The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms

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Abstract

Since the 19th century, American courts have relied on the “plenary power doctrine” to hold that federal immigration law is immune from constitutional challenge. Despite no such rule in Canada, this paper argues that a similar doctrine has silently crept into Canadian constitutional law. With its roots in the Supreme Court of Canada’s 1992 decision in Chiarelli, Canadian courts have set out a doctrine of evasion and technicality that has rendered many of the Charter rights of immigrants and refugees to be effectively non-justiciable. Without explanation, laws that detain, uproot, exile, separate families, and return people to persecution have been exempted from normal standards of justice. This paper charts the emergence of the “Chiarelli doctrine”, critiques its incoherence, and explores why judges have so steadfastly refused to engage with the human rights claims of non-citizens. It concludes with a simple proposal to bring these doctrines of exception to an end.
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INTRODUCTION

In 1889, the Supreme Court of the United States (SCOTUS) set out the first judgment in what would become known as the “plenary power doctrine”. In the Chinese Exclusion Case, a decision tinged with alarm about “vast hordes” of Chinese immigrants who will not assimilate, the Court held that immigration law is outside the scope of constitutional review.¹ To this day, the Chinese Exclusion Case has not been overruled. It continues to stand for the proposition that federal immigration power in the United States is “an inherent and inalienable right of the sovereign”,² and the immigration context is a space where the substantive rights protected in the US constitution do not apply. The plenary power doctrine has been subject to decades of attack from lawyers and scholars on its overtly racist origins and elusive justification.³ It has been described as a “constitutional oddity”⁴ and “an extraordinary doctrine of judicial abdication that has few if any analogues in other fields of public law.”⁵ This paper begins from the observation that over a century after the Chinese Exclusion Case, the Supreme Court of Canada has quietly built a similar doctrine of its own.

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¹ Chae Chan Ping v. United States, 130 U.S. 581, 603, 604 (1889) (Chinese Exclusion Case)
² Mathews v. Diaz et al., 426 U.S. 67, 81 (1976)
The Canadian Charter of Rights and Freedoms (Charter) came into being in the late 20th century in an age of human rights. There is no dispute that immigration law is subject to the Charter.\(^6\) Yet, the Charter has come to be applied in the immigration context in a manner that would be unrecognizable to practitioners of any other area of law.\(^7\) Through a series of tenuous propositions that have become binding precedents, the rights of immigrants and refugees have been rendered weightless, and many of the harms they experience have been stripped of constitutional meaning. Without explanation, laws that detain, uproot, exile, separate families, and return individuals to persecution have been increasingly immunized from Charter review.

In this paper, I seek to ask how and why. I argue that the state of the law has its origins in the reasons and logic of the Supreme Court of Canada’s 1992 decision in Chiarelli v. Canada (Minister of Employment and Immigration).\(^8\) I will argue that the Chiarelli decision has been expanded and reproduced into four propositions that have effectively muted the Charter as a vehicle to constitutionally challenge the state’s immigration power. In this vein, the Charter’s

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\(^6\) Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177. The rights in the Charter, with the exception of Article 3 voting rights and Article 6 mobility rights, are owed to “everyone” (Sections 2, 7-12) and “every individual” (Section 15).


\(^8\) Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, at p. 733
immigration jurisprudence should not be viewed as a series of isolated “bad decisions”, but as the “Chiarelli doctrine”: a Canadian doctrine of constitutional non-justiciability. Notably, unlike the plenary power doctrine which is explicit that immigration is exceptional, the exceptionalism of the Chiarelli doctrine is unspoken. It is a doctrine of evasion and technicality, that never explains or seeks to justify why normal constitutional standards are not being applied in the claims of immigrants and refugees.

The next question is why: why has a 19th century doctrine of exception been able to both endure in the United States, and reinvent itself in Canada in the interpretation of a modern constitution? The answer begins with acknowledgment that a degree of “immigration exceptionalism”\(^9\) may be inherent to the liberal state. Liberalism holds a perpetual tension between its belief in universal equality, and its commitment to the organization of human life into closed political communities.\(^10\) In a vastly unequal post-colonial world, the application of universal equality to the question of “who gets in” would necessitate the end of closure. There are simply no criteria in liberalism to limit who gets to live in a safe place that protects their basic rights. Given the potentially existential impact of applying a universal equality lens to questions of admission, I argue that courts have constructed these legal doctrines to exempt the border from liberal

\(^9\) The term “immigration exceptionalism” captures the idea that the principles and values that underlie the liberal legal system do not fully apply to immigration law: Hiroshi Motomura, “Federalism, International Human Rights, and Immigration Exceptionalism” (2000) University of Colorado Law Review, Vol. 70, at pg. 1363. This concept is very different from what has been termed “Canadian exceptionalism” in reference to Canadians’ overall positive sentiments toward immigration (see, for example: Irene Bloemraad, “Understanding Canadian Exceptionalism in Immigration and Pluralism Policy” (Washington, DC: Migration Policy Institute, 2012)). In fact, the argument of this paper with respect to Canadian courts’ view of the human rights claims of immigrants and refugees paints a very different picture. See also on this point: Dauvergne (2013), supra at pgs. 665-675.

principles. They signal that the court has entered a sphere where it perceives that right and wrong cannot be determined by principles of liberty and equality, as to do so could spell the end of the closed political community. In the place of liberal norms, the plenary power and Chiarelli doctrines are an assertion of a separate morality for the border: right and wrong is to be determined solely by the interests of those already inside.

This account does not suggest that courts are justified in simply throwing up their hands and abandoning constitutional review over immigration. I conclude the paper by arguing prescriptively that instead of proceeding with the dangerous fiction that non-citizens’ human rights do not engage the Charter, there is ample space at the justification stage of a Charter analysis for judges to try in good faith to weigh the competing claims at issue. While this justificatory exercise may be particularly difficult in immigration law, it is far better for it to be attempted transparently in the light, rather than continuing to allow a highly coercive exercise of state power to be carried out unjustified in the dark.

In Part I of this paper, I will outline plenary power doctrine as a lens to understand similar developments in Canadian constitutional immigration law. In Part II, I will set out the four planks of the Chiarelli doctrine. In Part III, I examine the normative underpinnings of these doctrines of exception. In Part IV, I try to chart a course toward the end of the Chiarelli doctrine.

PART I: THE PLENARY POWER DOCTRINE

The plenary power doctrine is immigration exceptionalism at its purest. It states openly and transparently that the principles and values set out in the US constitution stop at the border. Professor Thomas Alexander Alenikoff describes the doctrine as follows:
The Court's immigration cases bristle with language that sounds anachronistic to the modern constitutional lawyer: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." "Congress regularly makes rules [under its immigration power] that would be unacceptable if applied to citizens." "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.' The more recent opinions do not attempt to provide a theoretical foundation for continued judicial deference. They simply report that prior cases have called for such deference.\(^{11}\)

In this section, I will outline the American plenary power doctrine, and the decades of critique it has spawned, as a comparator to help gain insight into an analogous development in Canadian constitutional law.\(^{12}\)

The Foundational Cases

The US experience with constitutional challenge to its immigration law began in the late 19\(^{th}\) century.\(^{13}\) The leading early cases concern the Chinese Exclusion Act which sought to drastically limit Chinese immigration to the United States.\(^{14}\) In the Chinese Exclusion Case, referenced above, Chae Chan Ping, a Chinese immigrant who had been working in California, left the United States after obtaining a certificate authorizing his re-entry. During his time


\(^{12}\) While I use the American context as an interesting comparator, in no way do I mean to suggest that the legal contexts at issue are not distinct, or that judicial review over immigration in Canada is not significantly more robust than it is in the United States. In Canada, immigration power is reviewed under administrative law principles of reasonableness and fairness that do offer a great deal of the procedural protection that is often sought from the constitution in the American context. The similarity that I hope to uncover is with respect to the application of substantive constitutional rights and the invalidation of legislation under the Charter and US Constitution.


\(^{14}\) Philip Cole writes that it was only in the late 19\(^{th}\) century that migration went from being the building block of civilizations to being seen as a social ill. This is likely because the persons migrating to the West before this time were white Europeans. The migration of Chinese workers during this period saw analogous anti-Chinese legislation in Canada (the 1882 Chinese Immigration Act) and Australia: Cole, supra, pg. 84. The American Chinese Exclusion Act was discriminatory on its face as it explicitly targeted Chinese labourers, prohibiting the entry of any new Chinese workers for a ten-year period and putting strict conditions on those already living in the country (Saito, supra).
abroad, the law changed and the applicant’s re-entry certificate was retroactively invalidated. The applicant brought a claim to the Supreme Court seeking due process in the denial of his readmission. The Supreme Court began its judgment by noting that immigration power is not one of the powers explicitly enumerated in the US Constitution. This insight – that immigration power is “extra-constitutional” – represents the seeds of plenary power doctrine. Immigration is a “plenary” – or “complete” – power that is inherent in sovereignty. As this power was founded outside the constitution, the Court reasoned that immigration power is thus not properly subject to constitutional restraint. Along with this appeal to absolute sovereign power, the Court in the *Chinese Exclusion Case* offered another justification for declining to review immigration matters: it held that immigration control is a matter of self-preservation. According to the majority judgment, preserving the state’s independence and protecting it from foreign aggression, was “the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.” The Court concluded that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.” In this manner, the foundational plenary power cases see immigration as an invasion, and congressional limits as a matter of national self-defence similar to war power. Four years later in *Fong Yue Ting*, the Supreme Court expanded this holding beyond admission to the country to

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15 *Chae Chan Ping*, supra note 1
16 *Ibid*. The *Chae Chan Ping* Court further held that it should not be fettered by judicial review as it is an "undoubted right" of "[e]very society... to determine who shall compose its members".
the deportation of Chinese immigrants already present.\(^{18}\) In *Fong Yue Ting*, the Court reviewed a provision of the *Chinese Exclusion Act* that detained immigrants who could not produce at least one “credible white witness” to testify to their lawful presence. The Court concluded again that this matter went directly to sovereignty and could not be qualified by the constitution: “The right to exclude or 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”.\(^{19}\)

Like many constitutional judgments from over a hundred years ago, the foundational plenary power doctrine cases are jarring to the modern reader. There are at least four reasons that one would have expected modern constitutional law to have abandoned these precedents. First, these decisions concern an overtly racist law and their reasoning is rooted in racist sentiments of the time. The opinions issued in *Chae Chan Ping* include reference to the “obnoxious Chinese…this distasteful class”.\(^{20}\) These decisions were issued just over twenty years after the end of slavery, and they slightly predate the infamous *Plessy v. Ferguson*, which set out the “separate but equal” doctrine condoning segregation.\(^{21}\) In *Plessy*, even in the lone much-heralded dissent of Justice Harland, it was observed that: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with

\(^{18}\) *Fong Yue Ting* v. U.S, 149 U.S. 698 (1893)

\(^{19}\) *Ibid*. In language familiar to Canadian readers of *Chiarelli* one hundred years later, the Court held “the right of a nation to expel foreigners” is “unqualified”.

\(^{20}\) *Chae Chan Ping*, *supra* note 1

\(^{21}\) *Plessy v. Ferguson*, 163 U.S. 537 (1896)
few exceptions, absolutely excluded from our country. I allude to the Chinese race."  

