

# ***My New "Atlantic" Article Making the Case for Abolishing Constitutional Double Standards in Immigration Law***

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## **Body**

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Oct 03, 2019( The Volokh Conspiracy: <http://reason.com/volokh> Delivered by Newstex) The Statue of Liberty. Earlier today, The Atlantic published my article[1] making the case for abolishing **double standards** under which courts have largely exempted **immigration** restrictions from constitutional constraints that apply to virtually every other exercise of government power. Here is an excerpt:Americans generally take it for granted that the U.S. government cannot restrict freedom of speech.

It cannot discriminate on the basis of ethnicity and religion, and it cannot detain people without due process. Though these rights are not absolute, there is at the very least a strong constitutional presumption against such measures. Much of this is thanks to the Bill of Rights and other constitutional protections, particularly the Fourteenth Amendment. But there is an area of public policy in which the government routinely gets away with oppression and discrimination that would be readily recognized as unconstitutional anywhere else: **immigration** law. Last year, in *Trump v. Hawaii*, the Supreme Court upheld[2] President Donald Trump's "travel ban" policy, which barred most entry into the United States from several Muslim-majority nations. The Court did so despite overwhelming evidence showing that the motivation behind the travel ban was religious discrimination targeting Muslims, as Trump himself repeatedly stated[3]. The supposed security rationale for the travel ban was extraordinarily weak, bordering on outright fraudulent[4]. In almost any other context, the courts would have ruled against a policy so transparently motivated by religious bigotry, and so lacking in any legitimate justification[5]. The travel ban is far from the only case in which **immigration** restrictions have been held to a lower constitutional **standard** compared with almost any other exercise of government power. In August, the Israeli government was rightly criticized[6] for barring entry to two American members of Congress unless they agreed not to promote the anti-Israel Boycott, Divestment, and Sanctions (BDS) movement during their visit. But few recalled that the U.S. also has a long history of banning foreigners with political views that the government disapproves of. Concerns that European immigrants had dangerous political views were a major motivation behind the highly restrictive 1924 **Immigration** Act, and were also used to justify barring many Jewish refugees from Nazi Germany[7] in the 1930s. Similar constitutional **double standards** pervade many other aspects of **immigration** policy. Courts have ruled that[8] the due process clause of the Fifth Amendment provides for paid counsel in most cases where the state threatens indigent individuals with severe deprivations of liberty. But indigent migrants targeted for detention and deportation are not entitled to free legal representation[9], and often have to navigate a complex legal system without assistance. This leads to such horrific absurdities as toddlers "representing" themselves in deportation proceedings[10]. There is no basis for the **immigration double standard** in the text and original meaning of the Constitution. Most constitutional rights are phrased as generalized limitations on government power, not privileges that only apply to specific groups of people, such as U.S. citizens, or to government actions in specific places, such as U.S. territory. Abolishing constitutional **double standards** in **immigration** law would not end all **immigration** restrictions. But it would ensure that **immigration** policy is subject to the same constitutional constraints as other exercises of federal authority. The government could still restrict **immigration** based on a variety of characteristics. For example, it could still

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discriminate using such criteria as migrants' education, occupational credentials, and criminal records. But it would no longer be permitted to engage in racial, ethnic, religious, or other discrimination that is forbidden in other contexts. [ 1]: <https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/> [ 2]: <https://www.oyez.org/cases/2017/17-965> [ 3]: <https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban> [ 4]: <https://reason.com/2018/05/24/evidence-indicates-there-is-no-extensive/> [ 5]: <https://www.vox.com/the-big-idea/2018/6/27/17509248/travel-ban-religious-discrimination-christian-muslim-double-standard> [ 6]: <https://reason.com/2019/08/15/why-governments-should-not-bar-entry-based-on-political-views/> [ 7]: [https://www.nytimes.com/2015/11/20/us/comparing-jewish-refugees-of-the-1930s-with-syrians-today.html?\\_r=0](https://www.nytimes.com/2015/11/20/us/comparing-jewish-refugees-of-the-1930s-with-syrians-today.html?_r=0) [ 8]: <https://fas.org/sqp/crs/homesec/R43613.pdf> [ 9]: <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [ 10]: <https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/>

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