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Minorities, Immigrant and Otherwise

Anupam Chander's article *Minorities, Shareholder and Otherwise*¹ brilliantly offers a "conservative" justification for a U.S. constitutional law truly dedicated to fairness and justice for all. It does so by counterintuitively looking to the bottom-line-oriented world of corporate law. This commentary offers a most powerful example of the gulf between constitutional law and corporate law identified by Professor Chander. Modern constitutional law affords no meaningful substantive protection to immigrants to the United States.² The Supreme Court has consistently held that the political branches of the U.S. government possess "plenary power" over immigration and the courts lack the power to review the substantive constitutionality of the immigration laws. The "plenary power" doctrine in operation serves as a bulwark of inequality for immigrants to the United States.

I. CORPORATE LAW: THE PROTECTOR OF MINORITY SHAREHOLDER RIGHTS

Minorities, Shareholder and Otherwise observes "that both corporate law and constitutional law address . . . exercise of power by controlling groups to benefit themselves at the expense of minorities."³ Solicitous of minority shareholder rights, corporate law provides remedies for abuses of power over minority shareholders through such mechanisms as cumulative voting, appraisal, and securities regulation. In contrast, modern constitutional law shirks away from protecting minorities from the excesses of the majority and leaves intact stark racial disparities.

1. Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 119 (2003).

2. As we shall see, immigrants desperately need judicial protection. The ImmigrationProf Blog, <http://lawprofessors.typepad.com/immigration/>, regularly offers contemporary examples of the harsh treatment under color of law of immigrants to the United States.

3. Chander, *supra* note 1, at 151.

For example, the Supreme Court has insisted upon rigid adherence to color-blindness in the law⁴ and has applied strict scrutiny to any racial classification, including ameliorative programs designed to remedy past exclusion of racial minorities from—and ensure fair results in—educational, employment, and other opportunities.⁵ The cornerstone of the modern Equal Protection doctrine is the Supreme Court’s decision in *Washington v. Davis*,⁶ which held that discriminatory impact of a governmental policy is insufficient to establish an Equal Protection violation; discriminatory intent by the state actor must be established. As a result of this requirement, the courts frequently turn a blind eye to stark disparities in housing, employment, law enforcement, and public university enrollment, to offer a few examples.⁷

Similarly, lawmaking by initiative, which is popular in many states, historically has disadvantaged racial minorities.⁸ Severe disadvantages specifically face noncitizens and Latinas/os in the initiative process, which has been employed by the voters of many states to the detriment of Latina/o immigrants.⁹ For example, voters in California, Washington, and Michigan in recent years eliminated race-conscious affirmative action through initiatives and limited the efforts of public universities to ensure diverse student bodies.¹⁰

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4. See, e.g., *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“In the eyes of government, we are just one race here. It is American.”).
 5. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (holding that the school district failed to carry its burden of showing that consideration of race in elementary and secondary school assignments was narrowly tailored to achieve a compelling state interest); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating an undergraduate admissions scheme that relied excessively on race).
 6. 426 U.S. 229 (1976), available at <http://supreme.justia.com/us/426/229/case.html>.
 7. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 338-39 (2d Cir. 2000) (holding that, when a victim identified the perpetrator of a crime as black, subsequent police questioning of all African American males in the predominantly white town did not violate Equal Protection Clause), *cert. denied*, 534 U.S. 816 (2001).
 8. See generally Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (analyzing generally how initiatives have operated to the detriment of racial minorities throughout U.S. history).
 9. See Kevin R. Johnson, *The Handicapped, Not Sleeping, Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. (forthcoming October 2008).
 10. See *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000) (addressing a Washington initiative that prohibits consideration of race in university admissions process); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997) (upholding California’s Proposition 209 prohibiting public race and gender “preferences”); Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16 (discussing Michigan anti-affirmative action initiative).

Courts, however, have often have taken a hands-off approach to reviewing the constitutionality of initiatives.¹¹

II. IMMIGRANTS AS THE “ULTIMATE” MINORITIES: A STARK EXAMPLE OF THE GAP BETWEEN CONSTITUTIONAL AND CORPORATE LAW

As discussed in Part I, modern constitutional law generally reflects a certain stinginess toward the rights of minorities. This is especially true with respect to the rights of immigrants to the United States, who receive virtually no substantive constitutional protections.

Denied the right to vote, and frequently disfavored because of their race,¹² nationality, and otherness, immigrants to the United States often are punished in the political process.¹³ Immigrants in modern times are distinctly disadvantaged politically by their historic unpopularity and by being denied the right to vote. As John Hart Ely observed, immigrants unquestionably are “discrete and insular minorities”¹⁴ who warrant special judicial protection.¹⁵ Yet modern constitutional law offers them precious little substantive protection.

