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## Disaggregating "Immigration Law"

Mathew J. Lindsay

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## DISAGGREGATING "IMMIGRATION LAW"

*Matthew J. Lindsay*\*

### Abstract

Courts and scholars have long noted the constitutional exceptionalism of the federal immigration power, decried the injustice it produces, and appealed for greater constitutional protection for noncitizens. This Article builds on this robust literature while focusing on a particularly critical conceptual and doctrinal obstacle to legal reform—the notion that laws governing the rights of noncitizens to enter and remain within the United States comprise a distinct body of “immigration laws” presumed to be part and parcel of foreign affairs and national security.

This Article argues that the U.S. Supreme Court’s recent immigration jurisprudence suggests a willingness to temper, and perhaps even retire, that presumption. In particular, the majority opinions in *Zadvydas v. Davis* and *Padilla v. Kentucky* evidence a growing skepticism among the Justices that the regulation of noncitizens comprises a discrete, constitutionally privileged domain of distinctly “political” subject matter that is properly buffered against judicial scrutiny.

To rescind that presumption would, in effect, disaggregate the category of “immigration law” for the purpose of constitutional review and subject federal authority over noncitizens to the same judicially enforceable constitutional constraints that apply to most other federal lawmaking. The disaggregation of immigration law would thus give full expression to noncitizens’ constitutional personhood. Foreign policy and national security considerations would continue to serve as constitutionally viable warrants for laws burdening noncitizens, but Congress and the President would no longer enjoy the extraordinary judicial deference that they currently receive as a matter of course.

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INTRODUCTION

Immigration occupies a paradoxical position in American law and political culture. On the one hand, the United States enthusiastically celebrates its heritage as a “nation of immigrants” and has long embraced the “melting pot” as a central metaphor of civic identity. For the past half-century, in particular, federal law governing eligibility for admission to the United States has generally reflected this inclusive, pluralistic heritage.<sup>1</sup> On the other hand, for more than a century, the U.S. Supreme

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1. Congress repealed the Chinese Exclusion Act in 1943, though immigration from China remained extremely limited for another two decades as the result of the minuscule immigration quotas allocated to nations in the “Asia-Pacific triangle.” Act of June 23, 1913, ch. 3, § 1, 38 Stat. 65, *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600. Congress abandoned the limitation of eligibility for naturalization to “free white persons”—a limitation first adopted in the Naturalization Act of 1790—in the Immigration and Nationality Act of 1952 (INA), also known as the McCarran–Walter Act. Act of Mar. 26, 1952, ch. 3, 1 Stat. 103, *repealed by* Immigration

Court has maintained that noncitizens and the laws that govern them are constitutionally exceptional, outside of and largely insulated from mainstream constitutional norms.<sup>2</sup> When the federal government banishes a noncitizen from the country or detains her for months or years at a time, for example, she does not enjoy many of the constitutional protections to which she, as a constitutional "person," would otherwise be entitled.<sup>3</sup> As a result, noncitizens in the United States operate under a deep and enduring estrangement from the American constitutional community. This estrangement stands in sharp contrast not only to the nation's prevailing, if still contested, cultural and political ethic of inclusiveness, but also the Constitution's denomination of "persons," rather than "citizens," as the beneficiaries of key constitutional

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and Nationality Act of 1952, Pub. L. No. 84-414, 66 Stat. 163 (1952). Yet it was not until the Immigration Act of 1965 that the civil rights revolution finally came to immigration law. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 300–02 (1996) (documenting that racial egalitarianism motivated many of the Immigration Act's leading sponsors). The 1965 Act eliminated the near-total exclusion for seven decades of immigrants from nations in the Asia-Pacific triangle, and abandoned the National Origins Quota system, which had severely restricted immigration from countries outside of western and northern Europe since the 1920s. *Id.* at 303, 316 & n.193; Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). Notwithstanding the racially egalitarian intent and effect of the Act, however, its liberalizing impulse was not without substantial limits. See Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of Modern U.S./Mexico Border Enforcement* 35, 38 (U.C. Davis Legal Studies Research Paper Series, Paper No. 360, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2362478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362478) (arguing that the 1965 Act's "artificial" numerical cap on migration from the Western Hemisphere represents a quite deliberate, though more sophisticated and less visible, intention to restrict Latino immigration to the United States); see also Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's SB 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 315 (2012) (documenting various ways in which federal immigration law, as well as state laws such as Arizona S.B. 1070, "readily provide color-blind, facially neutral proxies" for race and, "in the aggregate, [allow for racial discrimination] without the need for the express (and delegitimizing) reliance on race, on a massive scale"); Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOWARD L.J. 899, 902, 910–15 (2014) (discussing the "erosion of the 1965 Act's egalitarian goals" by the racially disparate impacts of workplace, national security, and criminal law enforcement).

2. See *infra* Section I.A.

3. See *infra* notes 50–61 and accompanying text. This constitutional estrangement was the product of a deep undercurrent—at once cultural, economic, and racial—of apprehension about the meaning of mass immigration for the quality of the nation's economic and political life. That apprehension found expression historically in a host of remarkably illiberal movements and policies that have colored American immigration policy, particularly before the mid-twentieth century. See generally Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 40–51 (2010) [hereinafter Lindsay, *Immigration as Invasion*]; Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 746–49 (2013) [hereinafter Lindsay, *Constitution of Foreignness*].

protections.<sup>4</sup>

This Article argues that the Supreme Court's recent immigration jurisprudence suggests a growing skepticism among the Justices that the regulation of noncitizens comprises a discrete, constitutionally privileged domain of distinctly "political" subject matter that is properly buffered against judicial scrutiny. To rescind that presumption would effectively disaggregate the category of "immigration law" for the purpose of constitutional review, and subject federal authority over immigrants and immigration to the same judicially enforceable constitutional constraints that apply to most other federal lawmaking. The disaggregation of immigration law would thus give full expression to noncitizens' constitutional personhood.

To better understand the terms and stakes of immigrants' constitutional estrangement, consider *Mathews v. Diaz*,<sup>5</sup> a staple of modern constitutional immigration law. In 1972, the U.S. Department of Health and Human Services denied the Medicaid applications of three elderly noncitizens—Cuban refugees Santiago Diaz and José Clara, and permanent resident Victor Espinosa—because they could not satisfy a statutory five-year residency requirement.<sup>6</sup> When Diaz, Clara, and Espinosa challenged the residency requirement as an unconstitutional denial of equal protection,<sup>7</sup> they had reason to be hopeful. The Supreme Court in *Graham v. Richardson* had recently applied strict scrutiny to a state law conditioning eligibility for welfare benefits on a period of residency and struck down the residency provision as an unconstitutional denial of equal protection.<sup>8</sup> Because "[a]liens as a class are a prime example of a 'discrete and insular' minority," the *Graham* Court declared, "classifications based on alienage, like those based on

4. The Due Process and Equal Protection Clauses protect "persons" without regard to citizenship. U.S. CONST. amends. V, XIV. The Supreme Court has long acknowledged as much when reviewing state laws discriminating on the basis of alienage. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (observing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality"). The First Amendment is framed as a general restraint on Congress. See U.S. CONST. amend. I. The only potentially meaningful exception is the Privileges and Immunities Clause of the Fourteenth Amendment, which prohibits the states from "abridg[ing] the privileges or immunities of citizens of the United States." *Id.* amend. XIV.

5. 426 U.S. 67 (1976).

6. *Id.* at 69–70.

7. *Id.* at 70–71. Specifically, the petitioners argued that the residency requirement violated the equal protection guarantee incorporated into the Due Process Clause of the Fifth Amendment by the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). See also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (declaring that equal protection under the Fifth Amendment "is the same as that under the Fourteenth Amendment").

8. 403 U.S. 365, 372, 382–83 (1971).

nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>9</sup> Yet the *Diaz* Court had little difficulty upholding the analogous federal statute. Because “the relationship between the United States and our alien visitors . . . may implicate our relations with foreign powers,” the Court explained, the responsibility of regulating noncitizens had been “committed to the political branches of the Federal Government.”<sup>10</sup> The same “reasons that preclude judicial review of political questions” therefore “dictate[d] a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”<sup>11</sup>

This constitutional diffidence has two curious features. First, there is a striking mismatch between the quintessentially *domestic* subject matter of the challenged statute—eligibility for federal Medicare benefits—and the Court’s rationale for deferring to the political judgment of Congress—the asserted connection between the regulation of noncitizens and the conduct of foreign affairs.<sup>12</sup> Second, the Court simply assumes without discussion that the challenged provision constituted a regulation of “immigration,” even though Medicare eligibility has no obvious bearing on any immigrant’s right to enter into or remain within the United States—the conventional indices of an immigration law.<sup>13</sup> These curiosities in the *Diaz* Court’s reasoning are symptoms of the Court’s very peculiar legal construction of the federal immigration power, known as the “plenary power doctrine.” Under the plenary power doctrine, federal authority to regulate immigration does not derive from any constitutionally enumerated power but is rather “an incident of sovereignty belonging to the government of the United States.”<sup>14</sup> The authority is thus extra-constitutional and exclusive to the federal government; moreover, its exercise by Congress or the President is buffered against judicially enforceable constitutional constraints.<sup>15</sup> As the

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9. *Id.* at 372 (footnotes omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

10. *Diaz*, 426 U.S. at 81.

11. *Id.* at 81–82.

12. *See id.* Federal courts of appeal rejected similar constitutional challenges to the 1996 Welfare Reform Act on the same grounds. *See infra* note 357.

13. *Diaz*, 426 U.S. at 79–80; *see also* *De Canas v. BICA*, 424 U.S. 351, 355 (1976) (defining the “regulation of immigration” as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”).

14. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889). The Court first grounded the federal immigration power in national sovereignty in the 1889 *Chinese Exclusion Case*, and it remains there to this day. For the classic formulation of the plenary power doctrine, *see id.* at 606–09; *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

15. This is not to suggest that the plenary power doctrine always wholly immunizes immigration-related federal lawmaking from meaningful constitutional review. As the Article

quoted language from *Diaz* suggests, the Court justifies the constitutional exceptionalism of the immigration power with reference to the purportedly intricate connection between immigration regulation and “basic aspects of national sovereignty, more particularly our foreign relations and the national security.”<sup>16</sup>

When a noncitizen encounters governmental authority outside of the immigration context—for example, as an employee, criminal defendant, or business licensee—he enjoys the same slate of constitutional protections afforded to citizens.<sup>17</sup> The moment a court determines that a federal law or enforcement action qualifies as a regulation of immigration per se, however, it triggers a constitutionally exceptional authority, the exercise of which lies largely beyond the scope of constitutional review.<sup>18</sup> This is true even when the constitutional protection being asserted—for example, the First Amendment or the Due Process or Equal Protection Clause—makes no distinction between “persons” and “citizens.”<sup>19</sup> Nor does it matter whether the underlying basis for removal bears even a colorable connection to foreign affairs or national security—for example, whether the noncitizen in question is a suspected terrorist mastermind or a teenage petty criminal. The consequences for noncitizens are often profound. Even long-term legal residents lack robust constitutional protections against improper detention during lengthy removal proceedings<sup>20</sup> or selection for removal based on otherwise constitutionally protected speech or associations.<sup>21</sup>

Scholars and courts alike have long noted the constitutional exceptionalism of federal immigration regulation, decried the injustice

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discusses below (*see infra* note 358), Justice Stevens’s unanimous opinion in *Diaz* does undertake a conscientious, if still highly deferential, form of rational basis review before concluding that the challenged alienage classification was “unquestionably reasonable” and not “wholly irrational.” *Id.* at 83. *See also infra* note 25 and accompanying text.

16. *Galvan v. Press*, 347 U.S. 522, 530 (1954); *see also, e.g., Demore v. Kim*, 538 U.S. 510, 522 (2003) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” (internal quotation marks omitted)). For background on the heightened national security cast of both political debate over immigration policy and constitutional immigration law in the years following the 9/11 terrorist attacks, see Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1830 (2007) and Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370–71 (2007).

17. *See infra* notes 205–07 and accompanying text; *see also Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

18. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

19. U.S. CONST. amends. I, V, XIV.

20. *See Demore*, 538 U.S. at 513.

21. *See Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999).

that it produces, and called for greater constitutional protection for noncitizens.<sup>22</sup> This Article builds on this literature but refocuses critical attention on a key but under-analyzed conceptual and doctrinal obstacle to legal reform: the notion that laws and regulations governing the rights of noncitizens to enter and remain within the United States comprise a discrete body of immigration laws that are presumed to be part and parcel of foreign affairs and national security.<sup>23</sup> It argues that this presumption is descriptively and analytically incoherent, and that its incoherence has produced a cascade of doctrinal confusion and substantive injustice. The Supreme Court should instead disaggregate immigration law for the

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22. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 196 (2002); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 15–20 (2007); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 13–14 (1996) (describing the “immigration anomaly”); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 19 (1998) (characterizing immigration as a legal “maverick” and “wild card”); T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9–10 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1704 (1992) (noting the “singularity” of immigration) [hereinafter Motomura, *Curious Evolution*]; Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) [hereinafter Motomura, *Federalism*] (defining “immigration exceptionalism” . . . as the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking”). But see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257–58 (2000) (arguing that the Court’s review of various discriminatory grounds for exclusion and deportation “may not be that different from how it has treated those groups domestically” and that “many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law”).

23. One might plausibly object that, although the foundational nineteenth-century plenary power cases did ground immigration exceptionalism squarely in foreign affairs and national security, the modern justification for the doctrine is considerably broader and more varied, and includes rationales that cannot easily be dismissed as inaccurate or anachronistic. Professor Hiroshi Motomura, for one, defends a discrete form of “immigration exceptionalism” with respect to federal exclusivity on the ground that immigration law and policy is “part of a project of national self-definition.” Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1374 (1999). Although it is true that immigration implicates distinctly national interests in ways that are highly relevant to constitutional immigration law (particularly with respect to federalism), my focus on the foreign affairs/national security rationale is nevertheless warranted because that rationale continues to do the lion’s share of rhetorical work in justifying the insulation of immigration-related lawmaking from constitutional review. See *infra* notes 406–17 and accompanying text (discussing *Demore v. Kim*); see also David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015) (arguing that the strong and continuing linkage between immigration and foreign affairs explains the durability of the plenary power doctrine in the face of decades of criticism by scholars and advocates).

purpose of constitutional review and recognize both federal and state regulation of noncitizens for what it is: a variegated conglomeration of laws and enforcement actions that concern labor, crime, public health and welfare, and, sometimes, foreign affairs and national security.

Under a disaggregated immigration law, courts would no longer approach the regulation of noncitizens as a distinct, constitutionally privileged domain of “political” subject matter. Rather, immigration-related lawmaking would be recast as a constitutionally ordinary instance of federal authority, akin to Congress’s “plenary” power to regulate commerce or to tax and spend for the general welfare. Federal action toward noncitizens would therefore be constrained by the same substantive, judicially enforceable constitutional norms that apply to most other federal lawmaking and enforcement. The disaggregation of immigration law would thus give full expression to noncitizens’ constitutional personhood; accordingly, regulations that employ a suspect classification, infringe a fundamental liberty interest, or chill free expression would be subject to strict constitutional scrutiny. Foreign policy and national security considerations would continue to serve as constitutionally viable warrants for laws burdening noncitizens, but Congress and the President would no longer enjoy the extraordinary judicial deference that they currently receive as a matter of course.<sup>24</sup>

Part I of this Article provides a brief overview of the federal immigration power, including its history, doctrine, and underlying rationale. It then argues that the varied legal techniques through which national and subnational governments attempt to govern noncitizens defy the basic notion of a legally discrete category of immigration laws that are functionally distinct from a host of other, *non*-immigration laws that shape the lives and migration-related choices of noncitizens.

Part II seeks to dispel the aura of naturalness that surrounds the plenary power doctrine. It first considers the history of immigration-related lawmaking in the century before immigration law emerged as a discrete legal category. It demonstrates that until the final decades of the nineteenth century, immigration regulation was an unexceptional aspect of both the state police power and the federal commerce power. It then describes a counter-history of plenary federal power—a history of dissent, criticism, and doubt on the part of not only scholars and activists,

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24. See *infra* notes 346–55 and accompanying text. The disaggregation of immigration law likewise would have important consequences for developing “immigration federalism” jurisprudence. Specifically, and in contrast to the current framework, courts would be able to acknowledge that the purpose and effect of many recent state and local initiatives is to deter certain noncitizens from living and working within a given jurisdiction, without rendering such laws automatically preempted under the plenary power doctrine. See *infra* notes 102–110, 350 and accompanying text.

but also many Supreme Court Justices—that refutes the claims of inevitability that typically characterize defenses of immigration exceptionalism.

Part III argues that the Supreme Court should disaggregate immigration law for the purpose of constitutional review. Section III.A contends that certain recent legal and rhetorical gestures on the part of the Supreme Court in *Zadvydas v. Davis*<sup>25</sup> and *Padilla v. Kentucky*<sup>26</sup> evidence a growing discomfort among the Justices toward the notion of a discrete, constitutionally privileged domain of immigration law. Section III.B considers the constitutional implications of a disaggregated, unexceptional immigration law in three select doctrinal contexts: the administration of public benefits, removal, and detention. Section III.C concludes by briefly sketching a course of doctrinal development that could plausibly culminate in the disaggregation of immigration law.

## I. THE FEDERAL IMMIGRATION POWER

This Part provides a brief overview of the modern federal immigration power, commonly known as the plenary power doctrine. As Section I.A explains, the plenary power doctrine defines as its object a legally discrete category of immigration laws that are presumed to be inextricably linked to the political branches' regulation of foreign affairs and national security. Section I.B argues that the notion of a distinct category of immigration law seriously mischaracterizes the relationship between immigration-related lawmaking and the actual governance of foreign migration to and from the United States; and further, that courts deploy the category instrumentally, as a means of calibrating constitutional skepticism toward a challenged law.

### A. *Plenary Federal Power, in Theory*

The modern federal immigration power is constitutionally exceptional in two distinct but interrelated aspects. First, the authority to regulate immigration does not derive from any enumerated power, but is rather "an incident of sovereignty belonging to the government of the United States."<sup>27</sup> Second, the federal government's enactment and enforcement of immigration laws is buffered against judicially enforceable constitutional constraints.<sup>28</sup>

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25. 533 U.S. 678, 695–96 (2001).

26. 130 S. Ct. 1473, 1478 (2010) (Alito, J., concurring).

27. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

28. *See, e.g., id.* at 606–09.

Ever since the Supreme Court first adopted the plenary power doctrine in the 1889 *Chinese Exclusion Case*,<sup>29</sup> it has justified this constitutional exceptionalism with reference to the purportedly intricate connection between the admission and removal of foreigners and “basic aspects of national sovereignty, more particularly our foreign relations and the national security.”<sup>30</sup> Because the authority emanates from the nation’s sovereignty, it is exclusively federal.<sup>31</sup> Although state and local governments can and do govern noncitizens in various ways outside of the immigration context, once a subnational law or enforcement practice is understood to implicate “core” immigration functions, it is structurally preempted under the Supremacy Clause.<sup>32</sup> This was not always the case. The late nineteenth-century Supreme Court refashioned the federal immigration power from a branch of Congress’s commerce power adapted to the regulation of labor, economic dependency, and crime—issues that have always characterized most immigration lawmaking—to the defense of the nation against foreign invasion.<sup>33</sup> Even today, when the *Chinese Exclusion Case* has long since assumed a prominent place in the Supreme Court hall of infamy, the Court continues to reason from the premise that certain laws and enforcement actions bearing on noncitizens occupy a logically self-evident, legally discrete category of immigration laws that are part and parcel of foreign affairs and national security.<sup>34</sup> Moreover, the Court perpetuates that premise even though the social and political judgments that historically appeared to justify it would strike most contemporary policy makers and judges as both anachronistic and patently racist.<sup>35</sup>

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29. *Id.* at 604.

30. Galvan v. Press, 347 U.S. 522, 530 (1954). On the origin of the “national security rationale” for immigration exceptionalism, see Lindsay, *Immigration as Invasion*, *supra* note 3, at 40.

31. See Lindsay, *Immigration as Invasion*, *supra* note 3, at 26.

32. Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2217–18 (2003).

33. Lindsay, *Immigration as Invasion*, *supra* note 3, at 6; Lindsay, *Constitution of Foreignness*, *supra* note 3, at 747–48 (“Throughout the nation’s first century, immigrants’ non-citizenship was incidental, or at least secondary, to the nature of the regulatory authority to which they, as immigrants, were subject. . . . Immigrants were legally reconstructed as foreigners only in the final decades of the nineteenth century, as Europeans and Chinese migrants alike increasingly became understood as fundamentally and permanently alien to the American character. . . . The Supreme Court then translated the discourse of indelible foreignness into a potent and durable rationale for immigration exceptionalism, forging the immigration power into an instrument of national ‘self-preservation’ to be deployed against invading armies of economically degraded, politically unassimilable, racially suspect foreigners.”).

34. Lindsay, *Constitution of Foreignness*, *supra* note 3, at 746–47.

35. See *id.* at 748 & n.20, 794–95.

Archetypal "immigration regulations" are rules that bear on the right of noncitizens to enter and remain within a jurisdiction, particularly federal statutes and regulations that define eligibility for admission to and grounds for removal from the United States.<sup>36</sup> Under this rubric, immigration laws are conceptually distinct from so-called "alienage laws," which target noncitizens for differential treatment but are not understood to implicate "core" immigration functions.<sup>37</sup> Examples include federal or state provisions excluding noncitizens or a class of noncitizens from receiving public assistance,<sup>38</sup> working without state authorization,<sup>39</sup> or entering particular occupations.<sup>40</sup> The Court's approach to alienage laws is notoriously opaque. It is reasonably clear that *state* alienage laws are generally subject to both conflict preemption analysis under the Supremacy Clause<sup>41</sup> and heightened scrutiny under the Fourteenth Amendment.<sup>42</sup> As a result, they are constitutionally suspect, but sometimes permissible.<sup>43</sup> Yet when reviewing *federal* alienage laws, though in theory distinct from immigration regulations per se, the Court has tended to blur the immigration/alienage boundary and to show considerable deference.<sup>44</sup> Although, as the following Section will discuss, the immigration/alienage distinction does not hold up under closer scrutiny, it nevertheless operates as a central premise of a relatively unfettered federal immigration power and shapes the Court's recent immigration federalism jurisprudence.