The reasoning behind this doctrine thus comes from a desire for racial purity and fear of cultural difference that is abhorrent to the modern liberal state. Secondly, these judgments are from a legal context that no longer exists. They rely on the principle at classical international law that sovereignty is absolute and unqualified. The doctrine pre-dates the post-World War II international legal system that recognizes external limits on sovereignty by various international economic, environmental, and human rights law regimes.  

Third, the Court’s view of immigration as a matter of national defense where foreign states would overwhelm the United States with outsiders is highly inapplicable to the present day. The contemporary individualized reality of immigration rarely if ever entails coordination between the migrant and sending state.  

Fourth, and finally, the logic of the decision simply does not track. It does not follow that because a power is not enumerated in the constitution it can therefore be exercised unbound by law. Similarly, while sovereignty may be a basis for the right to control the border, it does not follow that this power is beyond judicial review.  

22 Ibid., cited in Saito, supra, at pg. 14  
23 Alenikoff, supra, at 17  
25 Louis Henkin, “The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny,” 100 Harv. L. Rev. 853 (1987): “Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional.”  
26 Alenikoff, supra at pg. 17 writes “The Court just assumed that because the power to control immigration was "inherent," that it was also unlimited.”
And yet – in what remains a mystery to American legal scholars – the plenary power doctrine endures. In 2018, a case whose official title is “the Chinese Exclusion Case” is still good law.

*The Modern Doctrine*

In the 20th century, the justification for plenary power over immigration shifted from inherent and absolute power of the sovereign, to an understanding of immigration as a kind of non-justiciable foreign affairs power. Immigration matters that came before the court were considered closely tied to diplomacy and national security and found to be outside the scope of the court’s competence. Conceived in this light, the constitutional non-justiciability of immigration matters was reinforced in the Cold War era. In 1950, in *Knauff v. Shaughnessy*, SCOTUS upheld the exclusion of a German-born woman who had married a U.S citizen while working for the US military in Germany. Affirming the decision to exclude the applicant from ever joining her husband based solely on her national origin, the Court held that “an alien seeking admission to this country may not do so under any claim of right… such privilege is granted to an alien only upon such terms as the United States shall prescribe”. It was here that SCOTUS infamously held that any procedure set out by Congress “is due process” as far as

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28 United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation"); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."). In this way, plenary power doctrine is similar to the American “political questions” doctrine under which certain questions are seen as unsuitable for adjudication by courts: Baker v. Carr, 369 U.S. 186 (1962)

non-citizen’s admission is concerned.\textsuperscript{30} Two years later, in \textit{Harisiades v. Shaughnessy}, the plenary power doctrine was again invoked to uphold the deportation of three long-term resident non-citizens on the basis of their membership in the Communist Party. Here the majority decision tied the doctrine directly to foreign affairs and national security, and held that any “policy towards aliens” is “exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”\textsuperscript{31} In a concurring opinion, Justice Felix Frankfurter expressed the spirit of the doctrine in very clear terms: immigration matters are “for Congress exclusively to determine even though such determination may be deemed to offend American traditions.”\textsuperscript{32} Justice Frankfurter’s decision seems aware of the incongruity that a non-citizen would never be jailed for their political beliefs, but that they could still be rounded up and deported on this basis. His reasons are interesting as a distillation of the worldview of plenary power doctrine where immigration exists outside the realm of rights-discourse:

Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary… In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.\textsuperscript{33}

In the 1960s and 1970s the doctrine continued to be invoked to decline constitutional review of indefinite detention of a non-citizen who could not be deported\textsuperscript{34}; a law barring the admission of

\textsuperscript{30} \textit{Ibid.}
\textsuperscript{31} \textit{Harisiades v. Shaughnessy}, 342 U.S. 580, 597 (1952)
\textsuperscript{32} \textit{Ibid.}, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).
\textsuperscript{33} \textit{Ibid.}
\textsuperscript{34} \textit{Shaughnessy v. Mezei}, 345 U.S. 206 (1953)
homosexuals\textsuperscript{35}, and the deportations and denial of admission to the United States of non-citizens accused of Marxist sympathies.\textsuperscript{36} The latter part of the 20\textsuperscript{th} century and early 2000s saw cracks in the doctrine, as SCOTUS, without addressing its previous plenary power jurisprudence, allowed for due process rights in another long-term detention case, and in a challenge to the deportation of a long-term resident non-citizen.\textsuperscript{37} After a decade of relative silence in the 1990s\textsuperscript{38}, the doctrine returned with a vengeance in the years following September 11, 2001. In \textit{Domore v. Kim}, SCOTUS affirmed the indefinite detention of non-citizen terror suspects with a pure statement of immigration exceptionalism: “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”\textsuperscript{39}. As recently as 2015, the Court in \textit{Kerry v. Din} invoked plenary power to deny any procedural rights to a US citizen denied the ability to sponsor her husband based on an assertion without evidence that her Afghani husband was a security threat.\textsuperscript{40}

\textsuperscript{35} \textit{Boutilier v. Immigration and Naturalization Service}, 387 U.S. 118 (1967)

\textsuperscript{36} Kleindienst v. Mandel, 408 U.S. 753 (1972)

\textsuperscript{37} \textit{Zadvydas v. Davis}, 533 U.S. 678 (2001) and \textit{Landon v. Plasencia}, 459 U.S. 21 (1982); see discussion in Hiroshi Motomura, “Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation,” 100 Yale L.J. 545, 554 (1990); see also, Kagan, \textit{supra} at 121. Scholars have noted that the key distinction as to whether plenary applies is when the right claim is procedural rather than substantive and whether it is a law passed by Congress or the President rather than power delegated to the INS. Catherine Kim, “Plenary Power in the Modern Administrative State” (2017) 96 North Carolina Law Review 77

\textsuperscript{38} One relevant Supreme Court judgment in this period is \textit{Sale v. Haitian Centers Council}, 509 U.S. 155 (1993) where plenary power deflected the assertion of due process for Haitian asylum-seekers interdicted at sea.


\textsuperscript{40} \textit{Kerry v. Din}, 135 S. Ct. 2128 (2015) (plurality opinion). In the controlling opinion by Justice Anthony Kennedy, the plenary power was invoked to say that no liberty interest was engaged. Notably, Kennedy J. voiced concern that if plenary was lifted the Court could be asked to rule on every inadmissibility finding and balance every would-be immigrant’s interests with that of the United States (See discussion in Kagan, \textit{supra}). In the Supreme Court’s more recent decision in \textit{Trump v. Hawaii}, No. 17-965, 585 U.S. ___ (2018), the majority opinion applied a variation on plenary power without naming the doctrine and arrived at a similar result. See Adam Cox et al, “The Radical Supreme Court Travel Ban Opinion – But Why It May Not Apply to Other Immigrants’ Rights Cases”, Just Security, June 27, 2018.
From a 21st century perspective, the U.S plenary power doctrine jurisprudence is striking in how up front it is about the rightlessness of non-citizens seeking admission.41 The Court comfortably asserts that non-citizens can be treated in a way that would be unacceptable if they were American, and that this exercise of power is immune from review. The rationale for this exceptionalism has shifted from the absolute power of sovereignty in the 19th century, to foreign affairs and institutional capacity in the 20th and 21st century. As noted above, these justifications hardly stand up to scrutiny. For decades, American scholars have persuasively argued that American courts could workably apply “strict scrutiny” review to decisions with serious immigration consequences and that this would cause very little disruption to the immigration regime.42 Nevertheless, American courts have preferred to dutifully recite the holdings of the 19th century plenary cases and affirm the constitutional exceptionalism of the immigration sphere. Constitutional challenge to federal immigration legislation is non-justiciable. The border is not a place for rights and courts.

PART II: THE CHIARELLI DOCTRINE

Canada’s constitutional bill of rights is of course the product of a very different time, and a very different social and legal context than the constitution of its older neighbor to the South. Brought into law in 1982, the Charter is to offer a “broad and purposive” interpretation of the

41 Professor Peter Shuck writes that there is likely “no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system”: Peter H. Schuck, “The Transformation of Immigration Law,” 84 Colum. L. Rev. 1, 14 (1984)

rights it protects with a guiding principle of equal respect for human dignity. The scope of the rights in the Charter are to be interpreted at least as broadly as Canada’s commitments in international human rights law. The Charter is a universalist document and with only two exceptions the basis for rights-protection is “personhood” rather than “citizenship”. The first of these exceptions is the right to vote set out in section 3 of the Charter. The second Charter right that distinguishes on the basis of citizenship is section 6(1), which provides that: “Every citizen of Canada has the right to enter, remain in and leave Canada”. In contrast, the rights to life, liberty and security of the person in section 7 and protection against cruel and unusual treatment in section 12 apply to “everyone” in Canada. The right to equality in section 15(1) applies to “every individual” in Canada.

In Singh, the first Supreme Court refugee case of the new Charter, the majority opinion affirmed that the word “everyone” in section 7 included territorially present non-citizens. Up to the present day, there is no authority to the effect that the Charter should not apply with equal force to the immigration context. Notably, in its judgments in Charkaoui I and Charkaoui II, the Supreme Court explicitly renounced immigration exceptionalism, holding that standards for the application of section 7 should not

44 Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038
45 Section 7 provides that: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 12 provides that: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”
46 Section 15(1) of the Charter provides that: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”
47 Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177
differ based on area of law. The Court in Charkaoui I rejected formalistic labels as a basis for Charter exceptionalism and held that the constitutional analysis must focus instead on the impact on the individual. In this section, I will outline the manner in which the Court’s practice has radically diverged from the outwardly universalist statement of principles in Singh and in Charkaoui.