Indeed, the Supreme Court has all but eliminated judicial review of U.S. immigration laws. Out of whole cloth, the Court created the plenary power doctrine, which immunizes from judicial review the substantive immigration decisions—such as who to admit and deport—and was invoked to uphold racially discriminatory exclusions in one of the infamous Chinese exclusion acts of the late 1800s.¹⁶ No doubt encouraged by judicial abstinence, Congress followed these laws with the discriminatory national origins quotas system that limited southern and eastern European immigration to the United States.¹⁷

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11. See *Valeria v. Davis*, 307 F.3d 1036, 1039-42 (9th Cir. 2002) (upholding California Proposition 227 banning bilingual education despite racially disparate impacts); *Smith*, 233 F.3d at 1192 (addressing a Washington initiative that prohibits consideration of race in the university admissions process); *Coal. for Econ. Equity*, 122 F.3d at 697 (upholding California’s Proposition 209 prohibiting public race and gender “preferences”).
 12. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1505-1510 (2002).
 13. See generally Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139.
 14. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).
 15. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980); see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 981 (2002); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1383 (2007).
 16. *Chae Chin Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889).
 17. See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (4th ed. 2002) (summarizing political developments culminating in congressional passage of a quota system).

The Supreme Court has consistently refused to disturb discriminatory immigration laws. As Justice Frankfurter put it, “whether immigration laws have been crude and cruel, whether they have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.”¹⁸ In *United States ex rel. Knauff v. Shaughnessy*,¹⁹ the Supreme Court refused to intervene in a case in which the U.S. government relied on secret evidence to deny admission into the United States to the noncitizen spouse of a U.S. citizen: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” In *Shaughnessy v. United States ex rel. Mezei*,²⁰ the Court reiterated this holding in an even more extreme case—and rejected a constitutional challenge to the indefinite detention of a long-term lawful permanent resident denied re-entry into the United States based on secret evidence.

Despite the fact that scholars have consistently—and vociferously—criticized the plenary power doctrine,²¹ and despite the revolution in constitutional law over the last century, the hands-off approach to the review of the U.S. immigration laws remains the law of the land. In the 2003 decision of *Demore v. Kim*,²² for example, the Supreme Court upheld the mandatory detention of certain noncitizens pending their deportation and reiterated that the “this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”²³

Fortunately, Congress for the most part has eliminated the patently discriminatory exclusions that existed in previous incarnations of the immigration laws. In addition, the Supreme Court at various times has ensured procedural and limited substantive protections for immigrants.²⁴ Nevertheless, many provisions of the U.S. immigration laws include nationality, class, disability, gender, and other classifications that treat certain groups of

18. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

19. 338 U.S. 537, 544 (1950).

20. 345 U.S. 206, 212 (1953).

21. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996).

22. 538 U.S. 510, 522 (2003); see *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

23. Similarly, the Bush Administration invoked the plenary power doctrine in justifying special immigration rules and procedures for Arab and Muslim noncitizens after September 11, 2001. See *Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 52,584, 52,585 (Aug. 12, 2002).

24. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 695-96 (2001); *Landon v. Plasencia*, 459 U.S. 21 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982).

noncitizens at our border in ways that citizens of the United States could never be treated.²⁵ The plenary power doctrine immunizes such classifications and disparate impacts from judicial review. Consequently, noncitizens have little input and equal protection of the laws is little more than a constitutional mirage on the horizon for immigrants.

Immigration law reveals the breadth of the gap between corporate law and modern constitutional law with respect to a most vulnerable minority. By requiring us to look at the discontinuities between U.S. constitutional law and corporate law, Professor Chander forces us to confront our true dedication to fair play and substantial justice to a most politically disadvantaged minority group. History has repeatedly demonstrated—as seen in the nativist, sometimes anti-Mexican, sentiment in the immigration debate today—that immigrants often are the most unpopular of the unpopular, with limited political power (even less than minority shareholders) to protect themselves from the tyranny of the majority. Nonetheless, constitutional law offers them precious few substantive protections.

CONCLUSION

This commentary touches on the tip of the iceberg in highlighting what modern constitutional law could learn from corporate law. Ultimately, *Minorities, Shareholders and Otherwise* makes clear that corporate law proves that, if there is a minority that the law wants to protect, there is a way to protect that minority. In its constitutional law jurisprudence, the Supreme Court should recognize and act on that fundamental truth.

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25. See generally KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS (2004).