The precise nature of noncitizens' constitutional estrangement under the plenary power doctrine is likewise somewhat murky. On some occasions, the Supreme Court has implied that the substantive constitutional norms that otherwise constrain congressional power simply do not apply in the immigration context.<sup>45</sup> Yet at other times, the Court

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36. See Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 360–61 (2008).

37. *Id.* at 351.

38. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 78–79 (1976); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

39. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2503–05 (2012).

40. See, e.g., *Hampton v. Wong*, 426 U.S. 88, 116–17 (1976).

41. See, e.g., *Arizona*, 132 S. Ct. at 2500–01.

42. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973); *Graham*, 403 U.S. at 371–72.

43. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (upholding an Arizona law penalizing businesses that hired undocumented workers); *Cabell v. Chavez-Salido*, 454 U.S. 432, 447 (1982) (upholding a state requirement of U.S. citizenship for "peace officers"); *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979) (upholding a state requirement of U.S. citizenship for public school teachers).

44. See, e.g., *Vergara v. Hampton*, 581 F.2d 1281, 1286 (1978); *Mathews v. Diaz*, 426 U.S. 67, 69–71 (1976).

45. See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373,

has suggested that constitutional guarantees of due process and equal protection do, at least in theory, limit federal authority in immigration matters, but that the enforcement of those guarantees against Congress and the Executive Branch is beyond the proper institutional role of the federal courts.<sup>46</sup> Although both readings find plausible support in the case law, the Court's highly deferential posture is best understood as a limitation of the judicial role rather than the absence of applicable constitutional norms.<sup>47</sup>

Regardless of the legal-theoretical basis for buffering immigration regulation against constitutional review, the consequences for immigration lawmaking and enforcement, and, not least, for noncitizens themselves, are profound and far-reaching. Congress enjoys virtually unlimited authority to establish criteria for admission of noncitizens.<sup>48</sup> As Justice Felix Frankfurter explained six decades ago, policies governing the rights of noncitizens to enter or remain within the U.S. "are for Congress exclusively to determine even though such determination may be deemed to offend American traditions."<sup>49</sup>

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384–86 (discussing the "unlimited congressional power" conception of the plenary power doctrine and citing various judicial opinions employing that conception).

46. Professor Adam Cox proposes a third plausible reading of the insulation of immigration law against constitutional review: that "the plenary power doctrine is principally a doctrine of standing," under which "aliens lack the right to seek meaningful judicial review of the constitutionality of immigration policy." *Id.* at 278, 389.

47. As this Article discusses, the Court's self-conscious construction of federal statutes to avoid constitutional difficulties only makes sense if the Justices believe that substantive constitutional norms do, or at least should, apply to immigration regulation. *See infra* notes 295–23 and accompanying text. Consider, too, the *Diaz* Court's reference to the political question doctrine. *Diaz*, 426 U.S. at 81–82 ("The reasons that preclude judicial review of political questions also dictate[d] a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." (footnote omitted)). The Court is not literally invoking the political question doctrine in the sense of declaring that immigration regulation is nonjusticiable. Rather, it is suggesting that, similar to the way that certain issues raise nonjusticiable political questions, the subject matter involved in immigration regulation—specifically, "our relations with foreign powers"—warrants judicial restraint (i.e. "a narrow standard of review"), though not abstention. *See id.* (emphasis added). For a persuasive analysis of this issue, see ALENIKOFF, *supra* note 22, at 153–59.

48. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

49. *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring). When a noncitizen is denied entry at the border, and even detained for an extended period, "[w]hatever the procedure authorized by Congress is, it is due process." *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *see also Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauff* and agreeing that Congress has the ultimate authority to deny entry to an alien). On the difficulties involved in allocating rights based on this territorial distinction, see Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995). *But see Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (noting that although "an alien seeking initial admission to the United States requests a

It is perhaps in the context of removal (formerly called "deportation") that the relative absence of judicially enforceable constitutional constraints is most conspicuous.<sup>50</sup> Indeed, the Court has repeatedly recognized that deportation often "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."<sup>51</sup> Although the INA affords noncitizens certain due process rights during removal proceedings,<sup>52</sup> even those who have lived in the United States legally for decades lack robust constitutional protections against selection for removal based on otherwise constitutionally protected speech or associations,<sup>53</sup> or against unwarranted detention during lengthy removal proceedings.<sup>54</sup> Further, while it "cannot be doubted" that "deportation is a penalty,"<sup>55</sup> it is technically a civil proceeding rather than criminal punishment; therefore, noncitizens subject to removal are denied the suite of rights that protect criminal defendants against governmental abuses.<sup>56</sup> As a result, a noncitizen facing removal does not receive a *Miranda* warning,<sup>57</sup> does not have a Sixth Amendment right to appointed counsel,<sup>58</sup> cannot suppress evidence obtained in violation of the Fourth Amendment,<sup>59</sup> cannot challenge the retroactive application of new grounds for removal

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privilege and has no constitutional rights regarding his application, . . . a continuously present permanent resident alien [seeking reentry to the United States] has a right to due process").

50. The term "removal" now encompasses both deportation and inadmissibility. See Immigration and Nationality Act, 8 U.S.C. § 1229a(a) (2012). For an enlightening history of deportation policy and process, see generally KANSTROOM, *supra* note 22 (analyzing "the nature and history of a particular exertion of U.S. government power over noncitizens: its power to detain and to deport"); Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803 (2013).

51. *E.g.*, *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). As Justice Hugo Black explained sixty years ago, a noncitizen facing deportation stands to lose "his job, his friends, his home, and maybe even his children, who must choose between their father and their native country." Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting).

52. The Immigration and Nationality Act provides that a noncitizen receive written notice to appear, which informs him of the nature of the proceeding, the charges against him, and the legal authority under which the proceedings are conducted. 8 U.S.C. § 1229-29a. A noncitizen is afforded "a reasonable opportunity to examine evidence against [him], to present evidence on [his] own behalf, and to cross-examine witnesses presented by the Government" and the right to be represented by counsel "at no expense to the Government." *Id.* §§ 1229a(4)(A)-(B).

53. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491-92 (1999); *Galvan*, 347 U.S. at 523.

54. See *Demore v. Kim*, 538 U.S. 510, 513 (2003).

55. *Bridges*, 326 U.S. at 154.

56. *But see Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (holding that a defense attorney's failure to inform a noncitizen criminal defendant of the likely immigration consequences of a guilty plea constituted ineffective assistance of counsel within the meaning of the Sixth Amendment).

57. *United States v. Silva*, 715 F.2d 43, 46 (2d Cir. 1983).

58. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568-69 (6th Cir. 1975).

59. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984).

as a violation of the ex post facto clause of Article I,<sup>60</sup> and is not entitled to a conscientious review of his removal order.<sup>61</sup>

The stakes of this legal state of affairs for millions of noncitizens could hardly be higher. Over the past two decades, both the number of removable noncitizens and the number of actual removals have exploded. After fluctuating between 3900 and 38,500 deportations annually for most of the twentieth century, the number surged in the 1990s,<sup>62</sup> especially following the adoption of two federal statutes in 1996<sup>63</sup>: the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>64</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>65</sup> The laws radically expanded the statutory grounds for exclusion and deportation, applied new grounds for deportation retroactively, and eliminated certain discretionary waivers of deportability.<sup>66</sup> As a result, deportations more than doubled, from fewer than 51,000 in 1995 to more than 114,000 in 1997.<sup>67</sup> The number of noncitizens confined in federal detention facilities during the pendency of removal proceedings has swelled accordingly, to more than 440,000.<sup>68</sup> In 2013, the most recent

60. *Harisiades v. Shaughnessy*, 342 U.S. 580, 593–95 (1952).

61. See 8 U.S.C. § 1252 (2012) (severely limiting judicial review of removal orders). As Professor Daniel Kanstroom explains, a noncitizen who appeals a removal order may “receive a summary decision made by a single member of the understaffed and overwhelmed Board of Immigration Appeals produced after a ten-minute review of his case.” If the noncitizen appeals to a federal court, “he may well find that the court declines review of ‘discretionary’ questions, such as his potential eligibility for ‘relief’ from removal.” KANSTROOM, *supra* note 22, at 4; see also Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392–95 (2006) (describing the paucity of constitutional protection in immigration proceedings relative to the criminal context). It is stark testimony to the inadequacies of the current immigration adjudication system that there are several documented cases of U.S. citizens being denied entry or erroneously deported, based on the mistaken conclusion that they were noncitizens. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1971–80 (2013). For an overview of the daunting inadequacies of the underfunded, understaffed, and politicized immigration adjudication system, see generally Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1645–76 (2010).

62. *Yearbook of Immigration Statistics: Immigration Enforcement Actions: 2012*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/publication/yearbook-immigration-statistics-2012-enforcement-actions> (last visited Jan. 16, 2016) [hereinafter *Yearbook of Immigration Statistics*].

63. Walter A. Ewing, *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (Apr. 9, 2014), <http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine>.

64. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 8 U.S.C. § 1182.

65. Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA), 8 U.S.C. § 1227.

66. See KANSTROOM, *supra* note 22, at 10, 228–31.

67. *Yearbook of Immigration Statistics*, *supra* note 62.

68. JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, ANNUAL REPORT 6 (2014), <http://www.dhs.gov/sites/default/files/publications/>

year for which the U.S. Department of Homeland Security has reported removal statistics, the number stood at 438,000.<sup>69</sup> Notwithstanding President Barack Obama's declared policy of exercising prosecutorial discretion to focus removal efforts on noncitizens who "pose a danger to national security or a risk to public safety,"<sup>70</sup> as well as the 2012 initiative to provide legal status to certain undocumented noncitizens brought to the United States as children,<sup>71</sup> the Obama Administration has overseen more removals annually than any of his predecessors. During President George W. Bush's eight years in office, the United States removed just over 2,000,000 noncitizens;<sup>72</sup> President Obama's administration surpassed that number in April 2014—only sixteen months into the President's second term.

### B. *Classification Trouble: What Is an "Immigration Law"?*

Modern constitutional immigration law is premised on a distinction between a discrete class of immigration laws that govern the rights of noncitizens to enter and remain within the United States, and the host of other state and federal laws that subject noncitizens to various burdens and disabilities but do not purport to regulate immigration per se. This Section argues that the immigration/alienage distinction is analytically incoherent; and further, that courts often approach those categories instrumentally, by classifying state and federal rules alternatively as either "immigration" or "alienage" laws as a means of calibrating constitutional skepticism.

Immigration laws are generally classified as such because they define the rights of noncitizens to enter and remain within the United States, and thus operate as what Professor Adam B. Cox helpfully labels "selection

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ois\_enforcement\_ar\_2013.pdf. For a helpful overview of the 1996 reforms, see generally David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 62–68 (2001) and Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

69. SIMANSKI, *supra* note 68, at 1. Congress's "radical expansion of the grounds of deportation," in combination with "stringent admissions restrictions . . . and lax border enforcement policy by the Executive," has had the "counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive." Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

70. Memorandum from John Morton, Director of U.S. Immigration & Customs Enforcement, to All ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

71. *Deferred Action for Childhood Arrivals*, U.S. DEP'T OF HOMELAND SEC. (July 17, 2015), <http://www.dhs.gov/deferred-action-childhood-arrivals>.

72. See *Yearbook of Immigration Statistics*, *supra* note 62.

rules.”<sup>73</sup> Immigrant selection encompasses, most obviously, rules defining which noncitizens are eligible for admission to the United States, as well as rules governing the removal (or *de*-selection) of noncitizens already present in U.S. territory.<sup>74</sup> Selection rules are understood to be analytically and legally distinct from the vast array of state and federal laws that directly and indirectly *regulate* the status and conduct of noncitizens, but which do not purport to govern immigration *per se*.<sup>75</sup> The concepts rest on “a rough sense that selection has to do with the process of sorting, while regulation has to do with the process of determining how immigrants residing in the United States live their lives.”<sup>76</sup> Because the selection of noncitizens is understood to implicate national sovereignty and foreign affairs in ways that the regulation of resident noncitizens does not, the Court affords the federal government very broad authority to adopt and enforce selection rules, while restraining local, state and (to a lesser extent) federal regulation of resident noncitizens.<sup>77</sup>

Although the notion of a logically and legally discrete category of immigration laws is attractive in its apparent analytical clarity, it seriously mischaracterizes the manner in which immigration-related lawmaking and enforcement actually *governs* the migration of noncitizens to and from the United States. As Professor Cox explains, “Every rule that imposes duties on noncitizens imposes both selection pressure, potentially influencing noncitizens’ decisions about whether to enter or depart the United States, and regulatory pressure, potentially influencing the way in which resident noncitizens live.”<sup>78</sup> Consider the various statutory provisions that govern noncitizens’ eligibility to immigrate to the United States, such as rules concerning family connections,<sup>79</sup> employment qualifications,<sup>80</sup> and numerical quotas;<sup>81</sup> as well as conditions on noncitizens’ continued residence in the United States, such as refraining from certain criminal conduct.<sup>82</sup> As selection

73. Cox, *supra* note 36, at 344–45.

74. *Id.* at 342–43.

75. *See id.* at 343–45.

76. *Id.* at 345.

77. *See Hampton v. Wong*, 426 U.S. 88, 116 (1976) (striking down a federal Civil Service Commission regulation barring noncitizens from employment in the competitive civil service).

78. Cox, *supra* note 36, at 343. Professor Cox is not the first to point to the difficulty in drawing a clean distinction between immigration and alienage laws. *See, e.g.*, Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1063–68 (1994); Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2451–52 (2007); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 203 (1994) [hereinafter Motomura, *Immigration and Alienage*].

79. *See* Immigration and Nationality Act, 8 U.S.C. § 1151(c) (2012).

80. *See id.* § 1153(b).

81. *See id.* § 1152.

82. *See id.* § 1227(a)(2).

rules, these are archetypal immigration laws insofar as they define who is eligible to enter and remain within the United States. But as Professor Cox observes, such rules also necessarily “operate as immigrant-regulating rules by generating powerful incentives for immigrants to live their lives in particular ways.”<sup>83</sup> Most obviously, the prospect of removal from the United States “creates pressure for a resident noncitizen to avoid committing crimes classified as aggravated felonies.”<sup>84</sup> Similarly, federal statutory provisions making unauthorized entry grounds for removal will inform the choices of unauthorized entrants about where to live and work, as well as whether to engage in conduct that risks an encounter with government officials, such as driving or registering one’s children for school.<sup>85</sup>

Just as selection rules create substantial regulatory pressure, “putative immigrant-regulating rules create substantial selection pressure.”<sup>86</sup> Consider the recent spate of state and local laws restricting housing and employment opportunities for some noncitizens; requiring that noncitizens carry special registration documents; restricting eligibility for certain public benefits; and prohibiting noncitizen voting and office-holding.<sup>87</sup> These are classic alienage regulations in the sense that they burden noncitizens by virtue of their lack of citizenship but do not formally govern anyone’s right to enter or remain within a jurisdiction. Yet such regulations will powerfully shape noncitizens’ migration decisions—whether to migrate to the United States in the first place, where to settle if one does decide to migrate, and whether to remain in the United States or in a particular state if one has migrated already.<sup>88</sup>

The creation of selection pressure is the natural, and often intended, effect of such regulations. Indeed, the Supreme Court has acknowledged that state discrimination against noncitizens “necessarily operate[s] . . . to discourage entry into or continued residency in the State.”<sup>89</sup> To deny an alien “the necessities of life, including food, clothing and shelter . . . equate[s] [to] the assertion of a right, inconsistent with federal policy, to

83. Cox, *supra* note 36, at 361.

84. *Id.*

85. As Professor Cox observes, the “regulation effects of immigration rules” are not limited to noncitizens already present in the United States, as conditions for admission may shape “potential migrants’ decisions about education, marriage, and [employment].” *Id.* at 363.

86. *Id.* at 364.

87. For a fuller discussion of such laws, see *infra* notes 102–05 and accompanying text.

88. See generally Martin, *supra* note 68, at 18 (“Changes to the treatment or opportunity of noncitizens in the United States, whether in the direction of restriction or liberalization, almost inevitably affect the decisions of people and organizations abroad who are thinking about organizing or participating in migration to the United States.”).

89. *Graham v. Richardson*, 403 U.S. 365, 379 (1971).

deny entrance and abode.”<sup>90</sup> Viewed in this light, “such laws encroach upon exclusive federal power, [and] are constitutionally impermissible.”<sup>91</sup> The categorical distinction between immigration and alienage laws—or, in Professor Cox’s terminology, between immigrant-selecting rules and immigrant-regulating rules—is further complicated by the federal government’s long-standing and very deliberate practice of selectively under-enforcing federal immigration law—a practice that has prompted many states and localities to enter into the immigration arena.<sup>92</sup>

In short, that neat division between a select class of immigration laws and the various non-immigration laws that nevertheless directly and palpably shape the migration decisions of noncitizens, does not reflect how law actually functions to govern immigrants and immigration. Moreover, even if it were possible to draw an analytically defensible dividing line, it is unclear why that line would carry any legal significance.

If the distinction between immigration and alienage regulation is so illusory, however, why does it continue to operate as a central premise of the federal immigration power? Most obviously, the notion of a discrete body of laws defining who will be included with the American polity helps to underwrite the inherent sovereignty rationale for immigration exceptionalism. Insofar as formal legal conditions for admission and removal govern access to U.S. territory, the U.S. labor market, and potentially U.S. citizenship, they appear to implicate national sovereignty with an immediacy that mere alienage regulations do not.

More subtly, however, the distinction between immigration and alienage regulations also endows courts with remarkable flexibility in how they adjudicate challenges to laws that impose distinctive burdens or disabilities on noncitizens. Because the fiction of a discrete category of immigration laws radically understates the range of legal techniques through which lawmakers and other officials govern immigration—and which could therefore plausibly be characterized as immigration laws—it falls upon courts to classify a challenged law as either a regulation of immigration *per se* or something else. This classification function, in turn,

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90. *Id.* at 380 (internal quotation marks omitted).

91. *Id.*

92. As Hiroshi Motomura explains, by making “both lawful admissions and enforcement . . . highly selective,” the federal government has, in effect, invited mass “immigration outside the law,” primarily in order to satisfy domestic labor demands. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 22 (2014). Under this self-conscious “scheme of tolerance,” Motomura argues, “the actual operation of law in action . . . amount[s] to government policy,” even if that policy “seems inconsistent with what is explicitly written in statutes and regulations.” *Id.* at 107, 109. Many states and localities, in turn, have interpreted that unspoken federal “policy” as a vacuum of federal enforcement, and sought to fill that vacuum with their own immigration measures. *See id.* at ch. 2.

affords courts significant discretion in how they position various state and federal laws in relation to a given constitutional challenge. Consider *Mathews v. Diaz*, discussed in the opening paragraphs of this Article.<sup>93</sup> The Court simply assumed without discussion that the challenged provision—a federal statute establishing a five-year residency requirement for receiving Medicaid—constituted an immigration law.<sup>94</sup> That assumption consigned the matter to the “political branches,”<sup>95</sup> and thus limited the Court’s role in reviewing the constitutionality of a federal rule that had no obvious bearing on any immigrant’s right to enter or remain within the United States and that lacked a substantial connection to foreign affairs, national security, or any other typical concomitant of U.S. sovereignty. In short, the Court’s unstated classification foreclosed meaningful scrutiny of the noncitizen plaintiffs’ equal protection claims.

Five years earlier, when the Court struck down a similar *state* residency requirement in *Graham v. Richardson*,<sup>96</sup> one might have expected it to be on *federal* preemption grounds. After all, if the Court had classified the statute as an immigration law, as it did the analogous federal provision in *Diaz*, it would have been structurally preempted under the Supremacy Clause for having treaded into an exclusively federal regulatory domain.<sup>97</sup> Yet the Court did not stake its holding to the classification of the residency requirement as an immigration law. Instead, it invalidated the provision as an unconstitutional denial of equal protection.<sup>98</sup> Because “[a]liens as a class are a prime example of a ‘discrete and insular’ minority,” the *Graham* Court reasoned, “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”<sup>99</sup>

The slippage between the ostensibly discrete categories of immigration and alienage law afforded the Court considerable flexibility. Specifically, by approaching the provision in *Graham* primarily as an ordinary state welfare law, and only “additional[ly]” as a regulation of immigration, the majority elected to adjudicate the equal protection

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93. See *supra* notes 5–11 and accompanying text.

94. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

95. *Id.*

96. 403 U.S. at 382–83.

97. See Waxman & Morrison, *supra* note 32, at 2217–18.

98. *Graham*, 403 U.S. at 372.

99. *Id.* (footnotes omitted). Even before the Supreme Court adopted the now-familiar framework of applying heightened scrutiny to so-called “suspect classifications,” it struck down various state laws as a denial of equal protection. See, e.g., *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419–20 (1948) (striking down on equal protection grounds a state law restricting issuance of fishing licenses to noncitizens); *Traux v. Raich*, 239 U.S. 33, 43 (1915) (striking down on equal protection grounds a state law requiring a minimum percentage of employees to be U.S. citizens).

claim, and thus to pass constitutional judgment on what the justices viewed as an invidious classification.<sup>100</sup> But in *Diaz*, approaching the analogous federal statute as an immigration law enabled the Court to defer to the political judgment of Congress without having to explain why the challenged alienage classification did not offend a core constitutional commitment to equal treatment.

Nowhere is the judicial utility of this classification function more evident than in federal preemption challenges to the recent flood of state and local laws regulating noncitizens.<sup>101</sup> Most prominently, in *United*

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100. See 403 U.S. at 376–77.