From Singh to Chiarelli

It is useful to start with the Supreme Court’s reasoning in Singh to understand how far the Charter’s interpretation has travelled. The 1985 Singh decision is considered a high-water mark for refugee rights in Canada. Its primary legacy is that every refugee claimant is entitled to an oral hearing of their claim. The judgment also stands for the proposition that the section 7 Charter right to security of the person is engaged by the threat of persecution, and thus the refugee process must comply with the principles of fundamental justice. For our purposes, Justice Bertha Wilson’s decision in Singh is also notable as it addresses the right/privilege reasoning prevalent in the American immigration jurisprudence, and the plenary power doctrine itself. With respect to the right/privilege distinction, the Court held that this classification

49 Ibid.
50 Dauvergne (2013), supra at pg. 674
51 Singh at para. 47. Notably, Justice Wilson begins the decision with a distinction that would be strangely elusive to future Courts considering the rights of non-citizens. The analysis begins by noting that “the appellants make no attempt to assert a constitutional right to enter and remain in Canada…” (para. 13) Rather, as the Act and its incorporation of Canada’s obligations under the Refugee Convention set out circumstances when refugee claimants do have a right to remain in Canada, the question is simply whether the relevant procedures accord with the Charter. With this simple exercise, Singh presents the rare decision on the rights of non-citizens that sidelined broad appeals to territorial sovereignty, the very problem that led the analysis into incoherence in its subsequent decision in Chiarelli.
misdirected the analysis. The relevant focus is on the consequences to the individual of the decision at issue, and whether these consequences are the kind that engage the Charter.\textsuperscript{52} With respect to plenary power, Justice Wilson respectfully distinguished the Canadian context, noting that the American “political questions” doctrine did not apply in the Canadian context, and in any event, the question to be determined was simply whether the procedures chosen by Parliament complied with the Charter.\textsuperscript{53} No such institutional deference needed to be applied given the clear power to determine issues impacting on individual rights granted to Canadian courts by the Charter.\textsuperscript{54}

While Singh confirmed that section 7 of the Charter would be engaged in the case of a refugee, the question of engagement in the deportation of an immigrant claiming harms other than persecution had divided the Federal Court of Appeal. In Hurd, the Court of Appeal likened deportation from the country to “losing a license”, and found no engagement of section 7.\textsuperscript{55} Meanwhile, the Federal Court of Appeal judgment in Chiarelli found that “if things are looked at realistically…deportation necessarily implies an interference with the liberty of the person.”\textsuperscript{56} The latter decision was appealed to the Supreme Court of Canada, along with arguments on sections 12 and 15 of the Charter. This was the first time that section 7 was

\textsuperscript{52} Ibid at para. 52:
\textsuperscript{53} Ibid., at paras. 53-55. Note that Justice Wilson’s understanding that non-citizens inside the country do have due process rights is questionable given the conflicting US jurisprudence on this point: see Kim (2017), supra, at pg. 17. The example cited para. 55 of Singh concerns a case about delegated power and not the federal immigration power to which the doctrine has consistently held to be immune from even procedural review.
\textsuperscript{54} Ibid at 55. See also to this effect the opinion of Wilson J. on justiciability under the Charter in The Queen v. Operation Dismantle Inc., [1983] 1 F.C. 745.
\textsuperscript{55} Hurd v. Canada (Minister of Employment and Immigration), [1989] 2 F.C. 594
\textsuperscript{56} Chiarelli v. Canada (Minister of Employment and Immigration), [1990] 2 F.C. 299
applied to immigration law in the case of a non-refugee; the first immigration claim for substantive fundamental justice under section 7, and the first time that sections 12 and 15 were to be considered in the immigration context by the Supreme Court.

The facts of the case are fairly straightforward. Joseph Chiarelli was born in Italy but had lived as a permanent resident in Canada since childhood. As a result of a series of drug convictions and a ministerial opinion that he was a danger to the public, he faced deportation through a process where the Immigration Appeal Board was barred by statute from considering any humanitarian and compassionate considerations surrounding his case. These considerations would include both the harm of uprooting Mr. Chiarelli from his life and community in Canada, and the harm of return to a country he barely knew. Mr. Chiarelli challenged the law which mandated deportation with no individualized assessment of his circumstances as contrary to sections 7, 12 and 15 of the Charter. He also challenged the in camera process in which he was determined to be a danger to the public as contrary to section 7.57

The unanimous judgment of Justice John Sopinka dismissed all of Mr. Chiarelli’s Charter claims. In disposing of the section 7 challenge, the Court found it unnecessary to determine if the law constituted a deprivation of Mr. Chiarelli’s liberty because, in any event, it was found not to be contrary to the principles of fundamental justice. The structure of the Court’s analysis mirrors the plenary power cases rendered over a hundred years earlier, as well as their equivalents at common law in the United Kingdom.58 These decisions begin with an invocation of the broad

57 A majority of the Federal Court of Appeal had found this procedural aspect of the legislative scheme to be in violation of section 7 of the Charter.

58 For example, Attorney General for the Dominion of Canada v. Cain [1906] AC 542: “One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it and to expel or deport from the State, at pleasure, even a friendly
sovereign right of the state to exclude non-citizens. However, while plenary power doctrine’s invocation of sovereignty appeals to the “absolute and unqualified” power of the state to exclude, *Chiarelli* set out a more tempered variation: “the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.” Next, reminiscent of the heavy lifting that the absence of enumerated immigration power in the US constitution did in the *Chinese Exclusion Case*, the *Chiarelli* Court found a constitutionally relevant affirmation of its sovereign power to exclude in a feature of the *Charter*: the distinction between citizens and non-citizens in section 6(1) with respect to the right to remain. Finally, the Court concluded that because the conviction breached a condition of Mr. Chiarelli’s residence in Canada set out in the Immigration Act, that “it is not necessary, in order to comply with fundamental justice…to look to other aggravating or mitigating circumstances”. Deportation was a “legitimate, non-arbitrary” response to Mr. Chiarelli’s breach of a condition under which he was being permitted to remain in Canada. Relying on these same principles, the Court dismissed the s.12 challenge as it found it would be more outrageous to Canadian “standards of decency” to let a non-citizen who had breached a condition of his residence to stay in Canada and avoid deportation consequences. Finally, it dismissed the s.15 challenge because, as noted above, section 6 of the *Charter* distinguishes between citizen and non-citizen, and thus a deportation scheme applying to non-citizens could not be discriminatory for the purposes of the *Charter*.

alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s.231; book 2, s.125”
There is much to criticise in the reasoning of Chiarelli, and some of these critiques mirror a critique of the foundational plenary power cases from a century earlier. One distinct issue however is that the tempered invocation of sovereignty expressed in Chiarelli offers no substantive content at all. Mr. Chiarelli did not claim an “unqualified right to remain in Canada” and surely did not dispute that “Parliament has the right…to enact legislation prescribing the conditions under which non-citizens will be allowed to remain”. The question was whether the conditions at issue were arbitrary, disproportionate, discriminatory or procedurally unfair.59

Similarly, the second principle doing the work in Chiarelli – that section 6 of the Charter permits distinctions based on citizenship with respect to the right to remain – is similarly devoid of substance in addressing the question at issue. Indeed, Mr. Chiarelli did not have section 6 rights. This did not mean that he also could not have rights under sections 7, 12 and 15.60

Nevertheless, and as discussed below, Justice Sopinka’s “most fundamental principle of immigration law” has come to be dutifully recited at the outset of the analysis of any Charter claim in the immigration context. Its meaning in Chiarelli, and what it stands for to the judges who continue to rely on it, is likely much closer to its framing in American plenary power doctrine cases, like Knauff v. Shaughnessy: “An alien who seeks admission may not do so under any claim of right. Admission of aliens is a privilege….granted only on such terms as the [state] shall provide.”61 This is laid bare in Chiarelli where despite the fact that it is Mr. Chiarelli

59 Compare the way Justice Wilson in Singh rejected a similar misdirection of the analysis by clarifying that no one before the Court was seeking a “constitutional right to refugee protection”: Singh, supra at para. 13.
60 Stewart, supra, at pg. 80.
61 United States ex rel Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). See also the common law principle cited in Chiarelli from Lord Denning in R v. Pentonville Prison, [1973] 2 All E.R. 741: “At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason….If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatsoever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the
alleging that his rights have been breached, the Charter analysis is conducted entirely from the perspective of the state rather than the rights-claimant. The decision does not say a word about how Mr. Chiarelli is impacted by deportation from a place he has lived nearly his whole life. It considers the state’s “right” to set conditions on non-citizens, and appears to foreclose the notion that the impact of those conditions on the individual could ever raise Charter concerns.

However, no right, even the state’s right to exclude is absolute. Presumably, this right could be overridden in some case if the impact on the individual is sufficiently severe. This is essentially what the holding in Singh entails for a refugee. Yet the decision does not acknowledge that there is a rights-holder impacted here, other than the government. This is most explicit in the section 12 analysis where there is no balancing of rights whatsoever, and a conclusion that it would actually be a deep unfairness to the state if Mr. Chiarelli could not be removed on the facts of this case. It is hard to know that it was Mr. Chiarelli and not the government of Canada who were seeking the protection of the Charter.

Ultimately the Chiarelli judgment embodies the rights/privilege distinction that the Court hoped to avoid in Singh. For the Chiarelli court, immigration is a privilege subject to conditions. If the executive may arrest him and put him on board a ship or aircraft bound for his own country. The position of aliens at common law has since been covered by various regulations; but the principles remain the same.” (emphasis added)

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62 Audrey Macklin, Presentation at the Asper Centre Constitutional Roundtable, 20 October, 2017; Cohen, supra. See also, the argument in Revell v. Canada (Citizenship and Immigration), 2017 FC 905 at para. 40.

63 Cohen, supra at pgs. 470ff writes that the Court in relying on sovereignty as the ultimate source of authority foreclosed any countervailing argument drawing upon the significance of long-term community life. Dauvergne (2013) supra notes at pg. 682 that the section 15 argument on which a decision was made was not strongly pursued in counsel’s submissions. If properly presented, several commentators argue that there is a strong argument to be made that deportation law in these circumstances problematically rests on a formal status rather than the long-term resident’s actual relationship to society. (Cohen supra; Joseph Carens, “Immigration Democracy and Citizenship” and Donald Galloway, “Noncitizens and Discrimination”, both in Oliver Schmidtke and Saime Ozcurumez ed. Of States, Rights, and Social Closure (New York: Palgrave Macmillan, 2008))
guest here at the state’s pleasure breaches those conditions, they have no standing to make claims of right. While a non-citizen may have the rights to liberty, equality, and protection against cruelty, these dissolve at the moment of their interaction with the state’s right to exclude. Nevertheless, the Chiarelli judgment itself did not have to foreclose the application of the Charter in the immigration context to the extent that I will argue its holding has ultimately been stretched. In the years that followed, the logic and reasoning of Chiarelli was misinterpreted, expanded, and repurposed into four propositions impacting on the interpretation of the most salient Charter rights a non-citizen can claim. These four propositions are: i) The deportation process in itself does not engage section 7 of the Charter; ii) The deportation process for a refugee might not engage section 7 until the moment of removal, and sometimes not even then\(^64\); iii) Deportation cannot be cruel and unusual treatment for the purpose of section 12; iv) Distinctions based on status in the immigration context are not discriminatory for the purpose of section 15. These propositions have acted to repel any effort to apply constitutional standards to the operation of the government’s immigration power. Together, these four planks make up the Chiarelli doctrine – a Canadian doctrine of unspoken constitutional non-justiciability.

I. Deportation in Itself Does Not Engage Section 7 of the Charter

In the aftermath of Chiarelli, it was treated as settled-law that Charter claims in the deportation of long-term residents with no individualized assessment of their circumstances did not breach principles of fundamental justice (PFJ). In Canepa, with no regard to the specific impacts of deportation on that applicant, the denial of an appeal to consider humanitarian considerations

\(^{64}\) I am grateful to Jared Will for the phrasing of this proposition, and for his insights on the relevant case law.
was held so obviously settled by Chiarelli that the Court did not require the government to make argument on this point.\(^{65}\) Whether deportation could even engage section 7 and reach the PFJs – a point left open in Chiarelli – remained in dispute with conflicting jurisprudence in lower courts. Some decisions saw section 7 engaged by the ability to make a fundamental choice about one’s life\(^{66}\) or through the coercion inherent in being forcibly removed from Canada\(^{67}\), while others viewed that liberty simply could not encompass the ability to choose what country to live in.\(^{68}\) The question of engagement remained a live controversy until 2005 when Medovarski came before the Supreme Court of Canada.\(^{69}\) Medovarski concerned a challenge brought by two permanent residents who had been ordered deported for criminality. The applicants had an appeal eliminated by the passage of new immigration legislation and argued that on the correct interpretation of the transitional provisions this right to an individualized assessment should have been preserved. The Court decided the case on statutory interpretation and found there was indeed no right to an appeal, and in any event, following Chiarelli, the presence of a humanitarian exception under s. 25 of the Act was sufficient to comply with fundamental

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\(^{65}\) Canepa v. Canada (Minister of Employment and Immigration) (C.A.), [1992] 3 FC 270, 1992 CanLII 8567 (FCA)

\(^{66}\) Romans v Canada (Minister of Citizenship and Immigration), 2001 FCT 466 at para 22; see also Powell v. Canada (Minister of Citizenship and Immigration) 2005 FCA 42 (engagement assumed without deciding.)

