University (M.A. 1969). He lives in New York City where he has an office at NYU Law School

"Immigration Stories" is available for purchase, online at Foundation Press's website http://www.westacademic.com/Students/ProductDetails.aspx?tab=1&productid=131980, or by calling Foundation Press toll-free at 1-800-328-9352. Reprinted with permission.