101. The new “immigration federalism” has given rise to a large scholarly literature representing a broad spectrum of assessments. See, e.g., MOTOMURA, *supra* note 92, at ch. 2 (analyzing the broad array of state and local laws adopted in the 1990s and 2000s, as well as their influence on federal policy); Erin F. Delaney, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1855–56 (2007) (proposing the application of dormant Commerce Clause analysis to state laws regulating aliens as a way to overcome the limitations of conventional federal preemption doctrine and relative immunity to constitutional review of state laws enacted under an authority devolved from Congress); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that immigration is akin to “areas of constitutional law that involve a mix of federal and state authority” and rejecting the view that any state immigration regulation is structurally preempted); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012) (observing that the federal courts’ application of conventional preemption analysis to state and local efforts to regulate immigration often obscures important civil rights implications, including possible racial profiling); Motomura, *Federalism*, *supra* note 22, at 1392–94 (arguing in favor of retaining a discrete form of “immigration exceptionalism” with respect to federal exclusivity); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) (arguing that “immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (2007) (arguing for “a more robust role for the states in certain areas of immigration policy,” as long as “they reflect a legitimate state interest and do not interfere with the goals of federal immigration policy”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628–39 (1997) (proposing that immigration federalism may serve a “steam-valve” function in which the opportunity for anti-alien states to effectuate their political preferences, albeit in a limited way, could dampen the political impetus for federal anti-alien measures); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1565 (2008) (predicting that the “domestication of immigration law” by states and localities concerned with economic and criminal issues is “bound to expand judicial acceptance of state and local participation in immigration control”); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008) (arguing that the immigration federalism “crisis” identified by critics of subnational regulation is less “a response to immigration or a consequence of existing federal immigration policy” than a “more familiar byproduct of . . . how we structure and organize local communities . . . , provide and allocate local services, and define the legal relationship of local, state and federal governments”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration*

*States v. Arizona*, the Supreme Court struck down provisions of Arizona Senate Bill 1070 (SB 1070), which required aliens to carry registration documents, authorized the arrest of any person suspected of being an undocumented alien, and made it illegal for an undocumented alien to hold or seek employment.<sup>102</sup> Laws such as Arizona's bear many of the indices of immigration laws. Their often-express purpose is to deter undocumented migrants from entering the state and to induce those already present to leave. Indeed, the Arizona legislature's "declare[d] . . . intent" in adopting SB 1070 was "to make *attrition through enforcement* the public policy of all state and local government agencies in Arizona."<sup>103</sup> As the sponsor of a similar 2011 Alabama law explained, the theory of "attrition through enforcement," or "self-deportation," is that by "attack[ing] every aspect of an illegal immigrant's life," states and localities can "make it difficult for them to live here so they will deport themselves."<sup>104</sup> In fact, attrition through enforcement is a well-theorized strategy promoted aggressively over the previous decade by immigration restriction organizations and legal activists.<sup>105</sup>

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*Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001) (arguing that the 1996 Welfare Act's devolution to the states of the authority to deny benefits on the basis of alienage amounted to an "invitation to discriminate").

102. 132 S. Ct. 2492, 2503–05 (2012). Five more states—Alabama, Georgia, Indiana, South Carolina, and Utah—soon followed Arizona's lead, adopting bills modeled after S.B. 1070. Like the Arizona statutes, these laws "require law enforcement to attempt to determine the immigration status of a person involved in a lawful stop; allow state residents to sue . . . for noncompliance with immigration enforcement; require E-Verify . . . ; prohibit the harboring . . . of unauthorized aliens; and make it a violation for failure to carry an alien registration document." Brooke Meyer et al., *Immigration Policy Report: 2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/immigration/state-immigration-legislation-report-dec-2011.aspx> (last visited Jan. 16, 2016).

103. See Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41). *Id.* § 1 (emphasis added).

104. *Caught in the Net: Alabama's Immigration Law Is Proving Too Strict and Too Costly*, ECONOMIST (Jan. 28, 2012), <http://www.economist.com/node/21543541> (internal quotation marks omitted). The Alabama law additionally required public schools to verify students' immigration status. *Id.*

105. On the career of "attrition through enforcement," see MICHELE WASLIN, IMMIGRATION POL'Y CTR., DISCREDITING "SELF-DEPORTATION" AS IMMIGRATION POLICY 2–4 (2012), [http://www.immigrationpolicy.org/sites/default/files/docs/Waslin\\_-\\_Attrition\\_Through\\_Enforcement\\_020612.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Waslin_-_Attrition_Through_Enforcement_020612.pdf). In particular, Kansas Secretary of State Kris Kobach has been a legal and intellectual leader of the movement for attrition through enforcement. *Id.* at 4–5. Secretary Kobach, a former immigration official in the George W. Bush administration, coauthored the Arizona and Alabama immigration statutes, has published academic articles advocating for an expanded role for states and localities in combating unauthorized immigration, and as an attorney defended various state and local provisions against constitutional attack. *Id.*; see also e.g., Kris W. Kobach, *The*

If laws such as Arizona's were classified as immigration laws, they would be structurally preempted for having interfered in an exclusively federal regulatory arena.<sup>106</sup> Indeed, the logical argument for treating them as immigration laws seems quite compelling. In light of the Arizona legislature's declared purpose of "attrition through enforcement," Judge John Noonan of the U.S. Court of Appeals for the Ninth Circuit observed, "Without qualification, Arizona establishes its policy on immigration."<sup>107</sup> But Judge Noonan stands alone in that conclusion among federal judges. Courts have uniformly declined to review laws such as Arizona's as immigration laws, even while recognizing that they are motivated, at least in part, by legislatures' desire to effect noncitizens' migration and settlement decisions. In *Arizona v. United States*, for example, the Court cited the state's declared policy of "attrition through enforcement" and readily acknowledged that the express purpose of SB 1070 was to exert selection pressure on undocumented noncitizens who were either already present in or considering migrating to the state.<sup>108</sup> To uphold the provision authorizing state officers to make a warrantless arrest of any person the officer has "probable cause" to believe has committed a

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*Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181–82 (2006).

106. In federal preemption challenges, the U.S. government routinely characterizes state laws regulating noncitizens as "immigration laws," even if its substantive arguments center on field or conflict preemption. *See, e.g.*, Complaint at 2, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (2:10-cv-01413-NVM) (characterizing the challenged Arizona laws as "a sweeping set of provisions that are designed to 'work together to discourage and deter the unlawful entry and presence of aliens' by making 'attrition through enforcement the public policy of all state and local government agencies in Arizona,'" and arguing that a state "may *not* establish its own immigration policy"); Complaint at 2, *United States v. Alabama*, 2:11-cv-02746-WMA (N.D. Ala. filed Aug. 1, 2011) (characterizing the challenged Alabama law as "a sweeping set of provisions that are designed to address numerous aspects of immigration regulation and enforcement," and arguing that a state "may *not* establish its own immigration policy").

107. Judge Noonan wrote:

That immigration policy is a subset of foreign policy follows from its subject: the admission, regulation and control of foreigners within the United States. By its subject, immigration policy determines the domestication of aliens as American citizens. It affects the nation's interactions with foreign populations and foreign nations[.] . . . the travel of foreigners here and the trade conducted by foreigners here.

*Id.* While this Article disagrees with Judge Noonan's position that any regulation that bears in a substantial way on the inclusion of foreigners within the American polity should ineluctably be declared a matter of foreign affairs or national security, his concurring opinion helpfully illustrates how characterizing immigration regulation as a subset of foreign affairs and national security leads logically to the structural preemption of any subnational law that exerts substantial pressure on foreign migration to or from the United States.

108. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

removable offense, the Court declared, "would allow the State to achieve its own immigration policy."<sup>109</sup> The Court nevertheless declined to analyze SB 1070 as an immigration law *per se*, opting instead to strike down three different sections of SB 1070 on field and conflict preemption grounds.<sup>110</sup>

The intention here is not to criticize the Court for analyzing the challenged Arizona provisions as something other than immigration laws. The broader contention of this Article, after all, is that the very notion of a singular category of immigration law is analytically incoherent and should be retired. Rather, this analysis highlights that when courts decline to approach state laws restricting certain noncitizens' access to employment or requiring noncitizens to carry registration documents as something other than immigration regulations, they are making an interpretive choice. Consider the contrast between *Arizona* and *Diaz*. In *Diaz*, the Court assumed without discussion that a federal law defining Medicare eligibility *was* an immigration law,<sup>111</sup> a classification decision that enabled the Court to uphold the statute out of deference to Congress without having to explain why the challenged alienage classification was consistent with equal protection. The Court's decision in *Arizona* to approach SB 1070 as something other than an immigration regulation likewise held considerable instrumental value. Most obviously, by withholding the immigration law label the Court preserved for individual states a potentially meaningful role in regulating a class of persons—in

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109. *Id.* at 2506.

110. *Id.* at 2501–03. The Court held that Section 3, which created a new state misdemeanor punishing "the 'willful failure to complete or carry an alien registration document,'" was preempted because Congress had occupied the field of alien registration. *Id.* at 2501 (quoting ARIZ. REV. STAT. ANN. § 11-1509(A) (2011)). The Court held that Section 5(C), "maki[ng] it a state misdemeanor for 'an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor,'" and Section 6, "provid[ing] that a state officer, 'without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States,'" were preempted on the ground that they posed an "obstacle to the full purposes and objectives of Congress." *Id.* at 2503–05 (quoting ARIZ. REV. STAT. ANN. §§ 13-2928(C), 13-3883(A)(5)).

To observe that the Court characterized *Arizona* as an ordinary Supremacy Clause case rather than a plenary power case, however, does not mean that the values and concerns that underlie the plenary power doctrine—namely foreign affairs and national sovereignty—had no bearing on the Court's analysis. As Professor Kerry Abrams explains, the *Arizona* Court offers a lengthy "paean to federal power . . . [that] serves as a kind of rhetorical 'penumbra,' radiating out over the preemption analysis." Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013). By unfolding its preemption analysis in the shadow of plenary federal power, Professor Abrams suggests, Justice Anthony Kennedy's majority opinion could deploy national sovereignty rhetoric selectively, bolstering its preemption analysis with respect to some of the challenged provisions while withholding it in others. *See id.* at 627–33.

111. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

particular, undocumented migrants, as well as noncitizens more generally—the presence of which directly implicates local and national concerns.<sup>112</sup> Not least, it also reserved for reviewing courts the flexibility inherent in field and conflict preemption analysis. Rather than invalidating Arizona’s attrition through enforcement policy *in toto*, the *Arizona* Court could engage in a more granular analysis of the challenged statute—striking down some provisions as obstacles to a congressional purpose; upholding another as complementary to, rather than in conflict with, federal law; and reserving judgment on others until the state had enforced them.<sup>113</sup>

## II. A BRIEF (COUNTER-)HISTORY OF IMMIGRATION EXCEPTIONALISM

An aura of naturalness surrounds the plenary power doctrine today, as though withholding constitutional rights from persons subject to federal authority is a self-evident concomitant of exclusive citizenship and sovereign nationhood. When a noncitizen challenges a federal law or enforcement action on constitutional grounds, the reviewing court will take it as given that Congress and the President are owed extraordinary deference. Each time that the Supreme Court reaffirms the constitutional exceptionalism of the federal immigration power, it dutifully recites the presumptive connection between immigration regulation and the conduct of foreign affairs and national security.<sup>114</sup> Even dissenting or concurring Justices who appear to harbor serious misgivings about such deference often avoid attacking the plenary power doctrine directly, urging instead that it be applied more flexibly and humanely.<sup>115</sup>

This was not always the case. This Part seeks to recover the largely repressed history of judicial resistance to the plenary power doctrine. Section II.A considers the history of immigration-related lawmaking and enforcement in the century before immigration law emerged as a legal category. It demonstrates that until the final decades of the nineteenth century, immigration regulation was an unexceptional aspect of both the state police power and the federal commerce power. Section II.B describes a counter-history of the inherent sovereignty rationale—a

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112. See, e.g., Huntington, *supra* note 101, at 791; Rodriguez, *supra* note 101.

113. For conservative adherents of “new federalism” such as Chief Justice John Roberts, the author of the majority opinion in *Arizona*, conflict preemption may be preferable to the blunt instrument of plenary federal power because it permits the conclusion that Arizona did overstep its authority without foreclosing a more limited role for the states in regulating noncitizens within their border.

114. See, e.g., *Demore v. Kim*, 538 U.S. 510, 520 (2003); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–91 (1999).

115. See, e.g., *Demore*, 538 U.S. at 578–79 (Breyer, J., concurring in part and dissenting in part).

history of dissent, criticism, and regret on the part of not only scholars and activists but also many Supreme Court Justices—that defies the presumption of inevitability that typically characterizes modern defenses of immigration exceptionalism.

*A. Before Constitutional Exceptionalism: Pre-aggregated Immigration Law*

Beyond empowering Congress to “establish a[] uniform Rule of Naturalization,”<sup>116</sup> the U.S. Constitution omits any mention of the authority to regulate immigration. This virtual silence begs the question: why would a document that is otherwise so attentive to the allocation of power, both within the departments of the federal government and between the federal government and the separate states, neglect to define this “basic aspect[] of national sovereignty?”<sup>117</sup>

The answer lies in the fact that at the time of the founding of the United States and for nearly a century thereafter, American policy makers and judges did not conceive of immigration per se as a substantively or constitutionally discrete subject of lawmaking, federal or otherwise. This Section briefly reviews the pre-history of the modern federal immigration power, in order both to denaturalize the modern category of “immigration law” and to underscore that the inherent sovereignty model is not inherent to the regulation of immigration.

Until the 1870s, individual states exercised substantial authority over immigrants and immigration under their traditional police powers.<sup>118</sup> As the objects of state police regulation—as potential paupers or carriers of disease, for example—immigrants were simply persons, whose effect on the health, morals, and welfare of the community was, like that of all persons, subject to regulation.<sup>119</sup> Even when the Supreme Court transferred authority to govern the admission of foreign migrants from the states to Congress in the 1870s and 1880s, it characterized federal authority not as an attribute of national sovereignty but as a variety of international commercial regulation.<sup>120</sup> For the first century of the nation’s history, governing foreign migrants at the U.S. border and within U.S. territory was thus constitutionally indistinct from the larger bodies of state and federal economic regulation in which that governance was embedded. The decidedly unexceptional manner in which both state and federal law conceived of noncitizens defies the constitutional singularity of a distinct class

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116. U.S. CONST. art. I, § 8, cl. 4.

117. *Galvan v. Press*, 347 U.S. 522, 530 (1954).

118. Lindsay, *Constitution of Foreignness*, *supra* note 3, at 774.

119. *See id.* at 774–86.

120. *Id.* at 793.

of exclusively federal immigration laws that govern the admission and removal of foreigners.

It was a full century after the founding generation ordained the young republic the “asylum of mankind”<sup>121</sup> before the federal government claimed significant authority to govern foreign immigration.<sup>122</sup> Until the 1870s, Congress neither defined the terms of eligibility for foreigners’ admission into the country nor governed their manner of entry. Instead, the seaboard states—primarily New York, but also California, Louisiana, and Massachusetts, among others—administered the landing of immigrants, and each individual state determined the rights and privileges of foreigners residing in its territory.<sup>123</sup> It was not that the ebb and flow of foreign immigration was unproblematic. Indeed, notwithstanding the nation’s long-prevailing policy of encouraging—or at least not restraining—immigration, policy makers, reformers, judges, and other opinion leaders periodically worried throughout this period about the influence of foreign arrivals on the character and well-being of the communities in which they settled.<sup>124</sup> Yet well into the post-Civil War era, there was a broad consensus that the regulatory challenges and political interests implicated by the presence of foreigners—the problem of economic dependency and crime, for example, or the desire to attract laborers or settlers—were fundamentally local in nature.<sup>125</sup> As such, those problems fit comfortably within the states’ traditional police authority, through which states and municipalities regulated all aspects of public safety, health, morals, and welfare throughout the nineteenth century.<sup>126</sup> Sectional conflict over slavery likewise weighed heavily in favor of sub-national immigration law. Pro-slavery states’ rights advocates, in particular, denied that immigrants were properly understood as “articles of commerce” precisely because that view implied that Congress might have the authority to regulate other human articles

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121. MARILYN C. BASELER, “ASYLUM FOR MANKIND”: AMERICA 1607–1800, at 7 (1998).

122. See Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833–34 (1993). For background on the federalization of immigration lawmaking, see generally ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006); Kerly Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005).

123. See Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1094 (2013); Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181, 191–202 (2005) [hereinafter Lindsay, *Preserving the Exceptional Republic*].

124. See Lindsay, *Constitution of Foreignness*, *supra* note 3, at 765–74.

125. See *id.* at 774–78.

126. On the pervasiveness of police regulations in the nineteenth-century United States, see generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

of commerce, including slaves.<sup>127</sup>

From the first decades of the nation's history, regulating the status of foreigners present within the territory of a particular state was indistinct as a matter of legal authority from the task governing the domestic population. Because neither the Constitutional Convention nor the subsequent ratification debates addressed the authority to regulate immigration,<sup>128</sup> the clearest glimpse of contemporaneous thought on the issue comes from debates in Congress over the Alien Friends Act of 1798.<sup>129</sup> The Act authorized the President to order the removal of any alien that he judged "dangerous to the peace and safety of the United States, or . . . ha[d] reasonable grounds to suspect" was engaged in treason or "secret machinations" against the U.S. government.<sup>130</sup> It was a key component of the infamous Alien and Sedition Acts, and the most audacious legislative expression of the anti-alien frenzy stoked by Federalists in the 1790s.<sup>131</sup>

Congressional Republicans condemned the Act as a grotesque assault on the Constitution—" [a] sacrifice of the first-born offspring of freedom . . . proposed by those who gave it birth"<sup>132</sup>—that, among other offenses, threatened to "swallow[] up" at Congress's pleasure "all the reserved powers of the people or of the States."<sup>133</sup> State legislatures, they stressed, had long acted on the presumption that the individual states had "reserved to themselves the power of regulating what relates to emigrants."<sup>134</sup> That presumption, moreover, was rooted in the

127. See *infra* note 175 and accompanying text. On the role of slavery in the unfolding constitutional debate over immigration regulation, see Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 793–818 (1996).

128. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 15–18 (1996).

129. Alien Act, ch. 58, 1 Stat. 570 (1798). It was so designated to distinguish it from the Alien Enemies Act, which was part of the same package of legislation and applied only to the subjects of nations with which the United States was at war. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21 (2012)).

130. Ch. 58, 1 Stat. at 571.

131. In a series of bills preceding the Alien and Sedition Acts, Federalists had inflamed the nation's nativist mood by admonishing Americans that alien enemies, and particularly French radicals, had infiltrated the American polity with the intention of devouring the tree of republican liberty root and branch. See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801*, at 126–30 (1966); Lindsay, *Constitution of Foreignness*, *supra* note 3, at 758–63.

132. *E.g.*, 8 ANNALS OF CONG. 2015 (1798) (statement of Rep. Robert Livingston).

133. 9 ANNALS OF CONG. 2996 (1799) (statement of Rep. Albert Gallatin). Republican opponents of the Act charged that it violated the fundamental tenets of both separation of powers and federalism. See, *e.g.*, *id.*

134. 8 ANNALS OF CONG. 2022 (statement of Rep. William Smith).

fundamentally local nature of immigration policy making, which was heavily informed by the specific demographic and economic circumstances within each state. Albert Gallatin, a Republican leader in the House of Representatives and President Thomas Jefferson's future Treasury Secretary,<sup>135</sup> explained that while "States whose population is full, and to which few migrations take place, are little concerned" with the bill's potential to discourage immigration, it was of great "consequence . . . to those States whose population is thin, and whose policy it has always been to encourage emigration."<sup>136</sup> "Not only in some States have aliens been enabled to purchase, to hold, to inherit, and to leave by will, real estates," Representative Gallatin recounted, "but many have actually been admitted . . . to all the rights of citizens of those States."<sup>137</sup> Perhaps most tellingly, even the Act's Federalist advocates generally acknowledged that it granted to the President an extraordinary measure of authority, and that during more tranquil times the "power of admitting foreigners . . . remained with the States."<sup>138</sup>

In fact, the early states governed aliens in largely the same manner that they governed citizens. Historian Kunal Parker's study of the legal construction of immigrants in antebellum Massachusetts reveals that well into the nineteenth century, individual towns, rather than the state or nation, operated as the "salient territorial unit" for the purpose of poor relief—one of the principal functions of municipal government.<sup>139</sup> Because "[o]utsiders were specifically understood as all individuals lacking a settlement in the town, rather than as individuals lacking citizenship," town officials did not distinguish between "foreigners" who had been born and long resided in a neighboring town or state and "foreigners" who had immigrated to the United States from Ireland a month earlier.<sup>140</sup> Only several decades after American independence did citizenship come to inform the administration of the state's poor laws. My own earlier study of the New York State Commissioners of Emigration, the state agency that administered the landing of three-

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135. Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN ST. L. REV. 417, 424 (2008).

136. 8 ANNALS OF CONG. 1982 (statement of Rep. Gallatin).

137. 9 ANNALS OF CONG. 3000 (statement of Rep. Gallatin). Another Republican declared that "[i]f aliens were to be sent off or banished," it must therefore "be by the State Governments where they lived." 8 ANNALS OF CONG. 2003 (statement of Rep. Abraham Baldwin).

138. 8 ANNALS OF CONG. 1986 (statement of Rep. Harrison Otis). Federalist sponsors of the Alien Friends Act defended the Act on the basis of Congress's duty of national self-defense and repeatedly denied that they were positing anything like a general federal immigration power. See Lindsay, *Constitution of Foreignness*, *supra* note 3 at 758–63.

139. Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 LAW & HIST. REV. 583, 588–90 (2001).

140. *Id.* at 588, 597–98.

quarters of the nation's immigrants between 1847 and 1891, confirms that until the 1870s, state immigration regulation was animated by the quintessentially local law and logic of poor relief and moral uplift.<sup>141</sup>

Most importantly, the Supreme Court generated a body of constitutional immigration law premised on the idea that state laws governing the admission of foreigners to their jurisdictions were but one aspect of each state's poor laws, and that immigrants' noncitizenship was thus incidental, or at least secondary, to the nature of the regulatory authority to which they were subject. The early development of constitutional immigration law centered on two mid-nineteenth-century cases, *Mayor of New York v. Miln*<sup>142</sup> and the *Passenger Cases*,<sup>143</sup> involving state laws regulating the landing of immigrants. All of the Justices who participated in those cases agreed that federal authority to regulate immigration, whatever its extent, derived from Congress's commerce power. Disagreement centered on the nature and extent of authority reserved by the states. Notwithstanding the Justices' divergent views over where the boundary between state and federal authority lay, however, the Court consistently drew the line of demarcation based on the purpose and effect of the regulation at issue, rather than the citizenship status of the persons upon whom it operated.<sup>144</sup>

In *Miln*, the Court upheld against a federal preemption challenge a New York state law requiring the master of every vessel arriving in the port of New York from outside the state to report the name, birthplace, last legal settlement, age, and occupation of each passenger.<sup>145</sup> The challenger, a shipmaster convicted of violating the Act, argued that Congress had claimed exclusive authority over all aspects of immigration when it adopted the Passenger Act of 1819, regulating steerage conditions on foreign vessels bound for the United States.<sup>146</sup> Notably, the five-Justice majority endorsed the state's police rationale for a regulatory scheme that today would qualify unambiguously as an (exclusively federal) immigration law.<sup>147</sup> It is particularly revealing in light of the

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141. See Lindsay, *Preserving the Exceptional Republic*, *supra* note 123, 195–96. Massachusetts may complicate this general characterization of state policy. Historian Hidetaka Hirota demonstrates how Massachusetts lawmakers, animated by intense anti-Irish nativism, aggressively excluded and deported alien paupers in the decades following the period covered by Parker's study. See Hirota, *supra* note 123, at 1103–05.