\(^{67}\) Nguyen v Canada (Minister of Employment and Immigration), [1993] 1 FCR 696, 100 DLR (4th) 151 at para. 7: “forcibly deporting an individual against his will has the necessary effect of interfering with his liberty, in any meaning that the word can bear, in the same manner as extradition was found to interfere in Kindler”.

\(^{68}\) Williams v. Canada (Minister of Citizenship and Immigration), [1997] 2 FC 646, 1997 CanLII 4972 (FCA): “The refusal of a discretionary exemption from a lawful deportation order, as applied to a non-refugee who has no legal right to be in the country, does not involve a deprivation of liberty. "Liberty" does not include the right of personal choice for permanent residents to stay in this country where they have violated an essential condition under which they were permitted to remain in Canada.” See also discussion in Heckman, supra at 320.

\(^{69}\) Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539, 2005 SCC 51
justice. Most significantly, however, without analysis, or any acknowledgment of the debate on this issue in the Courts below, the Supreme Court effectively removed section 7 from the vast majority of the impacts of deportation:

The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada... Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms.

In this extraordinary holding, the court conflated the two steps of section 7 and cited Chiarelli’s holding that deportation in that case did not violate a PFJ for the conclusion that deportation in itself can never even engage section 7 of the Charter. Despite this clear analytical error, Medovarski was a final answer to the debate in the Federal Court of Appeal. It is now trite that the harms of deportation of a non-refugee cannot even get in the door of section 7 protection. In Chu, where the applicant was misadvised of her residency requirements and faced separation from her Canadian-born daughter, it was held that:

The Applicant has not shown that she has suffered a loss of life, liberty or security of her person. She has no “unqualified right to enter or remain in the country”: see Chiarelli. Her presence in Canada may be desirable for personal reasons, but it is not grounded upon a right.

70 Ibid., at para. 47
71 Ibid., at para. 46
72 Stewart supra at pg. 80; Heckman, supra at pg. 330
73 Note the way that Chiarelli has fully mutated into the Medovarski holding in a recent statement of the law by the Federal Court: “Moreover, the Supreme Court of Canada has held that even deportation, in itself, does not implicate the liberty and security interests protected by section 7 of the Charter, because non-citizens do not have an unqualified right to enter or remain in Canada: Brown v. Canada (Citizenship and Immigration), 2018 FC 452
74 Chu v. Canada (Citizenship and Immigration) 2006 FC 893 at para. 73, reasons for decision affirmed by the Federal Court of Appeal on appeal: 2007 FCA 205.
In a series of cases where a misrepresentation in entering Canada led to the loss of the right to sponsor dependent children, the Federal Court of Appeal has expanded this principle to find that potentially permanent separation of parents from their children does not implicate liberty or security of the person. Most recently, Chiarelli and Medovarski were relied upon to find that the revocation of Canadian citizenship is not a matter that engages section 7.

Of any exercise of state power, deportation is one of the most profoundly coercive. For those even threatened with deportation, the ability to enjoy any human right is put in doubt by the precariousness of their presence. When deportation is carried out, it is a process where an individual is forcibly taken from their home, detained, separated from loved ones, and then sent away, potentially to a country they may not know, and in which they may not have adequate medical care or ability to meet the basic conditions of life. It seems inescapable that the rights to “liberty” and “security of the person” would at least be engaged given these impacts and the standard of engagement in any other context. Applying normal constitutional standards, the right to liberty would be potentially engaged in two ways. First, liberty under section 7 has been held to

75 Azizi v. Canada (Minister of Citizenship and Immigration), 2005 FCA 406 at paras. 33-34; de Guzman v. Canada (Minister of Citizenship and Immigration), 2005 FCA 436 at paras. 45ff; see also: Begum v. Canada (Citizenship and Immigration), 2017 FC 409


77 Matthew Gibney has referred to deportation as the state’s “cruel power” as it involves the use of force on often-vulnerable people who are guilty of nothing more than seeking a better life: Matthew Gibney, “Asylum and the Expansion of Deportation in the United Kingdom” (2008) 43 Government and Opposition 2. See also: Matthew Gibney and Randall Hansen, “Deportation and the Liberal State” UNHCR Working Paper, 2003.

78 As the Supreme Court of Canada recently observed in R v. Wong, 2018 SCC 25 at para. 72: “People who are to be deported may experience any number of serious life-changing consequences. They may be forced to leave a country they have called home for decades. They may return to a country where they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation.”

79 Stewart, supra at pgs. 77, 80
include the autonomy to make fundamental life choices. This has included the right to refuse medical treatment; the right to make parental decisions about a child’s health and education; and arguably has already been held to include the ability to choose a place to live. Beyond the psychological aspect of liberty, it is likely that the use of physical force through detention and compelled removal in a deportation would in itself at least engage the right. It also seems hard to argue that the section 7 right to security of the person is not at least implicated by serious immigration consequences. The Supreme Court has held that the this right is “engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering.” Security of the person has been found to be engaged by state-imposed psychological stress arising from extraordinary delay in an administrative proceeding, restrictions on access to medical treatment, and the potential for state-removal of a child from parental custody.

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81 A.C. Ibid. at paras. 102ff
82 B. (R.) v. Children’s Aid Society of Metropolitan Toronto [1995] 1 SCR 315 at para. 80
83 Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at para. 66: “In my view, choosing where to establish one’s home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy”. The interesting question that might follow in citing Godbout in immigration law is whether crossing an international border makes this choice no longer “quintessentially private”.
84 Nguyen, supra; see also: Stewart, supra at pg. 80; Heckman, supra at pg. 331
86 Blencoe, supra at para. 48
87 R. v. Morgentaler, [1988] 1 S.C.R. 30 at 56; Carter, supra
88 New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46
While it seems quite likely that serious immigration consequences rise to the level of impacts engaging section 7, these arguments have been foreclosed by Medovar’ski’s misapplication of Chiarelli. In effect, the Medovar’ski holding expands Chiarelli to effectively swallow immigrants’ section 7 rights under the force of the state right to exclude. This judgment is particularly unfortunate because there is a far more coherent manner in which to balance the impact on the individual with the interests of the state. By moving consideration of the immigration objective to the PFJ stage of the analysis, the court could easily conclude in a given case that the impugned law engages section 7 rights but is not contrary to fundamental justice. 89 If the court sees the ability to legislate against non-citizen’s criminality as overriding the impact of deportation on their rights, it has the space to transparently arrive at this finding at the justification stage of the analysis. 90 Courts would be free to analyze and determine what fundamental justice requires in the immigration context. Similarly, if the fear is an abundance of processes that make it impossible to remove non-citizens who pose a threat to public safety without undue delay, this kind of public policy consideration can be addressed as a reason for a reasonable limit on rights under section 1 of the Charter.91 However, this kind of transparent balancing exercise has been precluded by the blanket pronouncement that non-refugee immigration impacts do not engage section 7. In result, the Supreme Court has affirmed that a vast sphere of highly coercive state power does not have to comply with fundamental justice.

89 Stewart, supra, at 74, 80-81; Heckman, supra at 324
90 This could be either in finding that the principles of fundamental justice are not offended by mandatory deportation in these circumstances, or that they are but that this is justified by pressing and substantial public safety objectives under section 1.
91 Section 1 sets out that “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
II. The Deportation Process for a Refugee Might Not Engage Section 7 Until the Moment of Removal, and Sometimes Not Even Then

Despite the developments described above, the Supreme Court’s decision in Singh on the engagement of the Charter in refugee determination has never been overruled. Refugees have been considered to have moral standing to qualify the right to exclude when persecution, torture, or death is at stake. However, for those who may face persecution in their home country, but who have been diverted out of the normal refugee system because of an inadmissibility for membership in a group that raises national security concerns, or for a criminal conviction in their past, a doctrine of prematurity stemming from the logic of Chiarelli has now also managed to put their section 7 rights out of reach. The Federal Court of Appeal’s decisions in Berrahma and Nguyen – the first right before Chiarelli and the latter right after it – bring the logic of Chiarelli to the refugee determination process.92 In Nguyen – a case about a refugee found ineligible to have his claim heard because of serious criminality - this is made explicit. The Court begins its analysis by echoing Chiarelli and setting out that “a foreigner has no absolute right to be recognized as a Convention Refugee”.93 As in Chiarelli, it is unlikely that anyone before the court ever claimed such a right. Also, as in Chiarelli, it is likely that this undisputable statement actually stood for something else: refugee status is a privilege subject to conditions. The Court thus distinguished Singh by agreeing that deportation would engage section 7, but that what was at issue here was not deportation, but access to a legal status. As the ineligibility finding concerned a status that

93 Ibid.
Parliament is free to set conditions on, and as it did not lead directly to deportation, section 7 was not engaged. This manoeuvre has been repeatedly affirmed by the Federal Court of Appeal, contenting itself with the existence of a potential risk assessment later in the process to find that any Charter argument is premature at the stage of eligibility.\(^\text{94}\) As the Federal Court of Appeal confirmed the law in holding that an ineligibility finding did not engage section 7 in the often-cited decision in *Jekula*:

> It may well be a breach of the rights protected by section 7 for the government to return a non-citizen to a country where she fears that she is likely to be subjected to physical violence or imprisoned. However, a determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada.\(^\text{95}\)

The difficulty with this approach is that a finding of ineligibility or inadmissibility *significantly* increases the likelihood that a refugee diverted out of the regular system will be deported to the risk they face.\(^\text{96}\) A refugee claimant found inadmissible is subject to a completely different process in which their life and safety will hinge. A person in this situation can now be deported even if they face a risk of persecution in their home country.\(^\text{97}\) They can avert removal only if they show on a balance of probabilities that they are at risk of torture.\(^\text{98}\) They lose their right to an oral hearing of

\(^{94}\) *Sandhu v. Canada (Minister of Citizenship and Immigration)* (2000), 258 N.R. 100; *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 (CanLII), [2005] 3 F.C.R. 487; *Canada (Public Safety and Emergency Preparedness) v. J.P.*, 2013 FCA 262

\(^{95}\) *Jekula v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 266, 1998 CanLII 9099 (FC) adopted in full by the Federal Court of Appeal in *Jekula v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16485 (FCA)

\(^{96}\) Ineligibility can take the form of an inadmissibility for security or criminality (sections 33-42 of the Immigration and Refugee Protection Act (IRPA)) or an exclusion from refugee protection on the basis of Refugee Convention exclusion grounds (Section 98 of the IRPA).