142. 36 U.S. (11 Pet.) 102 (1837).

143. *Smith v. Turner & Norris v. City of Bos. (Passenger Cases)*, 48 U.S. (7 How.) 283 (1849).

144. I elaborate some of the arguments recited here in Lindsay, *Constitution of Foreignness*, *supra* note 3, at 774–86.

145. *Miln*, 36 U.S. at 102.

146. An Act Regulating Passenger Ships and Vessels, ch. 46, 3 Stat. 488 (1819).

147. *Miln*, 36 U.S. at 132.

modern presumption of federal exclusivity that New York acknowledged that the reporting requirement was intended to regulate immigration per se, and defended it on that basis. The necessity of regulating the “constant and steady migration” of Europeans to the United States had become “obvious” in recent decades, the State explained.<sup>148</sup> Because New York had adopted the reporting requirement “to prevent the introduction of foreign paupers” into the state, the law was “a part of the system of poor laws,”<sup>149</sup> and thus was a quintessential police regulation. As such, it could “operate on persons brought into a state, in the course of commercial operations”<sup>150</sup> without making it “a commercial regulation” in the constitutional sense.<sup>151</sup> In support of the proposition that states had engaged in precisely such regulation since the nation’s founding, New York cited more than one hundred statutes adopted by a host of different states.<sup>152</sup> Notably, virtually none of these statutes appear to have had anything to do with immigration.<sup>153</sup> Indeed, that was exactly the point: as far as New York was concerned, the challenged reporting requirement was merely one among many police regulations enacted to protect the health and welfare of the State’s citizenry.

The Court concluded that by virtue of the Act’s purpose and object, it was “not a regulation of commerce, but of police; and [thus] . . . passed in the exercise of a power . . . rightfully belong[ing] to the states.”<sup>154</sup> Echoing the State’s brief to the Court, the majority acknowledged that the statute governed the conditions under which foreign migrants were landed in the port of New York, but maintained that this did not impeach its status as a valid police regulation.<sup>155</sup> The Act was “obviously” intended to protect New Yorkers against the burden of supporting “multitudes of poor persons . . . from foreign countries.”<sup>156</sup> As an affirmation of the State’s regulatory authority, the operative phrase here was not “foreign countries” but “poor persons.” Indeed, the Court stressed the profoundly local nature of the relevant legislative purposes: “New York from her particular situation, is, perhaps more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there.”<sup>157</sup> Although the reporting requirement governed the introduction of foreigners into the United States, it remained

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148. *Id.* at 106.

149. *Id.* at 110.

150. *Id.* at 129.

151. *Id.* at 110.

152. *Id.* at 114–15.

153. *See id.* at 113–14.

154. *Id.* at 132.

155. *See id.* at 131–32, 141.

156. *Id.* at 141.

157. *Id.*

quintessentially a poor law, and as such belonged to "that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government," including inspection, quarantine, and health laws.<sup>158</sup> There was thus "no mode in which the power to regulate internal police could be more appropriately exercised."<sup>159</sup>

The very ordinariness of a police regulation directed toward foreign migrants was underscored by the fact that, while the section of the law challenged in *Miln* applied to *foreign* migrants, the same statute regulated poor Americans in substantially the same manner, obliging shipmasters to remove to "the place of his last settlement" any *United States citizen* "deemed likely to become chargeable to the city."<sup>160</sup> In fact, New York had insisted that denying states the authority to control the entry of the foreign poor would necessarily deprive them of the ability to turn away domestic paupers as well.<sup>161</sup> It was thus "apparent," the Court agreed, that the legislature's purpose was "to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other . . . state[]." <sup>162</sup> In short, neither the legislature that adopted the statute nor the Court that upheld it distinguished between the State's authority to protect itself against poor Americans and its authority to protect itself against poor Europeans. To the extent that the majority "look[ed] at the person on whom [the law] operates," it mattered only that "he [was] found within the same territory and jurisdiction."<sup>163</sup>

Moreover, the Court insisted that there was nothing constitutionally distinctive about a statute that regulated foreigners engaged in the process of immigration. The majority likened the regulation of foreign migrants under the challenged poor law to the prosecution under New York criminal law of recently landed "officers, seamen and passengers, who are within its jurisdiction."<sup>164</sup> Just as "[t]he right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law,"<sup>165</sup> the Court explained, "the same reasons, precisely, equally subject [a shipmaster] . . . to liability for failure to comply with" the reporting requirement.<sup>166</sup> Each law depended upon the "same principle"—that New York, by virtue of its traditional police

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158. *Id.* at 133.

159. *Id.* at 141.

160. *Id.* at 154 (Story, J., dissenting).

161. *Id.* at 102 (majority opinion).

162. *Id.* at 133.

163. *Id.*

164. *Id.* at 141.

165. *Id.* at 140.

166. *Id.* at 141.

authority, could regulate “the persons and things within her territorial limits.”<sup>167</sup> Neither an immigrant’s foreignness nor his migration from abroad entered into the analysis.

Over the next half-century, even as the Supreme Court edged closer to federal exclusivity, the Justices continued to understand the regulation of foreign migration as a fairly unremarkable instance of the state police or federal commerce power. The Court’s next attempt to demarcate the states’ and Congress’s respective spheres of authority came twelve years after *Miln* in the *Passenger Cases*. A five-Justice majority<sup>168</sup> struck down similar New York and Massachusetts laws requiring the master of every vessel arriving from a foreign port to pay a small tax for each passenger—levied to fund a marine hospital and to support “foreign paupers,” respectively—on the ground that the laws unconstitutionally encroached upon the exclusively federal domain of “commerce with foreign nations.”<sup>169</sup> As the majority refigured immigrants as articles of commerce with foreign nations,<sup>170</sup> however, it staked congressional authority to the commercial nature of immigration rather than immigrants’ noncitizenship or the fact of their migration from abroad. Several of the Justices in the majority insisted that so long as the commercial goods at issue were transported across *state* lines, the Commerce Clause was indifferent to the national origin of either the goods themselves or the persons engaged in their transportation.<sup>171</sup> States were prohibited equally from taxing merchandise “from one State to another State or [from] foreign countries,” irrespective of whether the importers “are citizens or foreigners.”<sup>172</sup> Accordingly, the majority presumed that a holding with respect to foreign commerce would apply symmetrically to domestic interstate commerce.<sup>173</sup> If New York could lay a tax on passengers arriving from Europe, Justice John McLean warned, “every State [could] tax all persons who shall pass through its territory on railroad-cars, canal-boats, stages, or in any other manner.”<sup>174</sup> The consequence would be to

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167. *Id.*

168. The majority was highly fractured, with each of the five Justices writing separately. The four Justices in the minority issued three separate dissents, for a total of eight opinions consisting of nearly 300 pages.

169. *Smith v. Turner & Norris v. City of Bos. (Passenger Cases)*, 48 U.S. (7 How.) 283, 286, 400 (1849).

170. The Court had laid the foundation for that construction twenty-five years earlier in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). There, Chief Justice John Marshall famously concluded that “commerce” encompassed not only “buying and selling, or the interchange of commodities,” but also “commercial intercourse” more broadly. That included “navigation,” regardless of whether things transported were goods or passengers. *Id.* at 189–90.

171. *See, e.g., Passenger Cases*, 48 U.S. at 417 (Wayne, J., concurring).

172. *Id.*

173. *See id.* at 407 (majority opinion).

174. *Id.*

“enable a State to establish and enforce a non-intercourse with every other State.”<sup>175</sup>

Even after the *Passenger Cases*, however, the states retained significant authority to regulate immigration under their police powers so long as the state laws did not “collide” with the policy of Congress. It was only in the 1870s and 1880s that the regulation of immigration became fully and exclusively federal. Beginning in 1875, Congress adopted a series of statutes transferring immigration policy making and administrative control from the states to the federal government.<sup>176</sup> The Supreme Court, in turn, struck down several existing state regulations and upheld the new federal legislation.<sup>177</sup> In *Henderson v. Mayor of New York*, a unanimous Court acknowledged that European immigration to the United States “has become part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come

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175. *Id.* The dissenters shared the majority’s presumption that the Commerce Clause applied symmetrically to commerce with foreign nations and commerce among the several states. *See id.* at 473 (Taney, C.J., dissenting). Indeed, the dissenters resisted the view that immigrants could be the subjects of commerce at least in part because it implied that Congress could regulate the movement of other human articles of commerce that increasingly dominated the nation’s political consciousness—namely, slaves and free blacks. Chief Justice Roger B. Taney, who eight years later wrote the majority opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), warned that if the federal government could oblige states to receive immigrants, then “emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences.” *Passenger Cases*, 48 U.S. at 474. On the role of sectional conflict over slavery in the development of constitutional immigration law, see generally Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743 (1996).

176. *See* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (prohibiting the immigration of prostitutes, contract laborers, and convicts from “China, Japan, or any Oriental country”); Immigration Act of 1882, ch. 376, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–1574 (2012)) (transferring authority over the landing of immigrants from individual states to the U.S. Treasury Department); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) (prohibiting the entry of Chinese laborers into the United States for a period of ten years); Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952) (prohibiting the immigration of any foreigner who had entered into an employment contract with an American employer prior to departing his country of origin); Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084 (codified as amended at 8 U.S.C. §§ 1551–1574) (transferring sole authority to administer immigration regulations to the federal government and creating the Office of the Commissioner of Immigration and Naturalization under the authority of the Secretary of the Treasury).

177. *See* *Edye v. Robertson & Cunard Steamship Co. v. Same & Same v. Same*, (*Head Money Cases*), 112 U.S. 580, 599–600 (1884) (upholding the head tax provision of the federal Immigration Act of 1882); *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875) (striking down state head taxes); *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875) (striking down a California statute empowering a state immigration commissioner to require a bond for immigrant women determined to be “lewd and debauched”).

among us to find a welcome and a home.”<sup>178</sup> Recast as “the business of bringing foreigners to [the United States],”<sup>179</sup> as the Court later characterized it, immigration *qua* immigration became a branch of commerce with foreign nations and thus the exclusive province of Congress.

The *Henderson* Court also suggested, for the first time, that governing foreign migration was conceptually distinct from domestic commercial regulation. Because a law that impedes immigration “concern[s] the exterior relation of this whole nation with other nations and governments,” the Court declared, it “may properly be called *international*.”<sup>180</sup> Federal exclusivity would thus enable the United States to act as a single, unified sovereign in relation to foreign governments.<sup>181</sup>

Yet another decade and a half passed before the Court announced in the *Chinese Exclusion Case*<sup>182</sup> that federal exclusivity rested on a plenary, constitutionally exceptional power. Justice Stephen Field’s opinion for a unanimous Court not only upheld the Chinese Exclusion Act of 1882; it also remade Congress’s authority to regulate immigration from an unremarkable instance of the commerce power to an extra-constitutional cousin of the war power that was inherent in the nation’s sovereignty, essential to its self-preservation, and therefore “conclusive upon the judiciary.”<sup>183</sup> Although this re-grounding of federal authority marked a

178. *Henderson*, 92 U.S. at 270.

179. *Head Money Cases*, 112 U.S. at 595.

180. *Henderson*, 92 U.S. at 273.

181. Even after Congress assumed ultimate responsibility for the regulation of immigration in the Immigration Act of 1882, state officials continued to administer the actual landing of noncitizens in the United States for another decade under a provision of the 1882 Act that empowered the Secretary of the Treasury—the Executive department charged with the administration of the Act—to enter into contractual agreements with state immigration commissions “to examine into the condition of passengers arriving at the ports.” Immigration Act of 1882, § 2, 22 Stat. at 214; *see also* Lindsay, *Preserving the Exceptional Republic*, *supra* note 123, at 217 (describing the Immigration Act of 1882). During this period, Massachusetts officials continued to deport noncitizens deemed foreign paupers pursuant to state policy. *See* Hirota, *supra* note 123, at 1104–05.

182. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889).

183. *Id.* at 606. The Court wrote: “To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.” *Id.* The Court’s construction of national sovereignty and security were heavily inflected with the theme of racial degradation:

If, therefore, the government of the United States . . . consider[ed] 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, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity . . . only

radical break with historical practice,<sup>184</sup> the Court strove to characterize its innovation as a natural concomitant of sovereign nationhood that was rooted in timeless principles of international law. In *Nishimura Ekiu v. United States*,<sup>185</sup> decided less than three years later, the Court confirmed that its novel, extra-constitutional federal immigration power extended beyond the exigencies of Chinese exclusion to the nation's general immigration laws. In holding that the decision of a federal immigration inspector denying admission to a noncitizen was not reviewable in federal court,<sup>186</sup> the Court set out the formulation of the plenary power doctrine that would become a key rhetorical touchstone for subsequent immigration cases:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.<sup>187</sup>

The Court reasoned that, as a question of national sovereignty, the decision to deny admission to would-be immigrants had been consigned exclusively to the "political department" of the federal government.<sup>188</sup> It therefore lay beyond "the province of the judiciary" to declare that foreigners who had never resided in the United States "shall be permitted to enter, in opposition to the constitutional and lawful measures of the

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more obvious and pressing. The same necessity . . . may arise when war does not exist . . . .

*Id.* at 606. For a discussion on the role that fears of a racial degradation of American labor and citizenship played in the origin of the plenary power doctrine, see generally Lindsay, *Immigration as Invasion*, *supra* note 3.

184. *See infra* Part III.

185. 142 U.S. 651 (1892).

186. Federal immigration officials had denied entry to Nishimura Ekiu, a Japanese woman, under a provision of the Immigration Act of 1891 that excluded "persons likely to become a public charge" from the United States. Immigration Act of 1891, ch. 551, § 1, 16 Stat. 1084; *Nishimura*, 142 U.S. at 653. The 1891 Act had further assigned exclusive authority to administer the immigration laws, including the inspection of immigrants, to a national Superintendent of immigration lodged within the U.S. Treasury Department, and made final the decisions of federal inspection officers "touching the right of any alien to land," subject to review only by the Superintendent and Treasury Secretary. Immigration Act of 1891, §§ 7–8, 16 Stat. at 1085.

187. *Nishimura*, 142 U.S. at 659 (citations omitted).

188. *Id.*

legislative and executive branches.”<sup>189</sup> At least with respect to nonresident foreigners, the Court concluded that “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”<sup>190</sup>

One year after *Nishimura Ekiu*, in *Fong Yue Ting v. United States*,<sup>191</sup> the Court extended this principle to the expulsion of resident aliens. At issue was a provision of the Geary Act of 1892 that authorized the arrest and deportation of any Chinese laborer legally present within the United States who failed either to obtain a special “certificate of residence” or produce a “credible white witness” to attest that the laborer had resided in the United States prior to the adoption of the Chinese Exclusion Act in 1882.<sup>192</sup> A six-Justice majority upheld the certificate requirement. “The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [was] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare,”<sup>193</sup> the Court declared. Accordingly, constitutional criminal rights such as due process, “the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”<sup>194</sup> *Fong Yue Ting* remains good law, and the Supreme Court continues to cite the case in support of Congress’s plenary power to regulate immigration.<sup>195</sup>

In sum, the notion that foreign immigration per se comprised a legally discrete, constitutionally exceptional subject of federal lawmaking did

189. *Id.* at 660.

190. *Id.* A decade later, the Court did create a narrow opening for procedural review when it indicated that administrative officers could not “disregard the fundamental principles that inhere in ‘due process of law.’” *Yamataya v. Fisher (Japanese Immigrant Case)*, 189 U.S. 86, 100 (1903). Although noncitizens’ procedural challenges virtually always failed, the *Japanese Immigrant Case* did establish a formal doctrinal foothold for procedural due process claims that subsequently afforded meaningful, if still highly deferential, judicial review. *See* Motomura, *Curious Evolution*, *supra* note 22, at 1652 (describing a due process revolution in immigration law that culminated with the Court’s 1982 decision in *Landon v. Plasencia*, holding that a returning alien was entitled to due process in her exclusion hearing).

191. 149 U.S. 698 (1893).

192. *Id.* at 727. The “credible white witness” alternative to the certificate of residence was introduced in a rule issued by the Treasury Secretary, who was charged with enforcing the certificate requirement. *See id.* at 727–28.

193. *Id.* at 711.

194. *Id.* at 730. The Court has continued to insist on the essentially “civil” nature of deportation proceedings. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (“Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”).

195. *See, e.g., Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part) (quoting *Fong Yue Ting*, 149 U.S. at 705).

not preexist the adoption of the plenary power doctrine in the late nineteenth century. The legal category "immigration law" was an historical effect of, or adjunct to, the Supreme Court's re-grounding of immigration regulation in the nation's inherent sovereignty. When contemplating a transition away from a unitary, categorical, extra-constitutional immigration power and toward a disaggregated, more context-sensitive model of regulatory authority,<sup>196</sup> it is helpful to recall that the inherent sovereignty model is not inherent to the regulation of immigration. Rather, a century of *pre-aggregated* immigration law provides abundant legal and historical precedent.

### B. *Judicial Dissent from the "Inherent Sovereignty" Model*

Virtually from the moment of its adoption at the end of the nineteenth century, the plenary power doctrine has been the object of dissent, criticism, and regret on the part of not only scholars and activists but also many Supreme Court Justices. This Section surveys this counter-history of judicial protest against, and ultimately resignation toward, a federal immigration power that is untethered from the Constitution. It demonstrates how, at the plenary power doctrine's two key constitutive moments—its formative period of the 1890s and its solidification in the early 1950s—the doctrine remained intensely controversial. Throughout this period, several of the Justices argued strenuously in dissents that the consignment of immigration regulation exclusively to the political departments, buffered against judicially enforceable constitutional constraints, was fundamentally inconsistent with constitutional liberty and the rule of law. These dissents have served as a kind of jurisprudential refuge for the rights of noncitizens, where full constitutional personhood could be articulated.<sup>197</sup>

As Part II noted, in the 1889 *Chinese Exclusion Case* and subsequent decisions the Supreme Court reconstructed Congress's authority to regulate immigration from an unremarkable instance of the commerce power to an extra-constitutional analogue to the war power that was inherent in the nation's sovereignty, essential to its self-preservation, and therefore "conclusive upon the judiciary." The Court characterized its innovation as a natural concomitant of sovereign nationhood grounded in timeless principles of international law. Yet the patina of logical necessity in Justice Field's unanimous decision dissolved four years later, in *Fong Yue Ting*. The extension of the plenary power doctrine from the exclusion

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196. See *infra* Part III.

197. In his important study of due process dissents between the Reconstruction Era and the early twentieth century, jurisprudence scholar Colin Starger demonstrates how "dissents can keep particular traditions of constitutional interpretation alive [after they are] forced into exile by shifting majorities of the Court." Colin Starger, *Exile on Main Street: Competing Traditions of Due Process Dissent*, 95 MARQUETTE L.R. 1253, 1257 (2012).

of noncitizens to the expulsion of resident aliens produced three unusually vigorous dissents. Justice David Brewer condemned the very notion that legal residents of the United States could be subject to an extra-constitutional federal authority grounded in the ill-defined concept of national sovereignty; Justice Field, the author of the *Chinese Exclusion Case*, denounced at length the extension of the inherent-sovereignty model of federal authority from exclusion to deportation; and Chief Justice Melvin Fuller reiterated more briefly the essence of Justice Field's position. Justices Field's and Brewer's opinions are worth considering at length for what they reveal about the novelty and extraordinary constitutional exceptionalism of the emerging federal immigration power.

When contemplating the aura of naturalness and inevitability that surrounds the plenary power doctrine today, it is instructive that its primary architect “utterly dissent[ed]”<sup>198</sup> from the doctrine's application to noncitizens who were present within the U.S., and condemned “the decision as a blow against constitutional liberty” that “fill[ed] [him] with apprehensions.”<sup>199</sup> There was “a wide and essential difference,” Justice Field insisted, between the power to exclude foreigners from the country and the “power to deport . . . persons lawfully domiciled therein.”<sup>200</sup> “The moment any human being from a country at peace with us comes within the jurisdiction of the United States,” Justice Field explained, she “becomes subject to all their laws, is amenable to their punishment and entitled to their protection.”<sup>201</sup> Because the relevant constitutional protections described in the Bill of Rights applied to “persons” and those “accused” of crimes, he reasoned, aliens were entitled to the same protection against “[a]rbitrary and despotic power” as “native-born citizens.”<sup>202</sup>

Justice Field's reliance on the Court's then-recent decision in *Yick Wo v. Hopkins* is revealing.<sup>203</sup> In *Yick Wo*, the Court unanimously struck down a San Francisco ordinance endowing city inspectors with unrestrained discretion to grant or deny business permits to certain commercial laundries—discretion that the City had used systematically to close down Chinese-owned laundries.<sup>204</sup> Observing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were “universal in their application, to all persons within the territorial

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198. *Fong Yue Ting*, 149 U.S. at 755 (1893) (Field, J., dissenting).

199. *Id.* at 760.

200. *Id.* at 746.

201. *Id.* at 754.