\(^{97}\) Sections 112-114 of the IRPA

\(^{98}\) *Ibid.*
their claim and even if they are successful in showing a risk of torture, they remain in Canada in indefinite limbo with no access to permanent residence and its family reunification procedures. Yet, because the inadmissibility finding does not lead directly to deportation – it only makes it significantly more likely – the right to life, liberty and security of the person has been found not to be engaged. A decision that determines whether the state is allowed to deport an individual in the face of a known risk of persecution does not have to comply with fundamental justice.

It is difficult to overstate how inconsistent these authorities are with the law of section 7 in every other context. In the criminal and extradition contexts, it is well-established that any part of a criminal or regulatory process that may eventually lead to a deprivation of s.7 rights must comply with the Charter. In Bedford, the Supreme Court confirmed that any state action which even heightens the risk of a deprivation would at least engage the Charter and thus must comply with fundamental justice. Yet, it remains established law in the immigration context that there is no place for section 7 of the Charter until long after a decision that largely seals a refugee’s fate has already been made. It is possible that a reader encountering this area of law for the first time might suspect that the reason for sheltering inadmissibility decisions from section 7 scrutiny is deference to Parliament on national security and public safety matters. In the American plenary power cases, this was one of the key rationales put forward for constitutional non-justiciability when the government has argued that national security is at issue. The Canadian government could make

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100 Canada (Attorney General) v. Bedford, 2013 SCC 72 at paras. 71-72

101 Kerry v. Din, supra; Harissiades v. Shaughnessy, supra: “Whatever 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.”
the same national security argument at the stage of justification in either section 7 or section 1 of the Charter. However, they have never had to. No court has ever addressed or provided any reasons for why the application of the Charter with respect to a refugee’s inadmissibility does not have to accord with principles that are well-established in every other legal context.

In B010, this matter came directly before the Supreme Court of Canada.\textsuperscript{102} This case concerned the inadmissibility of Sri Lankan Tamil refugee claimants denied access to a refugee claim on the allegation that they had been complicit in people smuggling by working on the boat that brought they and their fellow asylum-seekers to Canada.\textsuperscript{103} They argued both that “people smuggling” could not be interpreted to catch refugee claimants not seeking profit but assisting in their flight to safety, and that any such interpretation led the inadmissibility into overbreadth in violation of section 7. At the Federal Court of Appeal, the arguments on section 7 were dismissed with a familiar recitation of the principle from Chiarelli and a finding that inadmissibility is not “equivalent” to removal and thus section 7 was not engaged.\textsuperscript{104} In the interval between the Federal Court of Appeal and Supreme Court judgment in B010, the SCC released its decision in Bedford. Bedford clarified the low threshold for section 7 engagement: state action must comply with fundamental justice when it heightens the risk to life, liberty, or security of the person. The Appellants and interveners before the SCC in B010 relied on Bedford and made extensive submissions on the impact of inadmissibility on the ability to access protection from persecution.\textsuperscript{105}

\textsuperscript{102} \textit{B010} v. \textit{Canada (Citizenship and Immigration)}, 2015 SCC 58, [2015] 3 S.C.R. 704

\textsuperscript{103} In other words, they were found inadmissible for smuggling themselves.

\textsuperscript{104} \textit{J.P, supra}, at paras. 117-125

\textsuperscript{105} See, among others, factum of the Appellant, B010; Factum of the Intervenor, Canadian Association of Refugee Lawyers; and Factum of the Intervenor, David Asper Centre for Constitutional Rights, online at: https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=35388
Namely, the law that was at issue removes all barriers to an inadmissible persons’ deportation to this risk. Ultimately, Chief Justice Beverley McLachlin decided the case in the Appellants’ favour, finding that people smuggling must require a profit motive and so the interpretation of the court below could not stand. Having granted the relief the appellants sought on this basis, the Court noted that it was “unnecessary” to decide the Charter issue. Yet then, inexplicably, and without addressing the arguments that had been made before it, the Court proceeded to decide the issue:

The argument is of no assistance in any event, as s. 7 of the Charter is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in Febles v. Canada (Citizenship and Immigration), 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the IRPA did not engage s. 7, because “even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place” (para. 67). It is at this subsequent pre-removal risk assessment stage of the IRPA’s refugee protection process that s. 7 is typically engaged.

The parallels between B010 and Medovarski are striking. Both are decisions of McLachlin C.J. where the Charter is not central to the decision and is mentioned briefly only at the end of the reasons. More significantly, B010 is a second decision where the Supreme Court has plainly mixed up the two stages of section 7. Febles, the decision cited in the holding above, was not a finding that the Charter was not engaged by exclusion, but rather a finding that in Mr. Febles’ case, it did

107 Ibid., 2015 SCC 58, [2015] 3 S.C.R. 704 at paras. 74-75. While it has not been addressed in subsequent jurisprudence, it is also impossible to square B010 and the decisions that follow with the Federal Court of Appeal’s decision in Covarrubias v. Canada (Minister of Citizenship and Immigration), [2007] 3 FCR 169, 2006 FCA 365 which held that PRRA officers – the ones who are supposed to be the decision-maker at the stage where the Charter finally emerges – do not have PRRA jurisdiction (para. 56).
not violate principles of fundamental justice. In other words, ten years after *Medovarski* misinterpreted *Chiarelli*, the Supreme Court made the exact same mistake. It is the difference between a law’s application to a specific set of facts being found fundamentally just, and a ruling, set out with no justification, that the law in any application does even get in the door of section 7 review.

The human consequences of judicial affirmation that a process that diverts someone out of the refugee system does not have to be fundamentally just are immense. It means that a membership provision so overbroad that it excludes from protection anyone who has ever played a humanitarian role in a liberation struggle is not subject to constitutional scrutiny. The same is true for anyone who at any time in their life regardless of rehabilitation and the passage of time has ever committed a “serious crime”. They are irrevocably barred from refugee status, and can only in exceptional cases hope to stay their removal to the persecution that has forced them to flee. The *Charter* here becomes illusory as at the point of removal, where it is finally engaged, the Federal Court has not let a refugee go back and constitutionally challenge the validity of their exclusion.

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108 *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at para. 67; see also the Federal Court of Appeal decision in *Febles* in relevant part at paras. 68-69; *Hernandez Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324

109 Section 34(1)(f) for example that provides among other things that anyone who has ever been a “member” of an organization involved in “engaging in or instigating the subversion by force of any government” is inadmissible to Canada. Membership in these cases is given a “broad and unrestricted” interpretation (Poshteh, *supra*). In *Maqsudi v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1184 the Federal Court noted the unfairness of this provision as applied to refugees who resisted dictatorial and repressive states in the circumstances that make them a refugee, but considered itself bound by law to uphold the inadmissibility finding. On the deeply problematic nature of the s.34 inadmissibility regime more generally, see Angus Grant, “Confronting Insecurity: Forging Legitimate Approaches to Security and Exclusion in Migration Law”, PHD Dissertation, 2016, online at: http://digitalcommons.osgoode.yorku.ca/phd/24/

110 *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68

laws are practically immune from review. A refugee’s claim for Charter standards to apply to decisions that fundamentally impact their safety have become either premature or a collateral act.

To conclude on this point, unless one is of the view that the Supreme Court committed the same basic legal error in two of its major section 7 immigration decisions, it is difficult to see these developments as anything other than a statement that normal constitutional standards should not apply to immigration law. This is deeply problematic, particularly because the Court has never said this out loud, and in fact said the exact opposite in Charkaoui. As above, if concerns about public safety or a desire for deference in national security motivate these decisions, these concerns could be fully accounted for at the PFJ stage of section 7, or in section 1. Ultimately, while the state’s right to exclude can at times be overridden by the dangers faced by a refugee, B010 stands for the implicit position that this is a matter of generosity rather than justice.

III. **Deportation is not Cruel and Unusual Treatment under Section 12 of the Charter**

Unlike the section 7 case law above where non-justiciability flows from misinterpretation and expansion of Chiarelli’s logic, the state of Canadian law on sections 12 and 15 are based more directly on the Chiarelli judgment itself. The norm at the heart of section 12 is gross disproportionality. It asks whether state action against an individual is “so excessive as to outrage

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112 Charkaoui I, supra. The Court in Charkaoui I at paragraph 18 cites Professor Hamish Stewart for the proposition it declined to follow without analysis in B010: “In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation. As Professor Hamish Stewart writes: ‘Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in criminal proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings.’“
[our] standards of decency”¹¹³ The judge is to look from the perspective of the impacts on the section 12 claimant and weigh whether these impacts are disproportionate to the state objectives being sought. In fairness, the section 12 balance of impact versus objective is no easy task and a section 12 breach is in general only to be found in exceptional circumstances. However, the impact of Chiarelli, is that the section 12 analysis has been inverted. Subsequent jurisprudence has treated the analysis as an assessment of how limits on the state’s right to exclude would outrage the court’s sense of decency. For example, in Gwala, Chiarelli’s state-centric approach to the Charter was followed for the proposition that it would actually outrage standards of decency for a long-term resident who had engaged in misrepresentation not to be deported.¹¹⁴ Other decisions see Chiarelli as dispositive of any immigration section 12 claim and the impact on the individual asserting the claim is never weighed. In Canepa, shortly after Chiarelli, the Court simply followed that decision and considered it settled law that deportation simply cannot be cruel and unusual. Other decisions following Chiarelli will add consideration of discretionary mechanisms in the Act – no matter how illusory that discretion – such that it can be said the balancing has been done and the law in question is not cruel and unusual.¹¹⁵ For example, in Solis the ability of a Minister conducting a danger opinion to look at personal circumstances, and the possibility of judicial review was a sufficient balancing of impact on the individual to find the deportation of a long-term resident proportional.¹¹⁶

Finally, a distinct and increasingly common approach has been to segment the removal process for the purpose of Charter review mirroring the trend in section 7 refugee jurisprudence set out above.

¹¹³ R v Smith (Edward Dewey), [1987] 1 SCR 1045, 1987 CanLII 64 (SCC) at para 54
¹¹⁴ Gwala v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 9069 (FC), [1998] 4 F.C. 43
¹¹⁵ Revell, supra and Moretto v. Canada (Citizenship and Immigration), 2018 FC 71
¹¹⁶ Solis Perez v. Canada (Citizenship and Immigration), 2009 FCA 171
In cases where deportation is not the immediate result of an administrative decision – even where it is argued to be an inevitable consequence - courts have treated the section 12 argument as “premature” and refused to conduct the analysis.\textsuperscript{117} No principled reason has ever been offered for the refusal to apply section 12 to any stage of the process except that immediately prior to deportation.

Again, the threshold for “cruel and unusual treatment” is a high bar to reach and will not be met in many cases. However, what is striking in the s.12 deportation jurisprudence is the unwillingness to even engage with the impacts on long-term residents who are in every substantive respect in the same position as a citizen and face in deportation a profound and life-altering impact. It is not apparent that the loss of family, community, livelihood and belonging along with return to a place unknown could \textit{never} outweigh past criminality. Yet, courts have refused to even wade into this balancing analysis. Again, there may be reasons of institutional capacity or a concern about grinding the immigration system to a halt with unlimited processes, but these are justifications that could be and never are articulated in the judgments. In result, the impact of deportation has been rendered weightless for the purpose of proportionality balancing under the \textit{Charter}.