202. *Id.*

203. *Id.* at 755 (discussing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

204. *Yick Wo*, 118 U.S. at 359, 374.

jurisdiction, without regard to any differences of race, of color, or of nationality," the Court invalidated the ordinance.<sup>205</sup> "[S]trangers and aliens" enjoyed precisely the same rights under the "universal" provisions of the Fourteenth Amendment as "every citizen of the United States."<sup>206</sup> For Justice Field, the same constitutional principles that prevented a state from discriminating against Chinese laundry owners in *Yick Wo* also constrained the federal government in its removal of resident Chinese.<sup>207</sup> He declared: "The fundamental rights to life, liberty, and the pursuit of happiness as individual possessions are secured by those maxims of constitutional law which are the monuments, showing the victorious progress of the race in securing to man the blessings of civilization under the reign of just and equal laws."<sup>208</sup> Accordingly, aliens enjoyed the very same protection against "[a]rbitrary and despotic power" as citizens.<sup>209</sup> To hold otherwise "would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its consent."<sup>210</sup> The majority decision carried the impossible implication that "Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who . . . have taken up their residence here on the invitation of the government."<sup>211</sup>

Justice Field emphatically rejected the majority's conclusion that deportation was a mere civil remedy rather than criminal punishment, and that noncitizens threatened with deportation therefore did not enjoy constitutional criminal rights guaranteed by the Fourth, Fifth, and Sixth Amendments.<sup>212</sup> He quoted at length from James Madison's protest against the Alien Act of 1798:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections, where he may have invested his entire property . . . , where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for, if a banishment of this sort be not a punishment, and among the severest of punishments, it

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205. *Id.* at 369.

206. *Id.*; see also *Wong Wing v. United States*, 163 U.S. 228, 233–34, 238 (1896) (striking down on Fifth and Sixth Amendment grounds a federal statute imposing imprisonment at hard labor on aliens determined in a summary administrative proceeding to be in the country illegally.)

207. See *Fong Yue Ting*, 149 U.S. at 755 (Field, J., dissenting).

208. *Id.* (quoting *Yick Wo*, 118 U.S. at 169).

209. *Id.* at 754.

210. *Id.* at 755.

211. *Id.* at 750.

212. See *id.* at 748–49.

would be difficult to imagine a doom to which the name can be applied.<sup>213</sup>

The “punishment” inflicted under the Geary Act, moreover, was “beyond all reason in its severity” and “out of all proportion to the alleged offence.”<sup>214</sup> “As to its cruelty,” Justice Field admonished, “nothing can exceed a forcible deportation from a country of one’s residence, and the breaking up of all the relations of friendship, family and business there contracted.”<sup>215</sup> Notwithstanding Justice Field’s protest, however, the conceit that deportation is not “punishment” remains a key premise of constitutional immigration law.

Justice Brewer, who was appointed to the Court after the *Chinese Exclusion Case* was decided and who dissented without opinion in *Nishimura Ekiu*, echoed Justice Field’s insistence that deportation was punishment<sup>216</sup> and that noncitizens living within the United States were entitled to the protection of the Constitution.<sup>217</sup> But Justice Brewer also added a withering condemnation of the very notion of unrestrained, extra-constitutional authority:

This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within the legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? . . . The expulsion of a race may be within the inherent powers of a despotism. . . . [The Framers] gave to this government no general power to banish.<sup>218</sup>

Justice Brewer’s words should disabuse modern readers of any notion that the plenary power doctrine is a natural or inevitable expression of

213. *Id.* at 749 (quoting 4 ELLIOT’S DEBATES 555 (2d ed. 1836)).

214. *Id.* at 759.

215. *Id.* (“The laborer may be seized at a distance from his home, his family and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business.”).

216. *Id.* at 740 (Brewer, J., dissenting) (“Every one [sic] knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”).

217. *Id.* at 738. Assuming that the Constitution implies “the power to remove resident aliens,” Brewer maintained, that power “still . . . can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.” *Id.* The Geary Act’s deportation provision therefore deprives resident aliens of “‘life, liberty, and property without due process of law.’ . . . It places the liberty of one individual subject to the unrestrained control of another.” *Id.* at 739–40 (quoting U.S. CONST. amend. XIV).

218. *Id.* at 737.

sovereign nationhood or exclusive citizenship. Rather, even during a period of intense anti-Chinese sentiment and in the context of a federal registration law meant to control the “obnoxious Chinese”<sup>219</sup> already present in U.S. territory, the assertion of an unrestrained authority inherent in federal sovereignty posed a conspicuous constitutional anomaly. “[The] arrest and forcible deportation from the country” of 100,000 people was not “beyond the reach of the protecting power of the Constitution.”<sup>220</sup>

Even as the constitutional exceptionalism of the federal immigration power became ever more firmly entrenched over the first half of the twentieth century,<sup>221</sup> the *Fong Yue Ting* dissents continued to resonate. In a series of “national security” cases decided at the height of the Cold War in the late 1940s and early 1950s, several Justices voiced varying degrees of discomfort with a federal authority that was virtually unrestrained by fundamental constitutional guarantees of procedural fairness and individual rights.

Justices William Douglas and Hugo Black, in particular, maintained in defiance of the plenary power doctrine that a resident alien threatened with deportation had a right to challenge the substantive basis of his deportation order.<sup>222</sup> In *Harisiades v. Shaughnessy*, for example, the Court upheld the deportation of a noncitizen—a legal U.S. resident for nearly four decades—on the ground that he had been a member of the Communist Party years earlier, before such membership was grounds for deportation.<sup>223</sup> The majority conceded that the perpetual vulnerability of long-term resident noncitizens to “expulsion” from the United States “bristle[d] with severities” and that the statute under which Harisiades had been ordered deported—the Alien Registration Act of 1940—“[stood] out as an extreme application of the expulsion power.”<sup>224</sup> Nevertheless, the power to expel a noncitizen remained “a weapon of defense and reprisal . . . inherent in every sovereign state,”<sup>225</sup> that was “so

219. *Id.* at 743.

220. *Id.* at 744.

221. *See, e.g.*, *Knauff v. Shaughnessy*, 338 U.S. 521, 543 (1950); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909).

222. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 598–99 (1952) (Douglas, J., dissenting).

223. *Id.* at 581–82, 595–96 (majority opinion). The U.S. Attorney General ordered that the petitioner, Harisiades, be deported based on a provision of the Alien Registration Act of 1940 authorizing the deportation of a legally resident alien because of membership in the Communist Party. *Id.*; *see Alien Registration Act of 1940*, Pub. L. No. 76-670, 54 Stat. 670 (1940) (codified at 18 U.S.C. §2385 (2012)).

224. *Harisiades*, 342 U.S. at 587–88.

225. *Id.* The warrant for such extraordinary federal authority, the majority continued, lay in the fact that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Id.* at 588–89.

exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”<sup>226</sup>

Justices Douglas and Black dissented, insisting that the citizenship-neutral language of the Fifth and Fourteenth Amendments and other provisions in the Bill of Rights entitled noncitizens to both procedural and substantive constitutional protection.<sup>227</sup> Because a noncitizen “who is assimilated in our society” is a “person” within the meaning of the Due Process Clause, Justice Douglas explained, he must be “treated as a citizen so far as his property and liberty are concerned.”<sup>228</sup> Justice Douglas then quoted at length Justice Brewer’s dissent in *Fong Yue Ting* condemning the “powers inherent in sovereignty” theory of immigration regulation—a critique, he wrote, which “grows in power with the passing years.”<sup>229</sup> The majority’s invocation of national security as a warrant for judicial diffidence was misplaced when the challenged federal action interfered with a fundamental constitutional liberty interest.<sup>230</sup> “The right to be immune from arbitrary decrees of banishment certainly may be more important to ‘liberty’ than the civil rights which all aliens enjoy when they reside here,” Justice Douglas wrote.<sup>231</sup> “Banishment is punishment in the practical sense,” he explained, and “may deprive a man and his family of all that makes life worth while.”<sup>232</sup> As a result, unless noncitizens “are free from arbitrary banishment, the ‘liberty’ they enjoy while they live here is indeed illusory.”<sup>233</sup> In stark contrast to the majority’s position, the fact that the Act governed the noncitizen petitioner’s right to be present in the United States did not exempt it from judicial review; to the contrary, the enormous stakes of a deportation proceeding enhanced the importance of judicially enforceable constitutional constraints.<sup>234</sup>

Other Justices appear to have acquiesced only reluctantly in the principle of plenary federal power. Justice Frankfurter’s majority opinion

226. *Id.* at 589.

227. *See id.* at 598 (Douglas, J., dissenting).

228. *Id.* at 598–99.

229. *Id.* at 599–600.

230. *See id.*

231. *Id.* at 600.

232. *Id.*

233. *Id.* Although the “drastic step” of banishment “may at times be necessary in order to protect the national interest,” Justice Douglas continued, unless the Government can show that “the continued presence of an alien . . . would be hostile to the safety or welfare of the Nation . . . , I would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees.” *Id.* at 601.

234. *See id.* at 598; *see also* *Galvan v. Press*, 347 U.S. 522, 533 (1954) (Black, J. dissenting); *id.* at 533–34 (Douglas, J., dissenting).

in *Galvan v. Press*,<sup>235</sup> for example, reveals his serious misgivings about the constitutional anomalousness of unrestrained federal authority. Juan Galvan, a thirty-year resident of the United States who had an American wife and four native-born children, had been ordered deported because of his brief membership in the Communist Party in the 1940s.<sup>236</sup> The Internal Security Act of 1950 had established as a matter of law that the Communist Party advocated the violent overthrow of the U.S. government, thus relieving the Government of the burden of proving as much.<sup>237</sup> Further, under the Government's construction of the Act, Congress had also dispensed with any need to prove that a particular noncitizen Party member was committed to, or even aware of, the Party's presumed violent purpose.<sup>238</sup> Although the "power of Congress over the admission of aliens and their right to remain [was] necessarily very broad," Justice Frankfurter mused, "touching as it does basic aspects of . . . foreign relations and the national security," the application of that principle in a case lacking any evidence of the noncitizen's violent or otherwise illegal purpose gave him pause.<sup>239</sup> "[C]onsidering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen," the deportation of Galvan "without permitting [him] to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity."<sup>240</sup> Because "the essence of due process" is "fair play," Justice Frankfurter reasoned, "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of [Congress's] political discretion"<sup>241</sup> to regulate the admission and removal of aliens. Further, "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause . . . should be applied to deportation."<sup>242</sup>

But alas, "the slate [was] not clean."<sup>243</sup> With respect to Congress's plenary authority over immigration, Justice Frankfurter wrote,

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235. 347 U.S. at 523–24, 531–32 (majority opinion) (upholding the deportation of a long-term resident alien under a section of the Internal Security Act of 1950 providing for the deportation of any alien who was a member of the Communist Party at any time after entering the country).

236. *Id.* at 532 (Black, J., dissenting).

237. *Id.* at 525–26 (majority opinion).

238. *Id.* at 526.

239. *Id.* at 530.

240. *Id.*

241. *Id.* at 530–31.

242. *Id.* at 531.

243. *Id.*

There is not merely “a page of history,” . . . but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.<sup>244</sup>

Despite such evident discomfort with the severity of the result, the Justices in the majority were “not prepared to deem [themselves] wiser or more sensitive to human rights than [their] predecessors,” and thus upheld Galvan’s deportation.<sup>245</sup>

Further, even some Justices who reluctantly acquiesced in the consignment of immigration regulation to the political branches reserved a role for the courts in ensuring that noncitizens were afforded due process of law. This was true in exclusion as well as deportation cases. In *Knauff v. Shaughnessy*,<sup>246</sup> for example, the Court famously declared that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>247</sup> Yet that principle, as well as the Court’s decision upholding the exclusion of a noncitizen based on undisclosed information,<sup>248</sup> garnered a bare majority of only four Justices, with three Justices—Frankfurter, Black, and Robert Jackson—dissenting.<sup>249</sup> The dissenters argued that to exclude Ellen Knauff, the German wife of an American citizen, without even a hearing was inconsistent with constitutional liberty.<sup>250</sup> “Security is like liberty in that many are the crimes committed in its name,” Justice Jackson scolded.<sup>251</sup> “The menace to the security of this country . . . from this girl’s admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern.”<sup>252</sup>

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244. *Id.* (citations omitted).

245. *Id.* at 531–32.

246. 338 U.S. 521 (1950).

247. *Id.* at 544.

248. *See id.* at 547.

249. *See id.* at 550 (Jackson, J., dissenting). Two Justices did not participate in the decision. *Id.* at 547 (Douglas & Clark, JJ., abstaining).

250. *Id.* at 550–51 (Jackson, J., dissenting).

251. *Id.* at 551.

252. *Id. Id.* at 537. Following her exclusion, members of Congress sought to gain Ellen Knauff’s admission to the U.S. through a private bill. Though the bill stalled in the Senate, congressional involvement prodded the Attorney General to grant Knauff a full exclusion hearing before a Board of Special Inquiry. That Board upheld her exclusion, but its decision was later reversed by the Board of Immigration Appeals (BIA). The government’s conclusion that Knauff represented a national security risk rested on nothing more than “unsubstantiated hearsay,” the BIA concluded, before ordering Knauff admitted to the U.S. as a permanent resident. *See* Weisselberg, *supra* note 49, at 958–64.

A few years later, Justices Jackson, Frankfurter, Black, and Douglas again dissented when a five-Justice majority upheld the exclusion and indefinite detention of a noncitizen on Ellis Island without a hearing.<sup>253</sup> Although courts owed Congress's and the Executive's substantive policy judgments regarding security "[c]lose to the maximum of respect," Justice Jackson wrote, "procedural fairness and regularity are of the indispensable essence of liberty" and would not be surrendered to legislative discretion.<sup>254</sup> Justice Jackson emphatically rejected the Government's (imputed) position that the noncitizen apprehended at the border "has no rights."<sup>255</sup> With respect to procedural due process, at least, noncitizens stood on equal constitutional footing with citizens. "If the procedures used to judge this alien are fair and just," Justice Jackson explained, "no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien."<sup>256</sup>

For the four *Mezei* dissenters, moreover, the denial of a hearing defied not only constitutional due process but also the essence of individual freedom and the rule of law.<sup>257</sup> Notably, both Justices Jackson and Black drew explicit parallels between *Mezei*'s indefinite detention and the practices of Europe's most infamous authoritarians. "[T]he Government's theory of custody for 'safekeeping,'" Justice Jackson observed, had "unmistakable overtones" of the Nazi system of "protective custody," under which "the concentration camps were populated with victims of summary executive detention for secret reasons."<sup>258</sup> Justice Black similarly objected to "the Court's holding that *Mezei*'s liberty is completely at the mercy of the unreviewable discretion of the Attorney General."<sup>259</sup> The Soviet People's Commissariat and Adolf Hitler's secret police claimed authority to imprison or banish both

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253. *Shaughnessy v. Mezei*, 345 U.S. 206, 215–18 (1953). At the time the Supreme Court issued its decision, Ignatz Mezei had spent three years detained on Ellis Island based on "national security" reasons that the government refused to divulge. As in the case of Ellen Knauff, *Mezei* managed to gain an exclusion hearing before a Board of Special Inquiry. The Board upheld *Mezei*'s exclusion, but this time (due to substantial evidence of *Mezei*'s past communist activities) the BIA affirmed. Based on the finding that *Mezei*'s role in the Communist Party had been only minor, however, the BIA recommended to the Attorney General that *Mezei* be paroled into the U.S., and the Attorney General acceded. See Weisselberg, *supra* note 49, at 979–84.

254. *Mezei*, 345 U.S. at 222, 224 (Jackson, J., dissenting).

255. *Id.* at 226–27.

256. *Id.* at 225.

257. See *id.* at 217–18 (Black, J., dissenting); *id.* at 218–21, 228 (Jackson, J., dissenting).

258. *Id.* at 225–26 (Jackson, J., dissenting).

259. *Id.* at 217 (Black, J., dissenting).

citizens and foreigners based on undisclosed information,<sup>260</sup> he scolded. The American Bill of Rights, however, served as an essential bulwark against such practices and reflected the Founders' abhorrence of "arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.'"<sup>261</sup> Taken to its logical conclusion, the consignment of immigration regulation exclusively to the political departments, free from judicially enforceable constitutional constraints, was fundamentally inconsistent with that principle. As Justice Jackson observed, "differences in the process of administration make all the difference between a reign of terror and one of law."<sup>262</sup>

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The national security cases of the early 1950s are notable today for their failure to command anything approaching judicial consensus about the metes and bounds of the federal immigration power. Although the holdings in those cases continue to carry significant precedential value, the opinions themselves go a long way toward unsettling the doctrinal foundation on which the modern plenary power doctrine rests. Even at the height of the Cold War, sixty years after the inherent sovereignty principle had presumably become settled law, and when claims of national security commanded extraordinary judicial deference, Justices Black and Douglas continued to reject the rule of *Fong Yue Ting*.<sup>263</sup> Others, such as Justices Frankfurter and Jackson, acquiesced reluctantly to six decades of precedent but continued to chafe at the patent unfairness that the doctrine sometimes produced, and to insist on meaningful procedural safeguards.<sup>264</sup> This remarkable lack of consensus defies the aura of naturalness and inevitability that surrounds the plenary power doctrine today.

### III. TOWARD AN UNEXCEPTIONAL IMMIGRATION POWER

This Part argues that the Supreme Court should disaggregate immigration law for the purpose of constitutional review, and proposes that recent developments in constitutional immigration law have begun to chart a course toward that end. Disaggregating immigration law would mean recasting federal immigration regulation not as a distinct, constitutionally privileged subset of foreign affairs and national security,

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260. *Id.* at 217–18.

261. *Id.* at 218.

262. *Id.* at 226 (Jackson, J., dissenting).

263. *See, e.g.,* *Harisiades v. Shaughnessy*, 342 U.S. 580, 598–600 (1952) (Douglas, J., dissenting).

264. *See, e.g.,* *Galvan v. Press*, 347 U.S. 522, 530–32 (1954).

but rather as ordinary lawmaking akin to Congress's plenary power to regulate commerce or to tax and spend for the general welfare. Federal authority over noncitizens, including noncitizens' right to enter or remain within the United States, would thus be constrained by the same substantive, judicially enforceable constitutional norms that apply to most other federal lawmaking and enforcement. Section III.A explains how mainstream constitutional norms have infiltrated the Court's immigration opinions in recent decades, and proposes that this infiltration has begun to erode some of the plenary power doctrine's key premises. Section III.B considers how a constitutionally disaggregated immigration law would operate in three select doctrinal contexts: eligibility for public benefits, removal, and detention. Finally, Section III.C begins to theorize a jurisprudential path that the disaggregation of immigration law could plausibly follow.

#### A. *The Encroachment of Mainstream Constitutional Norms*

During the decades following the Cold War cases discussed in Part II.B, several Justices continued to protest the Court's insulation of federal immigration regulation from constitutional review; however, they generally refrained from the sort of direct challenges that Justices Douglas and Black expressed in *Harisiades*.<sup>265</sup> Yet in a number of cases, the Justices have suffused their opinions with the very substantive constitutional norms that the plenary power doctrine has, in theory, exiled from constitutional immigration law. Although this Section focuses on relatively recent developments, the encroachment of mainstream constitutional norms into the Court's immigration decisions has been evident for decades. In two cases from the 1970s involving U.S. citizen

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265. Consider *Kleindienst v. Mandel*, 408 U.S. 753 (1972). There, the Court rejected a First Amendment challenge to the government's exclusion of Ernest Mandel, a Belgian Marxist journalist and scholar. *Id.* at 756, 770. Although the exclusion of Mandel implicated the First Amendment right of the petitioners (American scholars who had invited Mandel to an academic conference) to hear Mandel speak, the government's plenary power to exclude noncitizens trumped that right. *Id.* at 765–66. Justices Douglas, Marshall, and Brennan dissented. *See id.* at 770 (Douglas, J., dissenting); *id.* at 774 (Marshall, J., dissenting). Justice Marshall observed in passing that the *Chinese Exclusion Case*, *Fong Yue Ting*, and the Cold War cases were "not the strongest precedents in the United States Reports," but stressed that because "[t]here were no rights of Americans involved in any of the old alien exclusion cases, . . . their broad counsel about deference to the political branches is inapplicable." *Id.* at 781, 783. The jurisprudential pillars of the plenary federal power to exclude noncitizens were easily distinguishable and thus need not be "overruled to strike down Dr. Mandel's exclusion." *Id.* at 782.

It is unsurprising that judicial critics of plenary federal power stopped invoking Justice Field and Brewer's *Fong Yue Ting* dissents, as "citing to dissents risks undermining the authority of the argument." Starger, *supra* note 197, at 1264. Although "[t]he incentive not to cite dissents is strong," however, dissents can nevertheless "influence doctrine far more than its number of citations would indicate. *Id.*

petitioners, for example, the Court subjected federal admission provisions—the inner core of federal “immigration law” and the subset that bears most directly on national “sovereignty”—to meaningful, if still highly deferential, constitutional review, even as it affirmed Congress’s plenary power to exclude noncitizens.<sup>266</sup>

This Section analyzes two cases decided in the past fifteen years: *Zadvydas v. Davis*<sup>267</sup> and *Padilla v. Kentucky*.<sup>268</sup> The purpose of the analysis is twofold. First, it demonstrates the persistent dissatisfaction among some Justices with both the underlying logic and the practical consequences of the plenary power doctrine. Second, it proposes that the continued encroachment of mainstream constitutional norms into the Court’s immigration decisions has begun to wear a path of doctrinal development toward the end of plenary federal power and the disaggregation of immigration law.

### 1. *Zadvydas v. Davis*: Constitutional Norms in the Shadow of Plenary Power

The Supreme Court’s 2001 decision in *Zadvydas v. Davis* provides an especially striking example of how substantive constitutional norms long banished under the plenary power doctrine nevertheless inform judicial decision-making in immigration cases. In *Zadvydas*, the Court held that the government lacked statutory authority to detain indefinitely Kestutis

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266. In upholding Ernest Mandel’s exclusion on ideological grounds, the Court affirmed that “the legislative power of Congress [was] more complete over the ‘admission of aliens’ than any other ‘conceivable subject.’” Indeed, the majority quoted directly from the *Chinese Exclusion Case* and its early progeny, and expressly declined to reconsider the long and robust line of decisions upholding Congress’s plenary power “to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, . . . and to have its declared policy enforced exclusively through executive officers, without judicial intervention.” *Kleindienst*, 408 U.S. at 766 (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)). Notwithstanding such language, however, the Court also appeared to condition the exercise of that power on the presence of a “facially neutral bona fide reason.” *Id.* at 766, 770 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)). A few years later, the Court similarly acknowledged Congress’s “exceptionally broad power to determine which classes of aliens may lawfully enter the country,” even as it subjected the challenged law—a provision extending preferential immigration status to the “illegitimate” children of U.S. citizens mothers but not U.S. citizen fathers—to something approximating rational basis review. *Fiallo v. Bell*, 430 U.S. 787, 794 (1976). In so doing, the majority expressly rejected the government’s position that “substantive policy regulating the admission of aliens into the United States is not an appropriate subject for judicial review,” instead observing that “[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to . . . the admission and exclusion of aliens . . .” *Id.* at 793 n.5.

267. 533 U.S. 678 (2001).

268. 130 S. Ct. 1473 (2010).

Zadvydas, a resident noncitizen subject to a final order of removal,<sup>269</sup> and ordered Zadvydas released from federal custody and paroled into the United States.<sup>270</sup> To understand how the Court arrived at that conclusion is to understand how constitutional norms can infuse ostensibly non-constitutional review of immigration law.

The federal statute at issue in *Zadvydas* governed the detention of removable noncitizens; it provided for a ninety-day statutory "removal period" following a final order, during which the alien typically would be held in custody.<sup>271</sup> Ordinarily, the Government would remove the noncitizen within that ninety-day period.<sup>272</sup> Because the Government had been unable to locate a country that would accept Zadvydas,<sup>273</sup> however, he remained in custody after the expiration of the ninety-day removal period, with no realistic prospect of release.<sup>274</sup> The Government claimed the authority to extend Zadvydas's confinement indefinitely based on a statutory provision stating that when the Government fails to remove an alien during the ninety-day removal period and the Attorney General has determined the alien to be a "risk to the community or unlikely to comply with the order of removal," the alien "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision."<sup>275</sup> At issue in *Zadvydas*'s challenge was whether the quoted language authorized the Government to detain a noncitizen indefinitely or, as *Zadvydas* maintained, only for a "period reasonably necessary" to accomplish removal.<sup>276</sup> A five-Justice majority "construe[d] the statute to contain an implicit 'reasonable time' limitation, the application of which

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269. *Zadvydas*, 533 U.S. at 684–85, 702. Specifically, *Zadvydas* had been convicted of possessing cocaine with the intent to distribute, a deportable offense under 8 U.S.C. § 1251(a)(2) (1988 & Supp. V 1989–1994). *Id.* at 684.

270. *See id.* at 702. Although parole allows an excludable or removable alien to be released into the United States with or without monitoring and travel restrictions, it is not regarded legally as *admission* to the country. 8 U.S.C. § 1182(d)(5) (2000). Rather, a parolee has the same (limited) statutory and constitutional rights as an excludable alien at the border. *See id.*; Martin, *supra* note 68, at 57, 71; *Zadvydas*, 533 U.S. at 693.

271. *Zadvydas*, 533 U.S. at 682.

272. *Id.*

273. *Id.* at 684. Germany, where *Zadvydas* was born, declined to accept him because he was not a German citizen; Lithuania, of which his parents had been citizens, declined to accept him because he was neither a Lithuanian citizen nor permanent resident; the Dominican Republic, of which *Zadvydas*'s wife was a citizen, likewise refused. *Id.*

274. *Id.* at 684–85.

275. *Id.* at 688–89 (quoting 8 U.S.C. § 1231(a)(6) (1994 & Supp. V 1995–2000)) (emphasis added) (internal quotation marks omitted).

276. *Id.* at 682.

is subject to federal-court review.”<sup>277</sup>

Given that *Zadvydas* was, at bottom, a case about statutory construction, one might have expected the Court’s analysis to center on the text and perhaps the legislative history of the relevant provision. But it did not. After setting out the background of the case and establishing jurisdiction, Justice Stephen Breyer devoted eight pages of his twenty-one-page majority opinion to the “obvious” constitutional difficulty “arising out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection.”<sup>278</sup> Although the majority acknowledged that *Zadvydas*’s constitutional liberty interest could not serve as the basis for a direct constitutional challenge to his confinement, it also maintained that the venerable canon of “constitutional avoidance” required the Court to attend to the constitutional issue.<sup>279</sup> *Zadvydas*’s Fifth Amendment liberty interest thus entered into the Court’s analysis somewhat elliptically, through the “‘cardinal principle’ of statutory interpretation . . . that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”<sup>280</sup>

Even as the majority acknowledged that *Zadvydas* lacked a legal right to live at large in the United States and affirmed Congress’s plenary power over the removal of noncitizens, it nevertheless insisted that such power was “subject to important constitutional limitations.”<sup>281</sup> “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint,” Justice Breyer explained, “lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects.”<sup>282</sup> When detention results from a criminal proceeding, the Constitution provides for “adequate procedural protections” against the unwarranted deprivation of individual liberty.<sup>283</sup> Because the “indefinite civil detention” at issue in *Zadvydas* did not trigger comparable safeguards, however, it was incumbent on the Government to establish “strong special justification[s],” such as “preventing flight” or “protecting the

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277. *Id.* Four years later, the Court held that detention of noncitizens deemed inadmissible was likewise subject to a reasonable time limitation. *Clark v. Martinez*, 543 U.S. 371, 386–87 (2005).

278. *Zadvydas*, 533 U.S. at 692. As Professor David Martin has remarked, Justice Breyer’s attention to *Zadvydas*’s liberty interests reflected the majority’s “resolute insistence on viewing the situation from the perspective of the alien, not the government.” Martin, *supra* note 68, at 82.

279. *See Zadvydas*, 533 U.S. at 696, 699.

280. *Id.* at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

281. *Id.* at 695.

282. *Id.* at 690.

283. *Id.*

community.”<sup>284</sup> In this case, the Government failed to make such a showing.

In describing the purported “limitations” on federal authority, Justice Breyer made a point to discount the relevance of the usual rationales for buffering federal immigration regulations against constitutional review. The case did not involve “terrorism or other special circumstances,” he reasoned, “where special arguments” grounded in national security might justify “preventive detention and . . . heightened deference to the judgments of the political branches.”<sup>285</sup> Nor was the majority persuaded that the Government’s sole proffered “foreign policy consideration”—that judicially ordered release from detention could compromise “sensitive repatriation negotiations” with Lithuania—was sufficiently weighty to justify indefinite confinement.<sup>286</sup> Accordingly, the Court concluded that Zadvydas’s Fifth Amendment “liberty interest [was] . . . strong enough to raise a serious question” about the constitutionality of “indefinite and potentially permanent”<sup>287</sup> detention.

In a context other than immigration, that conclusion would warrant strict constitutional scrutiny, and thus a judicial inquiry into whether the challenged provision was narrowly tailored to serve a compelling government interest. By the Court’s own admission, however, the plenary power doctrine prevented Zadvydas from challenging the statute directly on Fifth Amendment grounds. “Despite this constitutional problem,” the majority conceded, if Congress had made clear its intent in the statute to authorize indefinite detention, “we must give effect to that intent.”<sup>288</sup> In fact, setting aside for a moment the serious constitutional implications of indefinite, unreviewable detention, a candid reading of the relevant statutory text favors the Government’s position that Congress intended to bestow on the Attorney General broad discretion to detain noncitizens subject to a final order of removal. Yet the majority, reasoning in the long, perhaps obfuscating shadow of Zadvydas’s constitutional liberty interest, could not discern “any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.”<sup>289</sup> The ambiguity lay in the provision that a removable noncitizen “*may* be detained beyond the removal period.”<sup>290</sup>

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284. *Id.* The majority was further troubled by Congress’s apparent delegation to the Immigration and Naturalization Service (INS), a mere “administrative body,” of an “unreviewable authority to make determinations implicating fundamental rights.” *Id.* at 692 (quoting Superintendent, Mass. Corr. Inst. Walpole v. Hill, 472 U.S. 445, 450 (1985)).

285. *Id.* at 696 (internal quotation marks omitted).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 697.

290. 8 U.S.C. § 1231(a)(6) (1994 & Supp. V 1995–2000) (emphasis added).

Although the statute's use of the word "'may' suggests discretion," the majority reasoned, "it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous."<sup>291</sup> Justice Breyer thus concluded that, "read in light of the Constitution's demands," the statute "does not permit indefinite detention," but rather "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States."<sup>292</sup> Accordingly, the majority adopted six months as the presumptive period of reasonableness.<sup>293</sup>

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*Zadvydas* illustrates at least two ways in which mainstream constitutional norms have encroached on constitutional immigration law. First and most evidently, in constructing the applicable statute the majority injected into its ostensibly sub-constitutional reasoning what Professor Hiroshi Motomura has called "phantom constitutional norms."<sup>294</sup> Second and more subtly, the majority refused to treat as dispositive one of the plenary power doctrine's most foundational categorical presumptions: that courts owe the political branches broad deference based on the inextricable connection between the regulation of immigration and the conduct of foreign affairs and national security.

#### a. Statutory Construction and Phantom Constitutional Norms

Although the plenary power doctrine obliges courts to refrain from direct constitutional review of substantive immigration law, constitutional considerations nevertheless frequently operate as "phantom constitutional norms," shaping the meaning that courts ascribe to statutes and administrative regulations.<sup>295</sup> By way of illustration,

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291. *Zadvydas*, 533 U.S. at 697.

292. *Id.* at 689. Justice Kennedy wrote scathingly in dissent that the "requirement the majority reads into the law simply bears no relation to the text; and in fact it defeats the statutory purpose and design." *Id.* at 707 (Kennedy, J., dissenting).

293. *See id.* at 701 (majority opinion). The majority based the period of six months on statements from a 1956 congressional debate suggesting that some members of Congress considered that detention longer than six months could be constitutionally problematic. *Id.* (citing *United States v. Witkovich*, 353 U.S. 194 (1957)).

294. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) [hereinafter Motomura, *Immigration Law*].

295. *See id.* at 548–49. As Professor Motomura explains, the "phantom constitutional norms" that inform statutory interpretation in immigration law "conflict with the expressly articulated constitutional norm—unreviewable plenary power." *Id.* at 564. Phantom norms are nevertheless "constitutional" in that they have been "actually adopted as an expressly constitutional decision in other areas of law, [and] then carry over to immigration cases, where they are substantial

Professor Motomura analyzed a host of cases from the late 1970s and 1980s in which courts very evidently, and often explicitly, adopted sometimes strained readings of immigration statutes and regulations in the service of phantom constitutional norms.<sup>296</sup> In so doing, they prohibited the government from, for example, discriminating against noncitizens on the basis of race and national origin;<sup>297</sup> detaining noncitizens indefinitely pending exclusion or removal;<sup>298</sup> denying due process of law to first-time entrants seeking asylum;<sup>299</sup> and excluding noncitizens on ideological grounds.<sup>300</sup> In each of these contexts, courts recognized that the plenary power doctrine foreclosed a direct challenge centered on the constitutionally protected interest at stake, but nevertheless strove (sometimes successfully) to vindicate those interests through the sub-constitutional means of statutory construction.

To characterize the constitutional liberty interest at work in *Zadvydas* as a "phantom" norm does not imply that it operated surreptitiously, or even subtly. Indeed, as the preceding overview of the majority's analysis indicates, the "serious constitutional problem"<sup>301</sup> of indefinite, unreviewable confinement looms over the entire opinion. At various points, Justice Breyer misleadingly implied that the alternative to constitutional avoidance was actually striking down the statute on constitutional grounds. On previous occasions, he counseled, "[w]e have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."<sup>302</sup> The implication is that "the

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enough to serve the limited function of informing interpretation of immigration statutes and other subconstitutional texts." *Id.*

296. *See id.* at 583–600.

297. *See, e.g.,* *Jean v. Nelson*, 472 U.S. 846, 852, 857 (1985) (reading a prohibition against race or national origin discrimination into a general provision governing the parole of noncitizens into the United States); *see also* Motomura, *Immigration Law*, *supra* note 294, at 587–93.

298. *See, e.g.,* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387, 1389–90 (10th Cir. 1981) (holding, after a trenchant and highly critical Fifth and Eighth Amendment analysis of the Government's position that it could detain the noncitizen petitioner indefinitely pending removal, that the INS lacked statutory authority); *see also* Motomura, *Immigration Law*, *supra* note 294, at 593–95.

299. *See, e.g.,* *Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983) (reading into the asylum statutes and regulations a procedural due process right for stowaways to an exclusion hearing at which they could bring asylum claims, even though first-time entrants generally lacked such a right); *see also* Motomura, *Immigration Law*, *supra* note 294, at 595–97.

300. *See, e.g.,* *Allende v. Schultz*, 605 F. Supp. 1220, 1226 (D. Mass. 1985) (reading a requirement that the Government provide a "facially legitimate and bona fide" reason for denying a nonimmigrant visa to the widow of former Chilean President Salvador Allende into the statutory provision on which the petitioner's exclusion was based); *see also* Motomura, *Immigration Law*, *supra* note 294, at 597–600.

301. *Zadvydas v. Davis*, 533 U.S. 638, 690 (2001).

302. *Id.* at 689.

Constitution's demands" compelled the majority to read an "implicit limitation" into the post-removal-period detention statute.<sup>303</sup> In fact, the obvious alternative to rewriting the statute to avoid the constitutional difficulty was to acknowledge that Congress, in its largely unrestrained authority to govern immigration, granted the Attorney General broad discretion to detain certain noncitizens subject to a final order of removal well beyond the statutory ninety-day removal period.<sup>304</sup> In straining to avoid such a result, the majority opinion incorporated Zadvydas's liberty interest as a phantom norm: it directly informed the disposition of the case—here, the construction of the statute not to sanction indefinite detention—even though it could not serve as its direct constitutional basis.

To suggest that Justice Breyer squinted to see ambiguity in the challenged provision and then read into the statute a time limitation that Congress surely never contemplated may sound like a criticism. But it is not intended as one. Yes, the majority's reading of the word "may" is strained and hardly stands as an example of textually rigorous statutory construction. Instead of viewing Justice Breyer's analysis as an "unanchored interpretation" of the statute that improperly "nullifies the statutory purpose,"<sup>305</sup> as Justice Kennedy charged in his dissent, the majority opinion should be understood as a particularly revealing artifact of the plenary power doctrine. Recall that in *Mezei* the Court held that a noncitizen with no right to be present in the United States could not challenge his indefinite, and perhaps permanent, confinement as an unconstitutional deprivation of liberty.<sup>306</sup> Notwithstanding Justice Breyer's generally unconvincing attempt to distinguish *Mezei*,<sup>307</sup> it is difficult to see why, as a purely doctrinal matter, it should not control the

303. *Id.*

304. Justice Antonin Scalia took this position in his dissent. Zadvydas's "claim can be repackaged as freedom from 'physical restraint' or freedom from 'indefinite detention,'" Scalia maintained. "[I]t is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here. There is no such constitutional right." *Id.* at 702–03 (Scalia, J., dissenting).

305. *Id.* at 710 (Kennedy, J., dissenting).

306. *See supra* note 253 and accompanying text.

307. Justice Breyer's distinction turned on the fact that *Mezei*, although a long-term resident of the United States, had been detained at Ellis Island upon his return to the United States and thus stood in the same position for constitutional purposes as a noncitizen stopped at the border, whereas Zadvydas was a resident alien facing removal. *See Zadvydas*, 533 U.S. at 684, 693 (majority opinion). As Justice Scalia pointed out in dissent, however, the territorial distinction on which Justice Breyer relied is informed by the fact that noncitizens present within the United States, and perhaps especially long-term residents, will generally have a stronger claim of right to be present in the United States than a noncitizen who has never been admitted. *Id.* at 703–04 (Scalia, J., dissenting). But Zadvydas's final order of removal had extinguished his right to remain in the United States. *Id.* at 703.

result in *Zadvydas*. To accept *Mezei* as controlling precedent, however, would have been to hold that the Attorney General had the authority, even absent any bona fide national security interest, to confine a man for years, and perhaps decades, with no realistic prospect of release; and to do so, moreover, outside the view of any constitutional court. That is an extraordinary assertion of sovereign power, which manifests the plenary power doctrine in its pure, undiluted form.<sup>308</sup> Working under the assumption that *Mezei* would continue to define the scope of the Government's detention authority, *Zadvydas* based his challenge not on constitutional grounds but on the Government's interpretation of the post-removal provision. It was, paradoxically, the sub-constitutional nature of the challenge—the fact that *Zadvydas* turned on the meaning of a statute—that created doctrinal space for the phantom constitutional norm. Faced with the alternative of sanctioning unrestrained governmental authority to deprive a person of basic human liberty—a proposition that a majority of the Court, like the *Mezei* dissenters, found fundamentally inconsistent with constitutional liberty and the rule of law—Justice Breyer chose to abandon strict fidelity to congressional intent.<sup>309</sup>

#### b. Challenging Immigration's Presumptive Foreign Affairs–National Security Nexus

Invoking the doctrine of constitutional avoidance to rewrite the challenged statutory provision was essentially an evasive maneuver, through which the majority avoided the logical consequence of plenary federal power. Even as the Court left the plenary power doctrine itself intact, however, it also implicitly contravened the doctrine's essential warrant for judicial deference: the presumption that immigration lawmaking and enforcement per se is part and parcel of the political branches' authority over foreign affairs and national security.

As this Article explained in Part I, the Court ordinarily presumes as a matter of course that immigration inherently implicates foreign affairs and national security—areas in which Congress and especially the Executive Branch operate largely beyond the purview of the federal courts. In 2003, for example, the Court upheld the mandatory six-month detention of a teenage petty criminal who, the Government conceded,

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308. Recall the *Mezei* dissents discussed above. *See supra* notes 253–62 and accompanying text.

309. Justice Breyer's analysis likewise reflects a rising judicial consciousness in the wake of the 1996 reforms (*see supra* notes 62–69 and accompanying text) that immigration law was becoming increasingly intertwined with criminal law in constitutionally relevant ways. In this respect, he anticipated the Court's explicit engagement with the immigration/criminal law nexus a decade later, in *Padilla v. Kentucky*. *See infra* notes 318–43 and accompanying text.

posed neither a flight risk nor a threat to the community.<sup>310</sup> As the majority explained, “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>311</sup> “[R]easonable presumptions and generic rules,” even when made by the INS rather than Congress,” the Court reasoned, “are not necessarily impermissible exercises of Congress’ traditional power to legislate with respect to aliens.”<sup>312</sup>

Yet the *Zadvydas* majority declined to apply the same categorical presumption. Instead, it specifically considered and rejected the merits of the sovereignty, security, and foreign affairs rationales advanced by the Government. Because the specific circumstances of the case did not “require us to consider the political branches’ authority to control entry into the United States,” Justice Breyer wrote, ordering *Zadvydas*’s release would “leave no ‘unprotected spot in the Nation’s armor.’”<sup>313</sup> “Neither do we consider terrorism or other *special* circumstances” that might justify “heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>314</sup>

Here, Justice Breyer subtly shifted two key pillars of plenary federal power. First, he implicitly shrank the sphere of immigration regulation that has been understood to implicate the nation’s inherent sovereignty. It is no longer immigration per se, understood as the right of noncitizens to enter and remain within the United States, but rather the “control of entry.” Second and more fundamentally, Justice Breyer implied that “heightened deference to the judgments of the political branches” will not be presumed, but instead requires an affirmative demonstration by the Government of “special” circumstances, such as terrorism. This is not the plenary power doctrine of *Mezei*, or even *Demore v. Kim*. The *Zadvydas* majority rejected the characterization of indefinite detention as merely an incident of the civil process of removal, and appeared to place the burden on the Government to provide a specific, constitutionally weighty justification. Although it was not quite the heightened scrutiny that the Government’s abridgement of a fundamental liberty typically triggers outside the immigration context, the majority nevertheless treated as extraordinary the assertion of authority to deprive *Zadvydas* indefinitely of his physical liberty, and insisted that such a deprivation must be justified by “special arguments” that were particular to *Zadvydas*’s case.

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310. *Demore v. Kim*, 538 U.S. 510, 513–14 (2003).

311. *Id.* at 522 (quoting *Matthews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)).

312. *Id.* at 526 (quoting *Reno v. Flores*, 507 U.S. 292, 313 (1993)).

313. *Zadvydas*, 533 U.S. at 695–96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

314. *Id.* at 696 (emphasis added).

So, too, did the majority rebuff the Government's asserted "foreign policy consideration"—specifically, the risk of interfering with "'sensitive' repatriation negotiations."<sup>315</sup> "[N]either the Government nor the dissents explain how a habeas court's efforts to determine the likelihood of repatriation . . . could make a significant difference in this respect,"<sup>316</sup> Justice Breyer observed. Indeed, even in the context of the "war on terror," the Court has declined on several occasions to defer categorically to the Government's invocation of national security to shield from judicial review the indefinite detention of noncitizens.<sup>317</sup> In marked contrast to the *Demore* Court's recitation of and reflexive capitulation to the traditional rationales for constitutional deference, the *Zadvydas* majority subjected each of those rationales to critical scrutiny, ultimately dismissing them as generic and devoid of substance.

## 2. *Padilla v. Kentucky* and the Erosion of the Civil–Criminal Distinction

The Supreme Court destabilized another key pillar of the plenary power doctrine in the 2010 case of *Padilla v. Kentucky*: the notion that because removal from the United States is defined legally as a civil proceeding rather than criminal punishment, noncitizens subject to removal are not entitled to the suite of rights that protect criminal defendants against governmental abuses of power.<sup>318</sup> As Part I observed, this means, among other things, that a noncitizen facing the prospect of

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315. *Id.* (quoting Brief for the Respondents at 21, *Zadvydas*, 533 U.S. 678 (2001) (No. 99-1791), 2001 WL 28667, at \*21).

316. *Id.*

317. In *Boumediene v. Bush*, for example, the Court extended habeas corpus rights to noncitizen Guantanamo detainees who had been designated "enemy combatants," notwithstanding the Government's asserted interest in "apprehend[ing] and detain[ing] those who pose a real danger to our security." 553 U.S. 723, 732, 797 (2008). "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism," the Court acknowledged that "proper deference must be accorded to the political branches." *Id.* at 796 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). However, "[s]ecurity subsists, too, in fidelity to freedom's first principles," it reasoned. *Id.* at 797. "Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives." *Id.* Although *Boumediene* is not an immigration case and its implications for constitutional immigration law are far from clear, it does illustrate how, even in contexts that unambiguously implicate the nation's security, the Court is prepared to rebuff the same rationale for judicial deference that undergirds the plenary power doctrine. For other recent examples of the Court's refusal to abdicate its role in reviewing the federal government's prosecution of the "war on terror," see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004).