\textit{Chiarelli Revisited: Revell and Moretto}

At the time of this writing, two cases are set to be heard together at the Federal Court of Appeal that ask the Court to depart from \textit{Chiarelli} and \textit{Medovarski} in determining the sections 7 and 12 claim of long-term residents facing deportation for serious criminality. At the Federal Court in \textit{Revell} and in

\textsuperscript{117} \textit{Brar v. Canada (Public Safety and Emergency Preparedness)}, 2016 FC 1214; \textit{Norouzi v. Canada (Immigration, Refugees and Citizenship)}, 2017 FC 368; \textit{Barrera v Canada (Minister of Employment and Immigration)}, 1992 CanLII 2420 (FCA), [1993] 2 FC 3;
Moretto, the applicants argued that Chiarelli should be revisited in light of developments in the law on section 7, in international law, and amendments to the legislation which removed access to an application for humanitarian and compassionate relief.\footnote{Revell, supra at para. 39; Moretto, supra} In Revell, the Applicant is a citizen of England who has lived in Canada for 42 years. He lost his permanent residence status and faced deportation after drug possession and domestic violence changes. His partner and children are all in Canada and he has no connection to England. In Moretto, the Applicant was born in Italy in 1969 and came to Canada when he was just 9 months old. He suffers from addiction and mental health issues and has all of his supports in Canada. He too faced deportation for serious criminality. The constitutional complaint in both matters is the absence of any mechanisms in the legislation for an individualized assessment of the impact and proportionality of removal in these circumstances. In both matters, the Federal Court declined the invitation to depart from the precedents above. In Revell, the Court reiterated that a non-refugee’s deportation cannot even engage section 7.\footnote{Ibid., at para. 40} To its credit, the Court did at least acknowledge the consequences at stake – the inability to make a fundamental life choice, potentially permanent separation from family and friends and emotional distress – but considered this not to engage the Charter because “this is the reality of deportation”.\footnote{Ibid., at para. 128. The reasoning on this point at paras. 128-130 is instructive: “Removal from Canada – if and when it happens – will infringe Mr. Revell’s ability to make a choice about where to live. He will be uprooted from his family, friends, and work and returned to the UK where he has no or few ties and this will cause him emotional distress. These are the unfortunate consequences of deportation – to be removed from work, family and friends and life in general in Canada…the jurisprudence…has found that deportation per se does not engage section 7 and that section 7 may be engaged where the consequences are more significant (e.g. where there is a risk of detention, torture or persecution).”} Puzzlingly, the Court also found – following the section 7 refugee jurisprudence – that section 7 was additionally not engaged here because at issue was a finding of inadmissibility
and not a deportation itself.\textsuperscript{121} This is odd because unlike a refugee where there is at least the existence in the Act of a future risk assessment, there is absolutely no other later mechanism in the act before removal that has jurisdiction to consider the harms at issue here. Nevertheless, the Court saw these findings as consistent with “the basic constitutional foundation of immigration law.”\textsuperscript{122}

With respect to section 12, the Court concluded that:

As a long-term permanent resident, the deportation order may appear harsh, and perhaps slightly disproportionate, if as he claims, he is at a low risk to reoffend and does not present any risk to public safety and given that he has called Canada home since childhood. However, this does not rise to the level of being grossly disproportionate or cruel and unusual.\textsuperscript{123}

The Court in \textit{Moretto} largely followed \textit{Revell} but relied also on the availability of an H&C that could be applied for after deportation on the facts of that case. The Court in \textit{Moretto} also affirmed \textit{Chiarelli} and the “overriding principles of immigration law” to find that section 7 was not engaged, and even if it was that deportation was neither grossly disproportionate, nor cruel and unusual for the purpose of section 12.\textsuperscript{124} In each case, the Federal Court certified a serious question of general importance allowing an appeal up to the Federal Court of Appeal, and perhaps one day the Supreme Court of Canada. These cases are deeply encouraging as they provide a vehicle to lift the shadow of \textit{Chiarelli} and \textit{Medovarski} and reshape the meaning of section 7 and 12 in immigration law.

\textbf{IV. Distinctions Based on Citizenship in the Immigration Context Are Not Discrimination Under Section 15 of the Charter}

\begin{flushright}
\textsuperscript{121} \textit{Ibid.}, at 114.  \\
\textsuperscript{122} \textit{Ibid.}, at para. 91 citing \textit{Stables v. Canada (Citizenship and Immigration)}, 2011 FC 1319 (CanLII), [2013] 3 F.C.R. 240  \\
\textsuperscript{123} \textit{Ibid.}, at para. 223.  \\
\textsuperscript{124} \textit{Moretto, supra} at para. 55
\end{flushright}
The final right foreclosed from application to immigration law by the *Chiarelli* doctrine is the protection against discrimination in section 15 of the *Charter*. The argument before the Court in *Chiarelli* was that after a certain number of years of residence in the community a non-citizen becomes a member through their substantive connection to the place they live. At this level of connection, it is discriminatory to let a criminal conviction effectively end their life in the community rather than letting them serve their sentence like any other member. Of course, this kind of argument for equality in the right to remain between citizen and non-citizen strikes at the heart of the logic of the border. In turn, the *Chiarelli* judgment refused to separate the right to remain in section 6 – owed only to citizens - from the requirements of equality in section 15 – grounded in *human* dignity and owed to “every individual” in Canada. It effectively affirmed the borders of membership to be an authorized zone of exception to equality jurisprudence. Yet, if the notion of “citizenship” implies differential treatment for non-citizens, the next question is how far this differential treatment could extend. The Supreme Court has found laws that bar non-citizens’ from access to employment to violate section 15. Similarly, no one would argue that a non-citizen charged with a crime should not have access to the full protection of the criminal law. Can the *Charter* condone bars on access to courts to judicial review immigration and refugee matters that are equally fundamental to their core interests as any other judicial matter? Deprivation of liberty

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127 Bosniak, *supra* at 118
128 Section 72 of the IRPA requires leave of a court to even have an immigration decision judicially reviewed. This bar on access to the fundamental right of judicial review was upheld as constitutional with very limited reasons in
based on hearsay – which is impermissible in the criminal law – is widespread and frequently approved in Canada’s immigration detention regime.¹²⁹ Is this discrimination? Does the Charter authorize surveillance and preventative detention of non-citizens that would be impermissible to citizens? Where does equality end and the morality of the border begin for non-citizens in Canada?¹³⁰

A review of the relatively limited case law on section 15 in the immigration context suggests that rather than wade in to these complex and important questions, courts following Chiarelli have effectively preferred to render them non-justiciable. This is most explicit in a Federal Court decision called Chaudry about benefits to criminal detainees that were not available to immigration detainees in the same facility. Relying on Chiarelli, the Court held that given the explicit distinction in section 6(1) of the Charter, “courts have not subjected provisions of the Immigration Act to review under section 15 on the ground that they discriminate on account of nationality”. It held that as the relevant provisions concerned a “deportation scheme”, they were accordingly “not subject to section 15 review”.¹³¹ The same tact was taken by the Federal Court of Appeal in Huynh, a section 15 challenge to bars on appeals of immigration matters in the Federal Court.¹³² Noting the distinctions inherent in immigration law, the Court considered Chiarelli to be dispositive: “While the particular

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¹³⁰ See the discussion on immigration law versus alienage law in US scholarship: Bosniak, supra at 122 and Lindsay (2016), supra at 88

¹³¹ Chaudry v. Canada (Minister of Citizenship and Immigration), [1999] 3 FCR 3.

provisions under attack in Chiarelli were different, we could see no difference in principle….We accordingly did not call for any argument from respondent on this point.” Finally, the most significant holding on section 15 in this context came in 2007 in the Supreme Court’s aforementioned decision in Charkaoui I. At issue in Charkaoui I was a detention regime that allowed for potentially indefinite detention for non-citizen terror suspects. In finding an analogous regime expressly permitting indefinite detention for non-citizens to be discriminatory, the United Kingdom House of Lords held that “Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals”.

The Supreme Court judgment in Charkaoui I disposed of this matter quickly, contenting itself to the finding that there was no evidence on record that deportation of the applicant detainees would never be carried out. As the detentions could still be characterized as immigration matters – a space of inherent discrimination based on citizenship - an indeterminate period of long-term detention did not offend section 15. Once a connection to immigration is found, the norms of human rights are replaced by the norms of the border, and the argument for equality becomes non-justiciable.

**Conclusion on the Chiarelli Doctrine**

It has been argued in this section that a Canadian doctrine of non-engagement, prematurity, non-applicability, and inherent discrimination have effectively immunized Canadian immigration law

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134 Charkaoui I, supra at paras. 129-132

135 Ibid.

136 Perhaps as this area is seen to have been foreclosed, there have been few serious subsequent challenges brought on section 15 in the immigration context. It should be noted that distinctions between groups of non-citizens in the immigration process – such inferior processes for refugees from certain “designated countries of origin” – has been found discriminatory on the basis of “national origin”: Y.Z. v. Canada (Citizenship and Immigration), [2016] 1 FCR 575, 2015 FC 892; Canadian Doctors for Refugee Care v. Canada (Attorney general), 2014 FC 651
from Charter review. Like the American plenary power doctrine, the Chiarelli doctrine has made the immigration process into a space of constitutional exceptionalism. Under the doctrine, the exercise of immigration power does not have to be fundamentally just; exclusion is inherent and cannot offend standards of decency; and norms of equality do not apply. It is worth here reiterating once more a critical difference between plenary power exceptionalism and Chiarelli exceptionalism. This is the complete absence of transparency and justification. American courts are at least explicit that immigration law is not subject to normal constitutional principles, and typically point to institutional capacity as a reason for why near-complete deference is warranted in this sphere. The Supreme Court of Canada however has gone so far as to say clearly with respect to the Charter that immigration is not exceptional. In Charkaoui II, it was held that whether section 7 applies “does not turn on a formal distinction between the different areas of law” but rather depends “the consequences of the state’s actions for the individual’s fundamental interests” of life, liberty and security of the person.\footnote{Charkaoui II at para. 53} In Charkaoui I, the Court confirmed that what matters is “the interests at stake rather than the legal label attached to the impugned legislation”.\footnote{Charkaoui I at para. 18} It is impossible to square these holdings with the conclusory and formalistic reasoning of decisions like Medovarski and B010 that repel the application of normal constitutional standards to decisions with a tremendous impact on life and safety. How do we account for the persistence of these doctrines of exceptionalism in different centuries, social contexts and constitutional cultures? In the next section, I look at the legal concept of justiciability and philosophical work on the complicated space of borders in liberal theory as a means to find the answer.
PART III: NORMATIVE FOUNDATIONS OF CONSTITUTIONAL NON-JUSTICIABILITY

Institutional Capacity and the Constitution

The plenary power doctrine explains its transparent immigration exceptionalism with reference to institutional capacity and the separation of powers. As Professor Alenikoff writes, “the underlying rationale for the plenary power doctrine is the court’s concern about intrusion into matters it believes better left to the political branches”.¹³⁹ In a sense, plenary then is a variation on the American “political questions doctrine”; essentially, that courts should not rule on fundamental matters of policy that are better suited to be answered by elected officials.¹⁴⁰ Several SCOTUS plenary power decisions analogize to the political question doctrine, and state their discomfort with balancing the rights of an immigrant against the rights of the United States, alluding to a lack of “judicially discoverable standards” in immigration.¹⁴¹ While there is something to this concern, as discussed below, it is hard to imagine that immigration law must thus be altogether beyond review. Many constitutional questions raise separation of powers concerns, and it is hard to imagine that immigration is so different from the complex balance of rights that is undertaken whenever the liberal state has to adjudicate conflicts between the democratic will and external moral standards of right.¹⁴² For decades, scholars in the United States have argued that the justifications for plenary power are without merit, and normal

¹³⁹ Alenikoff (2003), supra at 152
¹⁴¹ See Kerry v. Din, supra citing Baker v. Carr, Ibid.
constitutional standards could be fairly and workably applied to immigration law.\textsuperscript{143} Still, relying on the doctrine as a vehicle for institutional deference, courts have continued to hold these matters largely non-justiciable.