318. Compare *supra* notes 55–61 and accompanying text, with *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481–82 (2010).

removal does not have a Sixth Amendment right to appointed counsel, is not entitled to a *Miranda* warning, and cannot suppress evidence obtained in violation of the Fourth Amendment.<sup>319</sup> It was precisely this withdrawal of deportation from the purview of the Fourth, Fifth, and Sixth Amendments that Justice Field condemned in his *Fong Yue Ting* dissent.<sup>320</sup> Notwithstanding the protests of Justice Field and others, however, the conceit that deportation is not “punishment” remains a basic premise of constitutional immigration law.<sup>321</sup>

Although *Padilla* did not directly repudiate the categorical distinction between civil deportation and criminal punishment, the five-Justice majority blurred the boundary between them in a way that necessarily diminishes its constitutional saliency. In brief, the Court held that a noncitizen criminal defendant’s Sixth Amendment right to effective assistance of counsel<sup>322</sup> included receiving competent, accurate advice about the potential removal consequences of a criminal conviction.<sup>323</sup> The petitioner, José Padilla, was a long-term permanent resident of the United States who was ordered removed after pleading guilty to transporting a large quantity of marijuana<sup>324</sup>—an offense for which federal law unambiguously mandated removal.<sup>325</sup> Padilla then appealed his conviction on the ground that, prior to entering his plea, his attorney had falsely advised him that he “did not have to worry about immigration status since he had been in the country so long.”<sup>326</sup> The Kentucky Supreme Court denied Padilla post-conviction relief on the ground that the Sixth Amendment guarantee of effective assistance of counsel did not entitle a criminal defendant to competent advice about removal.<sup>327</sup> Because removal was outside the sentencing authority of the trial court,

319. See *supra* notes 57–61 and accompanying text.

320. See *supra* notes 198–215 and accompanying text.

321. See, e.g., *Demore v. Kim*, 538 U.S. 510, 523 (2003) (describing detention pending removal as a constitutionally permissible incident of the civil removal process).

322. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (holding that the Sixth Amendment right to counsel included the effective assistance of competent counsel determined by “reasonableness under prevailing professional norms”).

323. Defense counsel’s duty to inform her client about the possible removal consequences of conviction depends on the relative clarity of the statute, the majority explained. See *Padilla*, 130 S. Ct. at 1483. Where the “deportation consequences of a particular plea are unclear or uncertain,” it reasoned, “[t]he duty of the private practitioner . . . is more limited.” *Id.* In such circumstances, she “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* By contrast, “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.” *Id.*

324. *Padilla*, 130 S. Ct. at 1477.

325. See 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

326. *Padilla*, 130 S. Ct. at 1478 (quoting *Kentucky v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008)).

327. *Padilla*, 253 S.W.3d at 485.

the Kentucky Supreme Court reasoned, it was merely a "collateral" rather than "direct" consequence of Padilla's criminal conviction.<sup>328</sup> That conclusion, which several federal appellate courts had also reached,<sup>329</sup> was firmly rooted in the Supreme Court's long-standing position that deportation is a civil proceeding that is functionally and constitutionally distinct from the criminal proceeding from which it flows.<sup>330</sup>

In *Zadvydas*, the fusion of immigration and criminal law remained in the background. In overturning the Kentucky Supreme Court, the *Padilla* majority placed that fusion at the center of its analysis.<sup>331</sup> "Although

328. *Id.*

329. *See Padilla*, 130 S. Ct. at 1481 n.9 (citing decisions by the U.S. Courts of Appeals for the First, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits adopting the same position).

330. *See supra* notes 55–61 and accompanying text. *See generally* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002) (observing that collateral civil sanctions that deprive convicted felons of "the basic rights of membership in society," though relatively "invisible," often are the "most significant penalties resulting from a criminal conviction").

331. Over the last three decades immigration and criminal law have merged to a remarkable degree. As one of the leading chroniclers of this building "cimmigration crisis" explains, "immigration law became infused with the substance of criminal law" in three respects:

First, there has been 'unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens.' Second, violations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than ever before. Third, recent changes in immigration law have focused on detaining and deporting those deemed likely to commit crimes that pose a threat to national security.

Stumpf, *supra* note 61, at 382 (quoting Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003)); *see also* César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1468–74 (2013); *supra* notes 62–69 and accompanying text (describing the dramatic expansion of statutory grounds for removal in 1996). Moreover, the physical experience of immigration detention is often scarcely distinguishable from prison. As the former Director of the Immigration and Customs Enforcement Office of Detention Policy and Planning explains, despite the legal distinction between "civilly detained and criminally incarcerated inmates," they

tend to be seen by the public as comparable, and both confined populations are managed in similar ways. Each group is ordinarily detained in secure facilities with hardened perimeters in remote locations that are considerable distances from counsel and their communities. With only a few exceptions, the facilities that the government uses to detain immigrant inmates were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, custody management strategies, and operating standards are based largely upon corrections principles of command and control.

Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1444–45 (2010) (footnote omitted).

removal proceedings are civil in nature” as a purely formal matter, Justice Stevens observed, “deportation is nevertheless intimately related to the criminal process.”<sup>332</sup> Further, while American law has “enmeshed criminal convictions and the penalty of deportation for nearly a century,”<sup>333</sup> in recent decades Congress both radically expanded the number of deportable offenses and stripped the courts and the Attorney General of their traditional and often-exercised authority to grant discretionary relief from deportation.<sup>334</sup> Such enactments swelled the class of noncitizens eligible for deportation at the same time that they eliminated the traditional means of “ameliorat[ing] unjust results on a case-by-case basis.”<sup>335</sup> The result was to render deportation “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”<sup>336</sup> That development “dramatically raised the stakes of noncitizens’ criminal conviction”<sup>337</sup> and made it “‘most difficult’ to divorce the penalty from the conviction in the deportation context.”<sup>338</sup> The majority was “quite confident,” Justice Stevens added, “that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.”<sup>339</sup>

One might feel cautious about ascribing to *Padilla* dramatic implications for constitutional immigration law. After all, *Padilla* is arguably not an immigration case at all, but a case about constitutional criminal rights—particularly, whether one of the many common “collateral” consequences of a criminal conviction<sup>340</sup> is sufficiently serious or integral to the criminal process that defense counsel’s failure to address it competently would constitute “ineffective assistance” within the meaning of the Sixth Amendment. That is true as far as it goes; and in this respect, *Padilla* concerns the rights of criminal defendants who happen to be noncitizens rather than the rights of immigrants *qua* immigrants.

But the real meaning of *Padilla* for constitutional immigration law may lie in what it tells us about how the five Justices in the majority

332. *Padilla*, 130 S. Ct. at 1481.

333. *Id.*

334. *See id.* at 1478–79.

335. *Id.* at 1479.

336. *Id.* at 1480 (footnote omitted).

337. *Id.*

338. *Id.* at 1481 (quoting *United States v. Russell*, 686 F.2d 35, 38 (C.A.D.C. 1982), *abrogated by Padilla*, 130 S. Ct. 1473).

339. *Id.*

340. As Justice Samuel Alito observed in dissent, *Padilla*’s case happened to involve removal, but a criminal conviction can also lead to “civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.” *Padilla*, 130 S. Ct. at 1488 (Alito, J., dissenting).

understand removal. First, the majority emphasized and gave concrete legal effect to the often-extraordinary personal, familial, and economic stakes of removal. As this Article noted above, various Justices have at times acknowledged that deportation can carry momentous stakes, even characterizing it as a form of “banishment” or “exile.”<sup>341</sup> Almost invariably, however, such recognition has come in dissents and concurrences; or, if in a majority opinion, as an expression of regret on the way to holding that the plenary power doctrine forecloses the relief sought. In *Padilla*, by contrast, the majority stressed the enormous stakes of removal as a reason to *expand* the constitutional rights of noncitizen criminal defendants.<sup>342</sup>

Second, the majority suggested that the legislative reforms of the past two decades have changed the constitutional meaning of removal.<sup>343</sup> Removal is no longer an extraordinary sanction reserved for the worst offenders but rather a routine, yet no less weighty, element of both the criminal justice and immigration systems.<sup>344</sup> In this new legal environment, the traditional civil–criminal distinction rang hollow. To defend the withholding of an important constitutional right from a criminal defendant facing banishment on the ground that removal is a civil rather than criminal proceeding, or a collateral rather than direct consequence of conviction, increasingly suggests an elevation of formalism over substance—a point Justice Stevens underscored when he contemplated the irrelevance of the collateral versus direct issue from the perspective of a noncitizen defendant.<sup>345</sup> Inherited labels such as “civil” or “collateral” would not be dispositive of constitutional rights.

### B. *Disaggregating Immigration Law*

As this Article has discussed, denominating a statute or enforcement action directed at noncitizens an immigration law triggers a singular form

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341. See *Bridges v. Wixon*, 327 U.S. 125, 160–61, 163 (1945) (Murphy, J., concurring); *supra* note 51 and accompanying text.

342. See *Padilla*, 130 S. Ct. at 1480–82. One can be heartened by the *Padilla* Court’s recognition of the extent to which removal has become intertwined with criminal law, but also worry that importing criminal law norms such as effective assistance of counsel into the immigration context could have the unintended long-run effect of weakening established constitutional criminal protections. See César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla’s Two-Tiered Duty for Noncitizens*, 72 MARYLAND L. REV. 844, 854 (2013) (arguing that, by extending a watered-down version of the *Strickland* guarantee to noncitizen criminal defendants, *Padilla* risks eroding “the baseline Sixth guarantee of the right to effective assistance of counsel” outside the immigration context, as well).

343. See *Padilla*, 130 S. Ct. at 1478–80.

344. See *id.* at 1478 (“The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.” (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948))).

345. See *id.* at 1481–82.

of exclusively federal, extra-constitutional authority. The constitutional exceptionalism is firmly rooted in the categorical presumption that “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>346</sup> This Section argues that the Supreme Court should retire that presumption, and with it the notion that the regulation of noncitizens comprises a discrete, constitutionally privileged domain of distinctly “political” subject matter. The effect would be to disaggregate immigration law for the purpose of constitutional review and approach the regulation of noncitizens for what it is—a variegated conglomeration of laws and enforcement actions concerning labor, crime, public health and welfare, and, sometimes, foreign affairs and national security.

Stripped of its presumptive connection to foreign affairs or national security, the federal government’s authority to regulate immigration would remain “plenary” in the traditional sense. As Chief Justice John Marshall explained nearly two centuries ago, “[i]f . . . the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress . . . absolutely.”<sup>347</sup> Indeed, when the Court adopted the plenary power doctrine in 1889,<sup>348</sup> Congress had already exercised such “plenary” authority over immigration for at least fifteen (and arguably sixty) years pursuant to its commerce power.<sup>349</sup> Under a constitutionally *unexceptional* immigration power, the authority to govern the right of noncitizens to enter or remain within the United States would remain both broad and presumptively federal;<sup>350</sup> however,

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346. *Demore v. Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)).

347. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

348. *See Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (stating that decisions by Congress to exclude aliens are “conclusive upon the judiciary”).

349. *See supra* Section II.A. (discussing *City of New York v. Miln*, 36 U.S. 102 (1837) and *Smith v. Turner & Norris v. City of Bos. (Passenger Cases)*, 48 U.S. 283 (1849)).

350. Notwithstanding continued federal supremacy, the disaggregation of immigration law would implicate immigration federalism. Retiring the presumptive connection between immigration and foreign affairs entails reimagining much immigration-related lawmaking as ordinary, constitutionally unexceptional regulation of labor, crime, and public welfare—matters that historically were the province of the states, and which today the states and the federal government govern concurrently, subject to conventional preemption principles. Disaggregating immigration law would enable reviewing courts to acknowledge that a state law adopted pursuant to a declared policy of “attrition through enforcement” is for all intents and purposes a regulation of immigration, without rendering it automatically preempted. *See supra* notes 101–10 and accompanying text. On the one hand, it is doubtful that this acknowledgement would significantly expand the states’ domain of immigration-related lawmaking because such regulation would remain highly constrained by field and conflict preemption principles. *See* Huntington, *supra* note

that authority would be constrained by the same substantive, judicially enforceable constitutional norms that apply when Congress regulates commerce or taxes and spends for the general welfare.

Critically, the disaggregation of immigration law would give full expression to noncitizens' constitutional personhood. The individual right at issue, rather than the fact of noncitizenship or the categorical label immigration law, would frame the court's review. A law or enforcement action that employed a suspect classification, infringed a noncitizen's fundamental liberty interest, or had a chilling effect on free expression or association would be subject to strict scrutiny and upheld only if the government could demonstrate that it was necessary, or at least "narrowly tailored," to serve a compelling government interest.<sup>351</sup> Generic recitations of "foreign policy" or "national security" would lose their talismanic quality and cease to operate as trumps for meaningful constitutional review. Instead, reviewing courts would assimilate foreign policy and national security considerations into the strict scrutiny inquiry in the form of particularly compelling governmental *interests*. Foreign policy and national security would thus continue to serve as constitutionally viable warrants for laws burdening noncitizens, but the onus would lie with the government to demonstrate that such interests were meaningfully served by the constitutional denial at issue.

Recognizing noncitizens' full constitutional personhood would neither dissolve the legal distinction between citizens and aliens nor preclude the government from regulating immigrants *as immigrants*. As with constitutional challenges outside of the immigration context, the basic elements of strict scrutiny—the constitutional right at issue, the government's interest in the challenged law, and the relative congruence between that interest and the regulatory means adopted<sup>352</sup>—would

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101, at 850–52. However, it may enable reviewing courts to attend more candidly to the true purpose and effect of laws such as Arizona SB 1070—a candor that could be helpful in discerning whether a challenged provision conflicts with a policy of Congress. For an enlightening analysis of the federalism implications of an unexceptional immigration power, see Schuck, *supra* note 101, at 66 (in light of the "federalist default" arrangement under which most federal programs are administered cooperatively with states and localities, "in principle immigration should *not* be different, though the precise mix of federal and state authority and responsibility is and must always be domain-specific"); Stumpf, *supra* note 101, at 1565 ("Reimagining immigration law as a domestic affair linked with employment, welfare, and crime is bound to expand judicial acceptance of state and local participation in immigration control.").

351. The Court's formulation of the strict scrutiny inquiry has not been entirely consistent. At times the Court has indicated that the challenged provision must be "necessary" to achieving a compelling governmental purpose. *See, e.g., Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995). At other times, however, the Court has indicated that the challenged provision need only be "narrowly tailored" toward that end. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

352. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

remain highly context-sensitive. Even if the constitutional singularity of immigration law were dissolved, many of the categorical distinctions that currently inform both statutory and constitutional immigration law—for example, the distinction between would-be first-time entrants and long-term permanent residents, or between undocumented and documented immigrants—would remain constitutionally salient.<sup>353</sup>

The constitutional import of those distinctions, however, would be registered in the terms of conventional means–ends scrutiny—in the strength of the noncitizen’s constitutional interest; the compelling-ness of the government’s regulatory interest; and the requisite narrowness of tailoring. For example, in a substantive due process challenge to a noncitizen’s detention pending removal, a governmental interest in protecting public safety or preventing flight is much more compelling than an interest in administrative efficiency. So, too, is the removal of a noncitizen that knowingly funded an organization that sponsors terrorism vastly better calibrated to serve the government’s compelling interest in protecting national security than the removal of a noncitizen thrice convicted of minor drug offenses. Nor would the requirements of procedural due process consist in a “fixed content unrelated to time, place

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353. Consider Professor Martin’s proposal for formalizing a “clear and candid system of graduated [constitutional] protections”:

Aliens, at least if present here, may be members of a relevant community they share with citizens, and are thus entitled to . . . certain rights and subject to certain reciprocal duties. But there are different levels of membership, or different circles of community, and additional reciprocal duties and rights, or at least more stringent protections of rights, will come into being for persons as they move to higher circles of membership.

Martin, *supra* note 68, at 137, 89. Accordingly, Professor Martin offers a working “hierarchy of membership levels” in which U.S. citizens “occupy the highest rung of the community membership ladder,” followed by lawful permanent residents, admitted nonimmigrants, entrants without inspection, parolees, and, finally, applicants at the border. *Id.* at 92.

Even in the context of admission decisions—the legal setting in which a noncitizen occupies the lowest rung of Martin’s membership hierarchy—the Supreme Court has on occasion undertaken meaningful, if still highly deferential, constitutional review. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972) (denial of foreign scholar’s visa application must be based on a “facially neutral bona fide reason”); *Fiallo v. Bell*, 430 U.S. 787 (1976) (statutory provision extending preferential immigration status to “illegitimate” noncitizen children of U.S. citizen mothers but not U.S. citizen fathers is subject to “limited judicial review” to ensure a rational basis); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (slip op.) (Kennedy, J., concurring) (denial of visa application of noncitizen spouse of U.S. citizen must be based on a “facially legitimate bona fide reason”); *see also supra* note 265–66 and accompanying text (discussing *Kleindienst* and *Fiallo*). To be sure, such cases are exceptional and, not coincidentally, were all brought by U.S. citizens whose constitutional interests were directly impacted by the challenged governmental action. But they do suggest that a system of “graduated constitutional protections” is, as Martin proposes, already implicit in immigration law’s statutory and constitutional infrastructure.

and circumstances.”<sup>354</sup> As the Court famously explained in *Mathews v. Eldridge*, “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>355</sup> Indeed, it is precisely that flexibility that has allowed procedural due process to operate as a “surrogate” for substantive constitutional values that the plenary power doctrine ostensibly suppresses. Disaggregating immigration law would simply weigh those values against the relevant governmental interests in a formal, candid way.

The remainder of this Section offers a brief illustration of how a disaggregated, constitutionally unexceptional immigration power would operate in practice, centering on three distinct regulatory contexts: eligibility for public benefits, removal, and detention.

### 1. Eligibility for Public Benefits

As Part I noted, the Supreme Court has approached federal laws conditioning eligibility for federal benefits or employment on U.S. citizenship or length of residency as immigration laws. That classification decision spares what are, to all appearances, quintessential “alienage” regulations from meaningful constitutional review. As the *Diaz* Court explained, because “the relationship between the United States and our alien visitors . . . may implicate our relations with foreign powers,” the regulation of noncitizens had been “committed to the political branches of the Federal Government.”<sup>356</sup> That commitment in turn “dictate[d] a narrow standard of review” in matters of immigration and naturalization.<sup>357</sup> Consider the extraordinarily categorical nature of the Court’s presumption that such regulations implicate foreign affairs. It is enough that the relationship between the United States and its “alien

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354. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

355. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). *Eldridge* set forth three factors for assessing the requirements of due process: the “private interest that will be affected by the official action; . . . the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335. In the context of immigration regulation, this would mean, for example, that the constitutional liberty interest of a thirty-year lawful resident threatened with removal would be afforded much greater weight than that of an undocumented first-time entrant apprehended near the border.

356. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (emphasis added).

357. *Id.* at 82. Relying on *Diaz*, federal courts later upheld provisions of the 1996 Personal Responsibility and Work Opportunity Act, excluding lawful permanent residents from various means-tested federal welfare programs. *See, e.g., Rodriguez v. United States*, 169 F.3d 1342, 1353 (11th Cir. 1999); *City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999); *Abreu v. Callahan*, 971 F. Supp. 799, 826 (S.D.N.Y. 1997).

visitors” *may*, in some undefined manner, bear on the nation’s relationship with some unspecified foreign power. The Court’s rationale for deference is a generic one, lacking any suggestion that this *particular* exercise of federal authority—a statutory denial of Medicaid benefits to which the petitioners would otherwise be entitled—has any plausible application to the “reasons that preclude judicial review of political questions.”<sup>358</sup>

The constitutional stakes of classifying the challenged regulation as an immigration law become clear when *Diaz* is contrasted with the Court’s approach to analogous state laws. Even long before alienage was designated a “suspect classification” for equal protection purposes, the Court made clear that the plenary federal power to regulate immigration permitted Congress to employ race and alienage classifications in ways that the states could not. In its “broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, [and the] regulation of their conduct,” the Court explained in 1948, the federal government could govern noncitizens “in part on the basis of race and color classifications.”<sup>359</sup> It did not follow, however, that “a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.”<sup>360</sup>

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358. *Diaz*, 426 U.S. at 81–82. Notwithstanding the Court’s invocation of foreign affairs and the political question doctrine (see *supra* notes 10–16 and accompanying text; *supra* note 47), one can plausibly read *Diaz* more as a conventional equal protection case than an example of immigration exceptionalism. As Hiroshi Motomura observes, “*Diaz* took a constitutional challenge to an alienage law seriously, in contrast to immigration law decisions that rely on plenary power.” HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 84 (2006). Although it is true that Justice Stevens’ unanimous opinion did indeed “carefully examine” the challenged Medicare eligibility’s requirement, conscientiously assessing its reasonableness rather than “rejecting out of hand the argument that the rule was unconstitutional,” (*id.*; see also *supra* note 14), it is nevertheless difficult to account for the Court’s highly deferential posture toward an admittedly suspect classification without acknowledging the great influence of the plenary power doctrine. Consider, again, the stark divergence between the *Diaz* Court’s declaredly “narrow” standard of review and the *Graham* Court’s heightened scrutiny of state alienage classifications, which, “like those based on race,” burdened a “discrete and insular minority” and were thus “inherently suspect.” See *supra* notes 7–8 and accompanying text.

Characterizing *Diaz* as a plenary power decision is not intended to suggest that the Court abdicated any role in assessing the constitutionality of the provision. In fact, in reviewing the challenged provision for a rational basis, the Court employed a conventional form of constitutional analysis. Rather, *Diaz* is very much a plenary power case because the Court applied a different, and vastly more permissive, standard of scrutiny than it would have applied if the challenged classification had not been labeled an “immigration law.”

359. *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 418–19 (1948).