What then can we make of the constitutional non-justiciability of the Chiarelli doctrine? Canada does not have a “political questions” doctrine and the Supreme Court of Canada has repeatedly held that that the broad scope of the Charter has given it license to rule on any state action impacting on rights.\textsuperscript{144} From the earliest Charter cases, it was held that section 1 of the Charter provided a vehicle to address concerns about justiciability in a transparent and principled manner:

Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.\textsuperscript{145}

As such, according to Canada’s constitutional framework, “prudential” concerns including institutional capacity that may support an argument for non-justiciability in another legal system are matters that in Canadian constitutional law should be addressed under section 1. If the concern is that the application of the Charter will lead to endless processes prior to removal and

\begin{itemize}
  \item \textsuperscript{144} As the Supreme Court held in Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35 at para.183 (Binnie and Lebel J, in dissent, but not on this point): “There is nothing in our constitutional arrangement to exclude “political questions” from judicial review where the Constitution itself is alleged to be violated.”
  \item \textsuperscript{145} Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441 at para. 65
\end{itemize}
bring the immigration system to a crawl, section 1 is the place where a prudential concern of this nature can be accounted for. If the Court thinks it should defer on matters of public safety or national security, then, as it frequently does in any other context, it has the means to do so in section 1. Why then the insistence to hold that no right is violated in cases with an immense human impact, rather than simply engaging with the interests at stake and concluding the rights-infringement is justified? I argue that the roots of Chiarelli doctrine come from something more fundamental arising from the organizing principles of the liberal state.

**Liberalism and Closure**

In the secular Western state, liberalism is our governing ideology, and the doctrine we turn to in order to answer moral questions.146 There is a vast and fascinating literature on the problems that questions of justice in immigration pose for liberalism.147 Borders are in tension with three core values of liberal theory. First, a core value of liberalism is its belief in universal moral equality. All human beings are equally entitled to respect and dignity, and people should not have their life chances determined by morally arbitrary historical contingencies. Second, and related, liberalism is committed to rationality: liberal institutions and practises must be capable of justification to all rational agents. Finally, the liberal state is committed to democracy, and the idea that those impacted by a law should have a say in its formulation. But, less prominently than its commitments to these values, liberalism is also committed to closed political

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146 Dauvergne (1999) *supra*, at pg. 611
Liberalism understands justice and the most important institutions through which to pursue justice – citizenship, democratic governance, courts, social welfare institutions – in largely national terms. There is a sense these institutions are not practically achievable, nor necessarily desirable, at the level of a world state. As such, human beings need to be separated into autonomous communities where internal bonds of membership can be formed and questions of justice can be internally pursued.

But what about non-members? The core works of liberal theory presume a closed-society in which all issues of membership are already resolved. Liberal theory is silent on the moral relationship between the closed liberal political community and the outsider that approaches its borders. In a post-colonial world of vast inequality – a world where the place you are born determines if your life will be one of safety and opportunity or one of deprivation and war - the border is morally problematic. The universalism of liberal theory would be offended by a human being forever excluded from a better life solely on an accident of birth. Yet, there is a

148 See discussion in Cole, supra at 3; Veit Bader, “The Ethics of Immigration” (2005) 12 Constellations 3
151 For the most famous and often-cited liberal communitarian articulation of the need for closure: Michael Walzer, Spheres of Justice (New York: Basic Books, 1983)
152 For example, John Rawls, A Theory of Justice, (Cambridge: Harvard University Press, 1971. In early liberal works, the “human” and the “citizen” are interchangeable, for example, as Immanuel Kant writes in The Metaphysics of Morals: “No human being can be without any dignity since he at least has the dignity of a citizen” in Practical Philosophy, 470–72 (6:328–30 of the Prussian Academy edition).
sense that on some level the maintenance of the institutions pursuing equality inside the border must require closure lest these political, judicial and economic institutions be overwhelmed.\textsuperscript{154} Closure is motivated both by the internal democratic will for self-determination – including a say over who is a member – as well as the practical reality that on a certain level the community could not function with open borders.\textsuperscript{155} This is essentially the position expressed by SCOTUS in the 19\textsuperscript{th} century plenary power cases: Given the potentially existential consequences for the character and institutions of the closed political community, admission questions must therefore be exempt from claims of right. Herein lies a fundamental contradiction of the liberal state: the pursuit of justice and equality for those within requires the denial of equality to those without.\textsuperscript{156}

Are there morally legitimate criteria for exclusion in a liberal state? In the circumstances of immense global insecurity and inequality, the prevailing answer in liberal political theory appears to be no.\textsuperscript{157} Even if admission to the state was rationed solely on the basis of need for protection, it would not be possible for a national state to accept everyone worldwide who is in need and would benefit from entry.\textsuperscript{158} As entry would be here a scarce resource, there would no

\textsuperscript{154} Hampshire, \textit{supra} at pg. 62: “States rely on premise that people will spend their lives in the territory of their state: voting systems, tax regimes and welfare systems all have what might be called a sedentary bias in so far as they are ill-suited to cope with mass migratory movements.”

\textsuperscript{155} Bader \textit{supra} at pgs. 348ff; Cole \textit{supra} at pgs. 138ff.

\textsuperscript{156} Cole, \textit{supra} at pgs. 167ff; Dauvergne (1999) at pgs. 610, 620ff.

\textsuperscript{157} Cole, \textit{Ibid.}, at pgs. 1-14; Dauvergne (1999) at pgs. 609ff; Carens (2013), \textit{supra} at 11. Note the position advanced here is in reference to a modern post-colonial multicultural settler state like the United States or Canada. Carens has allowed for the possibility that the calculus may be somewhat different for a cultural or faith-based community that shares a collective identity at the national level.

morally legitimate criteria to divide between those who get in and those who don’t – all applicants being human beings in need of a state to protect their rights. Further, no immigration exclusion can ever be legitimate from the perspective of rationality or democratic theory as the outsider had no say in the formulation of the rule that excludes them.  

It could only be justified to them prudentially from the internal point of view: “We need to deny your equality so that we can keep our own”. Particularly in settler societies like Canada and the United States, the only thing distinguishing the majority of insiders from outsiders is that those families on the inside happened to arrive a generation or two earlier. There is no coherent basis in liberalism to favour those human beings inside the border over those on the outside, particularly where the outsider seeks refuge from harm. However, given that the complete application of universal liberty and equality norms to questions of admission would necessitate the end of closure and lead to open borders – a state of affairs that is not desirable from the perspective of those within - courts have preferred to suspend liberal morality from application to the immigration context.  

Joseph Carens describes this familiar position:

The power to admit or exclude aliens is inherent in sovereignty…Every state has the legal and moral right to exercise that power in pursuit of its own national interest even if that

159 Arash Abizadeh, “Democratic Theory and Border Coercion” (2008) 36 Political Theory 1

160 Liberal multicultural “countries of immigrants” like Canada and the United States cannot claim collective values like the preservation of a national community to even try to justify exclusion against the claims of an outsider seeking safety and security.

161 See literature review in Cole, supra at 165ff.

162 I am open to the critique that this account is too “colour-blind” and does not give enough weight to the role of racism and xenophobia and the sense for some judges that “foreigners” arriving in Canada are not owed the rights they are claiming from the state. While these factors are always present I believe that the complete unwillingness to apply constitutional standards in immigration cases compared to the greater willingness to give constitutional protection in the case of for example a racialized person in the criminal justice system suggests that there is also something more at play in immigration - something that makes immigration “exceptional”.
means denying entry to peaceful needy foreigners. States can be generous in letting people in but it is not an obligation.\textsuperscript{163}

I believe that this paradox - where immigration control is at once necessary to maintain the closed state but cannot be rationally justified under liberalism - is the foundation of the plenary power and \textit{Chiarelli} doctrines. Courts have felt the need to carve out a space of exception for the border from the normal application of the values of the constitution at large. They operate to exempt the imperative for closure from scrutiny, as closure is something that liberalism both requires and cannot rationally justify on its own terms.\textsuperscript{164} The constitution is of course an expression of the community’s shared notion of justice. It expresses values of universal equality and autonomy for all over fundamental personal choices. Yet, constitutions also “constitute” - they are a national membership document that brings together a “people”.\textsuperscript{165} For there to be a “people” rather than just humanity, the boundaries of the “people” must have closure. For there to be members, there must also be non-members.\textsuperscript{166} But this boundary cannot be set in a way that does not at least at some level betray the constitution’s liberal principles. Given this contradiction between liberalism’s universalism and its “concealed particularism”,\textsuperscript{167} there cannot be total coherence between a liberal state’s internal morality and the morality applied to its outside. A rights-claim in the immigration context sits between the universalism of the human rights protections in the constitution, and the particularism of national courts acting in the name and interests of a “people”. In these claims, an outsider is asking the liberal state to

\textsuperscript{163} Carens (2013) \textit{supra} at 8
\textsuperscript{164} Cole, \textit{supra} at 194
\textsuperscript{165} Bosniak (2010) \textit{supra} at 338; Alenikoff (2002) \textit{supra} at 17
\textsuperscript{166} Mouffe, \textit{supra} at pg. 23 citing Carl Schmitt, The Concept of the Political (New Brunswick, NJ: Rutgers University Press, 1976)
\textsuperscript{167} Cole, \textit{supra} at pg. 8
rationally justify why they are being excluded under the state’s governing principles. The plenary power and *Chiarelli* doctrines exist to turn away any such request. I believe they do so out of an intuition that closure cannot be rationally justified under liberalism. Judges see an absence of criteria in liberalism to balance the interests of the state against the impact of exclusion on every would-be immigrant\textsuperscript{168}, and the potentially existential consequences for the character and institutions of the community if normal standards of liberty and equality protection were applied to immigration.\textsuperscript{169} It is a sense that rights-review *must* be inapt to questions of admission given what it would entail. Thus, in abandoning liberal human rights principles, the plenary power and *Chiarelli* doctrines instead assert that immigration is an arena where right and wrong is judged from the interests of those already inside. From this perspective, a non-citizen arguing that exclusion will cause them serious harm presents only question of whether the national community is in a position to help. If the political community decides that the non-citizen has rendered themselves unworthy of help, that is their own decision to make. The community expresses its will in these matters through its immigration laws. If the standard is national

\textsuperscript{168} See for example *Kerry v. Din* (Kennedy J.) *supra* citing *Kleindienst v. Mandel*, 408 U. S. 753 (1972), a case about the denial of entry to the United States of a Marxist academic who was invited for a lecture: “The Court declined to balance the First Amendment interest of the professors against “Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’ ” Id., at 766, 768 (citation omitted). To do so would require “courts in each case . . . to weigh the strength of the audience’s interest against that of the Government in refusing a [visa] to the particular applicant,”” a nuanced and difficult decision Congress had “properly . . . placed in the hands of the Executive.” Id., at 769.” [emphasis added]. In this manner the question was rendered one of democratic will and not a balancing that invites a rights-framework. There is also the separate question unmentioned in the jurisprudence of immigration as the “ultimate floodgates problem” where judges simply do not want to be in the business of balancing the rights of everyone who arrives in Canada and wants to stay. While I believe this does play a role in the motivation to render these rights non-justiciable, the reality is in Canada that these cases already come before the Court under administrative law principles so there is little difference in judicial workload to simply develop a Charter jurisprudence on the impacts at stake.

\textsuperscript{169} Interestingly a similar analytical evasion can be found in social and economic rights cases in Canada where courts apply a kind of unprincipled non-justiciability to anything that falls into the blurry category of a “positive right”: *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 8; *Tanudjaja v. Canada (Attorney General)* 2014 ONCA 852. This may be a judicial unwillingness to apply liberal principles of equality to capitalism must in the way the Chiarelli doctrine operates to deflect liberal principles away from the principle of closure.
interest, rather than universal rights, there is no place for judicial intervention. These matters must be non-justiciable.

The “concealed particularism” of liberalism is most pronounced in the case of the Charter. Canada is famously a mosaic with a constitutional commitment to multiculturalism and human dignity. Canada is far more universalist and far less nationalistic in its self-conception than the United States. This is why I believe that the Chiarelli doctrine has manifested itself as an unspoken doctrine of exception. Canadian constitutional culture is both morally committed to universalism, and does not have room for non-justiciability in contrast to its American counterparts. However, the same conflict between the universalism of human rights and the ethical particularism of the border is playing out in the Charter claims of immigrants and refugees. The convergence of these two moral worlds is section 6(1) of the Charter. Section 6(1) - in a document that otherwise speaks the language of humanity - is a provision that admits there is a constitutionally relevant difference between citizens and non-citizens with respect to the right to stay. Beginning in Chiarelli, section 6(1) has provided a means to insert a state right to exclude into the Charter and render conditions of exclusion immune from other Charter rights claims. This is most apparent in Chiarelli as the Court proceeds in a Charter analysis – an analysis of individual rights against the state – from the perspective of the rights of the state rather than the rights of the individual. Section 6(1) is thus utilized as a Charter acknowledgement that immigration is not a right but a privilege. In the section 7, 12 and 15 case law above, section 6(1) is repeatedly invoked as a reason that the Charter’s other rights cannot be offended by the border. It is a rights-based argument for border particularism. How can

170 Audrey Macklin, Presentation at the Asper Centre Constitutional Roundtable, 20 October, 2017; Cohen, supra at pg. 471
Charter standards apply to removal when fundamentally it is constitutionalized that they do not have the right to stay? Even in the refugee cases where there are clear rights at international law, the courts have set down principles of prematurity and non-engagement in order to resist the consequences of rights-review in cases of those refugees who may perhaps be seen as less worthy of generosity. In the conflict between universal and particular, courts have used the invocation of Chiarelli’s “most fundamental principle in immigration law” as embodied in section 6(1) as a vehicle to suspend normal constitutional principles and switch its lens to the morality of the border. Using the principles from Chiarelli to operate from particularism, the court imagines for itself a far-more limited role than what Charter review would otherwise require. The Chiarelli doctrine has thus developed as a vehicle to translate the morality of the border into the language of the Charter. The result is a doctrine of deference to highly coercive state action that is otherwise unknown to Canadian constitutional law.

PART IV: RESISTING THE EXCEPTION

While universal principles sit in tension with the border, it does not follow that courts are justified in deflecting any and all attempts to apply constitutional standards to immigration. Recognizing that liberal principles cannot be applied with total coherence to the border is a long way from saying that liberal principles cannot be applied at all. Particularly, where the human interests at stake are this significant, judges maintain a duty to apply constitutional standards to the greatest extent possible, and to seek justification from the state for departure from these standards. It bears repeating that the plenary power and Chiarelli doctrines are judicial abdications: courts have abandoned their duty to hold the government to justification in a deeply coercive exercise of state power. The consequences of abdication in an area like this are
immense. It is a state of affairs that threatens both the rule of law and the liberal character of the community within. A state cannot treat human beings in a way that is arbitrary, discriminatory or disproportionate at its edges and expect that this will remain confined to its borders. In particular, the experience of those citizens who share a race or religion with so-called “outsiders” is likely to become similarly problematic as the border moves inward. Most urgently, constitutional non-justiciability over immigration inflicts tremendous harm on refugees and immigrants. At the time of this writing, the human consequences of abandoning moral standards at the border is playing out in the United States. A Muslim travel ban has been effectively legalized by SCOTUS, and the US government has engaged in a policy of separating parents from their children at the US border. The President of the United States has referred to migrants in dehumanizing language familiar to historians of genocide. As war, poverty, and climate change will only increase the numbers of human beings seeking admission, the necessity of judicial review at the border could not be more vital. The results of treating the border as

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171 See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 71 (citing Manitoba Language Rights Reference): “…the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”. It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, supra, at para. 10, that ”the exercise of all public power must find its ultimate source in a legal rule”. Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.” See also: Crevier v. A.G. (Québec) et al., [1981] 2 S.C.R. 220


outside the scope of constitutional principles could quite literally lead to the worst atrocities imaginable. As such, when faced with a rights-claim from a migrant subject to highly coercive state action, courts have a legal and moral duty to subject state action in this area to justification. There is no good reason that judges cannot try to bring liberalism’s “concealed particularism” out in the open and attempt in good faith to weigh the imperative for closure against the very real harm to human beings that is at issue.

**Confining the Border to the Stage of Justification**

As I have alluded to several times in the writing above, there is space in the Charter analysis for judges to at least try to subject immigration law to justification. Again, recognizing the difficulty of reconciling borders with principles of liberty and equality does not have to lead to blanket non-justiciability, or that any such reconciliation should never even be attempted. The Chiarelli doctrine can be lifted by simply recognizing that border control objectives are justifications, and so they should be treated as such at the proper stage of the analysis. Accordingly, instead of inserting the morality of the border into the rights infringement analysis and preventing that analysis from ever really taking place, courts must confine these border control objectives to the stage of justification, both internally in the section 7 right, and at section 1 of the Charter. As Professor Jamie Cameron has written with respect to constitutional analysis in general: “The distinction between breach and justification must be maintained to preserve the Charter’s integrity”.176

In this vein, a better approach to the Charter claims of non-citizens would follow the Supreme Court’s own guidance in Charkaoui and look at the impact on the individual rights claimant and nothing more at the stage of rights-engagement under ss. 7, 12 and 15. The claimants’ immigration status should have no place in this analysis given that the rights claimed are owed to “everyone” in Canada. This alone would be a significant step forward by simply treating the rights of non-citizens as weighty claims, and beginning the analysis by looking at human impact rather than formal category. After establishing the impact on the individual, the court should transparently consider the importance of the immigration control objective; whether that objective is truly being forwarded; whether there is a less-rights impairing course of action available. The proposal here is not to guarantee any result but to ask courts to simply conduct the constitutional analysis as they would in reviewing any other exercise of state power. It is the difference between treating a state’s right to exclude as the end of the matter, versus acknowledging that in certain compelling circumstances the state’s duties based in common humanity may outweigh the principle of membership. The circumstances of those who seek to remain in Canada vary widely, and not everyone will have a moral claim to remain. The strength of their claim will depend on the degree of their connection and roots in Canada, and the extent of the harm they will face if returned to their country of citizenship. I acknowledge again that this justification exercise will be imperfect as there are not answers within liberalism for a judge seeking to balance harm to a non-citizen against abstract categories like “sovereignty” and the preservation of a closed political community. Proportionality balancing of these matters will be

177 In other words, the Oakes test: R. v. Oakes, [1986] 1 S.C.R. 103. However, these same principles of proportionality and rationality do much of the work in sections 7 and 12 as well.
indeterminate. However, this form of review is frankly all that the liberal legal system has in matters of rights-adjudication. In many of the Canadian cases discussed above, the end of non-justiciability would be completely workable and would protect innocent people from harm in a way that poses no disruption whatsoever to the system at large. In the case of refugee inadmissibility, for example, applying a normal section 7 Charter analysis would simply hold the government responsible to draft laws that do not endanger the lives of people whose situation has nothing to do with the national security objectives at issue. In these cases, the concerns that I believe have lead courts to repel attempts to apply normal constitutional standards to immigration are unfounded. In other cases, judges will still have room to choose the imperative for closure as outweighing a breach of the Charter rights of a non-citizen. The difference in the approach proposed here is that they must simply say so out loud. Despite the analytical challenges of justification at the border, it is far preferable to mandate that courts attempt this exercise of justification rather than proceed with the fiction that the immense human consequences of immigration law are not harms recognizable to Canadian notions of justice. The road to the end of the Chiarelli doctrine starts with lifting the concerns that have motivated non-justiciability out of the dark and into the justification stage of the Charter analysis.

CONCLUSION

In perhaps the foundational work on immigration in political theory, Joseph Carens began with the simple observation that “borders have guards, and the guards have guns”. He asked what

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178 However, the same could be said about many other areas of law. See: Vicki Jackson “Constitutional Law in an Age of Proportionality” (2015) 124 Yale Law Journal
179 Carens (1987), supra at pg. 1.
morally justifies the use of force on the peaceful and often vulnerable people who simply seek a safe place to live. As the public morality of a state is expressed through its constitution, it is left to courts on constitutional review to grapple with these moral questions. This paper has argued that Canadian courts have abandoned this role. In this way, a highly-controversial doctrine of exceptionalism from the 19th century United States has silently reproduced itself in a universalist 21st century constitutional law. While I have argued that this exceptionalism endures because it is a feature and not a bug of the liberal state, this does not mean that courts are right to throw up their hands and allow a different morality to wholly govern the border. Review for rationality, discrimination and proportionality is challenging in this context, but applying these standards to the greatest extent possible, and seeking justification for deviation from these principles, is still well within judicial capacity. Future scholarly work should seek to go “beyond liberalism” and try to imagine new analytical modes to better structure this analysis. For now, the modest claim made here is that departure from core values should be transparently justified, as it would be in any other area of law. Where the state infringes on liberty and equality, these acts must be subject to a burden of justification. In Revell and Moretto, the Supreme Court of Canada is likely to find itself with a chance to revisit several elements of the Chiarelli doctrine. Doing so and simply bringing the analysis to justification would be a marked improvement from the rightlessness and non-justiciability that pervades the status quo.