360. *Id.* at 418–20 (striking down a California law restricting eligibility for commercial fishing licenses to citizens); see *Truax v. Raich*, 239 U.S. 33, 43 (1915); *Yick Wo v. Hopkins*,

Then, in 1971, the Court added alienage to the constitutional roster of suspect classifications, alongside race and national origin. As this Article discussed above, in *Graham v. Richardson* the Court applied strict scrutiny to a state law conditioning eligibility for welfare benefits on a term of residency or U.S. citizenship.<sup>361</sup> Traditionally states retained "broad discretion" under equal protection principles to engage in social and economic regulation, the Court explained, but "classifications based on alienage, like those based on nationality or race" were "inherently suspect." Regardless of whether the challenged regulation impacted a fundamental right, noncitizens were "a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."<sup>362</sup> Two years after *Graham*, the Court reviewed a Connecticut law excluding aliens from the practice of law under heightened constitutional scrutiny.<sup>363</sup> In striking down the law, the Court not only affirmed noncitizens' full constitutional personhood, but also stressed that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society."<sup>364</sup> Accordingly, it was "appropriate that a State bear a heavy burden when it deprives them of employment opportunities."<sup>365</sup>

Once alienage classifications became subject to strict scrutiny, the only thing standing between the regulation of noncitizens by Congress or the President and the "heavy burden" of justification imposed on the states was the categorical presumption that federal regulations were

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118 U.S. 365, 374 (1886). Before 1971, states could discriminate against aliens so long as the discrimination served a special public interest—a standard that permitted a broad array of alienage classifications. See *Terrace v. Thompson*, 263 U.S. 197, 220–21 (1923) (recognizing a special public interest in denying aliens the right to own land); *Heim v. McCall*, 239 U.S. 176, 189–90, 194 (1915) (upholding New York law prohibiting the employment of aliens on public works projects); *Patsone v. Pennsylvania*, 232 U.S. 138, 145–46 (1914) (recognizing a special public interest in prohibiting aliens from hunting wild game).

361. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

362. *Id.* at 371–72 (footnotes omitted) (citation omitted) (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938)).

363. See *In re Griffiths*, 413 U.S. 717, 721–22 (1973); see also *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973) (striking down the provision of New York Civil Service Law restricting eligibility for certain positions within the state civil service to citizens).

364. *Griffiths*, 413 U.S. at 722.

365. *Id.* at 722. Notwithstanding heightened constitutional scrutiny, the Court has upheld citizenship requirements for state positions involving a "political function." See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 447 (1982) (upholding state requirement of U.S. citizenship for peace officers). State alienage classifications bearing on democratic self-government are likewise subject to only rational basis scrutiny. See *Sugarman*, 413 U.S. at 647–48 (upholding the denial to noncitizens of the right to vote or hold public office); *Perkins v. Smith*, 370 F. Supp. 134, 138 (D. Md. 1974) (upholding the exclusion of noncitizens from jury service), *aff'd*, 426 U.S. 913 (1976).

immigration laws that implicated distinctly national interests. In fact, in its sole decision striking down a federal alienage classification, *Hampton v. Mow Sun Wong*,<sup>366</sup> the Court starkly illustrated both the remarkable power of that presumption and what it might mean to abandon it. On the same day that it decided *Diaz*, the Court in *Hampton* invalidated a federal citizenship requirement for employment in the competitive civil service on the ground that the federal agency that promulgated the regulation—the Civil Service Commission (CSC)—failed to demonstrate that Congress had delegated its plenary power to govern immigration to the agency.<sup>367</sup>

As it did in state alienage cases such as *Graham* and *Griffiths*, the Court recognized that the noncitizen plaintiffs held important constitutional interests that the citizenship requirement infringed. The Court worried that the CSC rule disfavored “an identifiable class of persons” who were “already subject to disadvantages not shared by the remainder of the community.”<sup>368</sup> Although the Court formally declined the noncitizen respondents’ request to review the rule under heightened constitutional scrutiny, it nevertheless emphasized that the citizenship requirement “deprive[d] a discrete class of persons of an interest in liberty on a wholesale basis.”<sup>369</sup>

Even without invoking the “suspect classification” framework, the Court undertook an unusually searching examination of the CSC’s justification. It was true that the CSC’s argument “drew support from both the federal and the political character of the power over immigration and naturalization,” the Court acknowledged, and that an “overriding national interest[]” might thereby justify “a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State.”<sup>370</sup> Yet the federal immigration power was not “so plenary that any agent of the National Government” could “arbitrarily” single out noncitizens for unfavorable treatment,<sup>371</sup> the Court insisted. Rather, “[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.”<sup>372</sup> The CSC had cited various familiar “national interest[s]” as a warrant for judicial deference, including aiding the

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366. 426 U.S. 88 (1976).

367. *See id.* at 116.

368. *Id.* at 102.

369. *Id.* at 102–03.

370. *Id.* at 101.

371. *Id.*

372. *Id.* at 103.

President in his dealings with "foreign powers," providing an incentive for "aliens to qualify for naturalization," and ensuring "undivided loyalty in certain sensitive positions."<sup>373</sup> Yet the Court rejected these rationales. Because the CSC lacked "direct responsibility for fostering or protecting" such interests, the Court would not assume that those interests had influenced the promulgation of the citizenship requirement.<sup>374</sup>

To be sure, because the *Hampton* Court declined to apply the kind of heightened constitutional scrutiny that would normally be triggered when the government employs a suspect classification,<sup>375</sup> it stopped short of subjecting federal regulation of noncitizens to mainstream constitutional norms. Moreover, as a matter of constitutional doctrine, *Hampton* merely stands for the proposition that if Congress wants to delegate its plenary authority to discriminate against noncitizens in ways that, if enacted by a state, would violate the Equal Protection Clause of the Fourteenth Amendment, it must do so explicitly. Indeed, immediately following its rejection of the various "national interest[s]" advanced by the CSC, the Court suggested that "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption."<sup>376</sup> In other words, the Court would have employed the same rational basis scrutiny that it did in *Diaz*, if necessary by searching the speculative universe for legitimate national interests that the discrimination might plausibly serve. In fact, following the Court's decision in *Hampton*, President Gerald Ford issued an executive order reinstating the citizenship requirement,<sup>377</sup> and the U.S. Court of Appeals for the Seventh Circuit upheld the order on the basis of *Hampton*—a

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373. *Id.* at 103–04.

374. *See id.* at 103–05. The CSC "has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies." *Id.* at 114.

375. *See, e.g.,* *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (subjecting federal race-based affirmative action program to strict scrutiny); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (subjecting discrimination between mothers and fathers in the federal Aid to Families with Dependent Children program to intermediate scrutiny).

376. *Hampton*, 426 U.S. at 103. The majority apparently withheld judgment on whether Congress or the President could enact the challenged requirement in order to gain the votes of Justices Brennan and Marshall, who joined the opinion on the condition that the Court had "reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government." *Id.* at 117 (Brennan, J., concurring).

377. Exec. Order No. 11,935, 41 C.F.R. § 37301 (1976). The Order provided, *inter alia*, that "[n]o person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States." *Id.*

result the Supreme Court declined to review.<sup>378</sup>

More important than *Hampton*'s limitations as a constitutional holding, however, is the manner in which it models scrutiny of the federal government's usual justifications for judicial deference. In the absence of a virtually automatic presumption that any federal regulation of noncitizens serves uniquely federal interests, the government would need to persuade a reviewing court both that compelling national interests were genuinely at issue and that the citizenship requirement was specifically tailored to serve those interests—not as a categorical matter on the basis of an asserted generic connection to foreign affairs or naturalization, but with respect to the particular job categories to which it applied. In *Hampton*, the Court objected in particular to the conspicuous mismatch between the challenged requirement and the national interests that it was purported to serve. Mow Sun Wong, the lead plaintiff, for example, had been an electrical engineer in China but under the CSC regulation “was ineligible for employment as a janitor for the General Services Administration.”<sup>379</sup> After the President reissued the citizenship requirement, however, reviewing courts continued to operate under the presumption that a regulation excluding an otherwise qualified noncitizen from employment as a janitor was an immigration law that implicated ineluctably federal interests and thus warranted a high degree of constitutional deference.

Under a disaggregated immigration law, a reviewing court would approach the President's executive order as the “inherently suspect” alienage classification that it is, and uphold the discrimination only if the government could prove that it was narrowly tailored to serve a compelling government interest. Considerations of foreign policy or national security would remain available to the government as constitutionally viable warrants for a citizenship requirement, but would be assimilated into the reviewing court's strict scrutiny inquiry as government interests. The government would therefore bear the burden of demonstrating that the requirement was narrowly tailored to serve such interests—a burden that it would be unlikely to satisfy with respect to many civil service positions.

## 2. Removal

The Supreme Court has long regarded laws governing the right of resident noncitizens to remain within the United States to occupy the inner core of federal immigration policy.<sup>380</sup> Consider *Galvan v. Press*,<sup>381</sup>

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378. *Vergara v. Hampton*, 581 F.2d 1281, 1287 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

379. *Hampton*, 426 U.S. at 91.

380. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 731 (1893).

381. 347 U.S. 522 (1954).

a poster child for the virtual immunity of the deportation process from substantive constitutional review. As Section II.B explained, Juan Galvan was a thirty-year resident of the United States who had been ordered deported on the ground that he was briefly a member of the Communist Party, years before the Internal Security Act of 1950 made such membership automatic grounds for deportation.<sup>382</sup> Justice Frankfurter's majority opinion upholding Galvan's deportation serves as a virtual catalogue of constitutional derelictions: of the "harsh incongruity" of deporting a constitutional "person" who had long been "part of the American community" and was innocent of any wrongdoing;<sup>383</sup> of Galvan's Fifth Amendment substantive due process right to individual liberty, which should, as a matter of principle, apply to deportation; and of the inapplicability of the Ex Post Facto Clause to retroactive grounds for deportation. If only the Court were "writing on a clean slate," Justice Frankfurter lamented, much could be said for "qualif[y]ing the scope of [Congress's] political discretion" in immigration matters.<sup>384</sup> Unfortunately, however, the "slate [was] not clean."<sup>385</sup> Because "[p]olicies pertaining to the entry of aliens and their right to remain here" touched "basic aspects of national sovereignty, more particularly our foreign relations and the national security," the formulation of those policies had been "entrusted exclusively to Congress."<sup>386</sup> A half-century later, a majority of the Court continued to accept this essential framework, reaffirming the "civil" nature of deportation proceedings and holding that a noncitizen ordered deported could not bring a selective prosecution challenge alleging that he was singled out for deportation due to membership in a politically unpopular group.<sup>387</sup>

As with the administration of federal benefits and employment, this virtual immunity from judicially enforceable constitutional constraints rests on the presumption that immigration laws are, as a categorical matter, part and parcel of the conduct of foreign affairs and national security. Unlike eligibility for welfare benefits or employment in the federal civil service, however, laws that define the conditions of inclusion within both U.S. territory and the American polity do seem to involve the nation's sovereignty in a direct and palpable way. To acknowledge that the presence of noncitizens in the United States implicates national

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382. *Id.* at 523.

383. *Id.* at 530.

384. *Id.* at 530–31.

385. *Id.* at 531.

386. *Id.* at 530–31.

387. In *Reno v. Am.-Arab Anti-Discrimination Comm.*, the Court rejected First and Fifth Amendment challenges brought by noncitizens claiming that the Government had targeted them for deportation due to their affiliation with the Popular Front for the Liberation of Palestine. See 525 U.S. 471, 473–74, 491–92 (1999). "An alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488.

sovereignty, however, in no way requires that the authority to govern their presence operates outside the scope of robust constitutional review.

Disaggregating immigration law would retire the reflexive conflation of removal with foreign affairs and national security, and thereby give full expression to the constitutional norms that the Court suppressed in *Galvan*. In practice, this would mean that a noncitizen could challenge the substantive grounds of a removal order. The statute at issue in *Galvan*, for example, would be vulnerable on multiple counts. First and most evidently, a provision requiring a noncitizen's physical apprehension and permanent expulsion from his long-time place of residence would be understood to deprive him of his Fifth Amendment substantive due process right to liberty.<sup>388</sup> In fact, the Court has long recognized that deportation implicates a noncitizen's Fifth Amendment liberty interest and that he is thus entitled to due process of law before he can be expelled from the country.<sup>389</sup> If the Court were to decouple removal from foreign affairs and national security, thus bringing it out of the shadow of plenary federal power, the deprivation of liberty that the removal process necessarily entails would trigger strict constitutional scrutiny. The Government would therefore bear the heavy burden of demonstrating that the challenged removal provision was narrowly tailored to serve a compelling government interest.<sup>390</sup>

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388. See *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (Deportation places "the liberty of an individual . . . at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.").

389. See *Chew v. Colding*, 344 U.S. 590, 597 (1953) (holding that a noncitizen is entitled to "notice of the nature of the charge and a hearing . . . before an executive or administrative tribunal" before he can be "expelled and deported"). As the Court has explained in another context, the "liberty" protected by the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 299 (1923)). Such a capacious understanding of constitutional liberty surely includes, as in *Juan Galvan's* case, the right to remain in the country where one has lived for three decades and of which one's spouse and children are citizens.

390. A noncitizen in *Galvan's* position likewise could challenge the statutory grounds for removal as an "unconstitutional condition" on his First Amendment right to free speech and association. Even when a person lacks a "right" to a governmental benefit or privilege, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). To permit the government to "penalize[] and inhibit[]" the exercise of constitutional freedoms would allow it to "produce a result which it could not command directly." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). By making *Galvan's* fleeting membership in the Communist Party grounds for deportation, even absent any evidence that

Further, under a disaggregated immigration law the classification of removal as a civil proceeding would no longer limit the applicability of constitutional guarantees intended to protect criminal defendants against governmental overreaching.<sup>391</sup> For example, the Supreme Court has long held that the Constitution's Ex Post Facto Clause<sup>392</sup> applies only to *criminal* punishment. Accordingly, the retroactive imposition of civil burdens generally cannot be challenged as ex post facto laws.<sup>393</sup> As

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Galvan actually subscribed to the Party's declared support for the violent overthrow of the U.S. government, the Internal Security Act imposed an unconstitutional condition on his First Amendment right of association. On unconstitutional conditions doctrine, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARVARD L. REV. 1413 (1989). Although the government's interest in preserving the nation's security surely qualifies as compelling, the extraordinary breadth of the class of persons that Congress made deportable—any noncitizen who knowingly joined the Communist Party, without regard to the timing or duration of membership, the noncitizen's motives in joining the Party, his personal history of obedience to the law or loyalty to the country, or whether he actually shared the Party's objectionable political commitments—strongly suggests that the provision was insufficiently narrowly tailored.

391. Numerous scholars have challenged the civil classification of removal and argued that the removal process should be subject to various constitutional constraints. See, e.g., Beth Caldwell, *Banished for Life: Mandatory Detention of Juveniles as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2277, 2280 (2013) (arguing that because deportation is often "imposed to punish," it should be subject to the Eighth Amendment prohibition against cruel and unusual punishments); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1894–95 (2000) ("Although the Court has repeatedly distinguished deportation from punishment and has characterized deportation as civil, this does not mean that every deportation law is immune from constitutional scrutiny."); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.—C.L. L. REV. 289, 290–91 (2010) (arguing that "the determination whether to *expel* a noncitizen whom the government has previously invited into the national community as a lawful permanent resident is [better understood as] a criminal proceeding, in which the defendant is entitled to the full panoply of criminal procedural protections guaranteed by the Constitution"); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417–18 (2012) (arguing that removal is "sufficiently punitive to trigger proportionality review" under the Due Process Clause and the Cruel and Unusual Punishments Clause).

392. U.S. CONST. art. I, § 10, cl. 2.

393. See *Calder v. Bull*, 3 U.S. 386, 391 (1798); see also *Rogers v. Tennessee*, 532 U.S. 451, 460–61 (2001) (defining ex post facto laws exclusively as those that retroactively impose criminal punishment). Although a law imposing retroactive civil consequences currently can be challenged under the Due Process Clause, it will not be subject to heightened scrutiny. In *Usery v. Turner Elkhorn Mining Co.*, for example, the Court rejected a due process challenge to a provision of the Black Lung Benefits Act of 1972 requiring mine operators to provide compensation for former employees' death or disability due to illness caused by employment in mines, even if such employment ended prior to the adoption of the Act. See 428 U.S. 1, 19–20 (1976). The Court reasoned that because the provision was a "rational measure" for spreading the cost of injury and not a "wholly unreasonable" means of "providing benefits to those who were most likely to have shared the miner's suffering," it satisfied the requirements of due process. *Id.* at 18, 25–26. Under a constitutionally unexceptional immigration power, however, the threat of removal would implicate a noncitizen's Fifth Amendment liberty interest, thus triggering heightened scrutiny.

*Padilla v. Kentucky* suggests, however, the Court increasingly may be willing to look past the formal criminal–civil distinction to the actual function and meaning of removal. As the *Padilla* majority explained, the statutory reforms of the preceding two decades have made deportation “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”<sup>394</sup> In fact, the Court has acknowledged outside the removal context that when a statutory scheme challenged under the Ex Post Facto Clause is clearly “punitive either in purpose or effect,” a “civil label is not always dispositive.”<sup>395</sup> If the Court were to reject the constitutional exceptionalism of the removal process, laws that “prescribe[d] exile for prior innocent conduct” (as Justice Douglas described the provision at issue in *Galvan*) would look much more like impermissible ex post facto laws.<sup>396</sup> The Court would likewise need to revisit its long-standing position that the exclusionary rule does not apply in the context of civil removal proceedings.<sup>397</sup> The U.S. government’s “obligation to obey the Fourth Amendment . . . [would] not [be] lifted simply because the law enforcement officers were agents of the [INS], nor because the evidence obtained by those officers was to be used in civil deportation

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The Court has repeatedly stated that the Ex Post Facto Clause does not apply to deportation. *See, e.g.*, *Marcello v. Bonds*, 349 U.S. 302, 314 (1955) (stating that retroactive application of new grounds for deportation is not an impermissible ex post facto law); *Harisiades*, 342 U.S. 580, 594–95 (1952) (determining that constitutional prohibition against ex post facto laws does not apply to deportation).

394. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (footnote omitted).

395. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). Relatedly, the Supreme Court has resisted the retroactive application of removal provisions when it would conflict with “familiar considerations of fair notice, reasonable reliance, and settled expectation.” *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1999)) (internal quotation marks omitted) (construing statutory provision eliminating discretionary waivers of removal for noncitizens convicted of an aggravated felony not to apply to noncitizen criminal defendants who pleaded guilty prior to the effective date of the statute). The Court reasoned that this would create the “potential for unfairness” to the noncitizen criminal defendant. *Id.* at 323. “As our cases make clear,” Justice Stevens (also the author of *Padilla*, 130 S. Ct. 1473) instructed, “the presumption against retroactivity applies far beyond the confines of criminal law.” *Id.* at 324.

396. *Galvan v. Press*, 347 U.S. 522, 533 (1954) (Douglas, J., dissenting) (“For joining a lawful political group years ago—an act which he had no possible reason to believe would subject him to the slightest penalty—petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country.”).

397. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). *Lopez-Mendoza* applied the framework set out in *United States v. Janis*, 428 U.S. 433 (1976) for determining to which noncriminal proceedings the exclusionary rule should apply. This involved weighing the “likely social benefits of excluding unlawfully seized evidence” against the costs to both law enforcement and the administrative efficiency. *Lopez-Mendoza*, 468 U.S. at 1041.

proceedings.”<sup>398</sup>

Finally, by dissolving the reflexive presumption that removal is part and parcel of foreign affairs, the disaggregation of immigration law would mean finally overturning the *Chinese Exclusion Case* and *Fong Yue Ting*—grim monuments to the legalized racism of the pre-civil rights era<sup>399</sup>—and subjecting discrimination based on race or nationality to strict constitutional scrutiny. In *Fong Yue Ting*, the Court had warned that anything short of an absolute power to control the presence of foreigners within U.S. territory could subject the nation to “the control of another power.”<sup>400</sup> “The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace,” the Court declared, was “an inherent and inalienable right of every sovereign and independent nation.”<sup>401</sup> Many readers might find it incredible that 120 years later the presumptive nexus between immigration and foreign affairs continues to insulate even blatant racial discrimination from robust constitutional review.

Critically, the constitutional mainstreaming of immigration law would not prevent courts from taking full account of circumstances in which the removal of a noncitizen *is* meaningfully connected to the conduct of foreign affairs or the preservation of national security, or where it is vital that the nation “speak with one voice.” By dissolving the presumptive conflation of immigration with foreign affairs, disaggregation would shift the burden to the government to demonstrate that the challenged removal order was narrowly tailored to serve such an interest. Noncitizens faced with the prospect of removal would not cease to be constitutional “persons” within the meaning of the First and Fifth Amendments merely because they are the objects of the immigration power.

In short, disaggregating immigration law would ensure constitutional protections commensurate with the human stakes of banishment. In this

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398. *Lopez-Mendoza*, 468 U.S. at 1052 (Brennan, J., dissenting); see also Austin T. Fragomen, *The “Uncivil” Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 31–32 (1978).

399. This is more than a hypothetical or symbolic issue. “Although the [INA] generally prohibits discrimination on the basis of [race and other factors], the [IIRIRA] created a substantial exception, authorizing the State Department to use race (as well as religion, sex, and other factors) in establishing visa application procedures and locations.” Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 9 (1998) (footnotes omitted). Professor Jack Chin further observes that a majority of federal circuit courts have affirmed in recent decades that, under the plenary power doctrine, not only may “aliens . . . be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se.” *Id.* at 3–4 (footnote omitted).

400. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (quoting *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889)).

401. *Id.* at 711.

respect, it would merely reinstate what the author of the *Chinese Exclusion Case* considered the essential constitutional bulwarks of individual liberty against “[a]rbitrary and despotic power.”<sup>402</sup> After refocusing the constitutional analysis on the liberty of the person, the fact that removal proceedings involve the right of a noncitizen to remain in the United States enhances rather than diminishes the importance of judicially enforceable constitutional constraints. As Justice Douglas put it six decades ago, “[t]he right to be immune from arbitrary decrees of banishment certainly may be more important to ‘liberty’ than the civil rights which all aliens enjoy when they reside here.”<sup>403</sup>

### 3. Detention

Following the Supreme Court’s decision in *Zadydas v. Davis*,<sup>404</sup> some courts and commentators surmised that the Justices were poised to recognize noncitizens’ Fifth Amendment right to challenge the lawfulness of their confinement.<sup>405</sup> That expectation was dashed just two years later in *Demore v. Kim*,<sup>406</sup> however, when the Court upheld a provision of the Immigration and Nationality Act (INA) requiring the detention of certain removable noncitizens for the duration of their removal proceedings.<sup>407</sup> The Court affirmed that federal immigration regulations were due considerable constitutional latitude because “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>408</sup> Here, again, the categorical presumption of a vital nexus between any regulation of a noncitizen’s right to be present in the United States, on one hand, and foreign affairs or national security, on

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402. *Fong Yue Ting*, 149 U.S. at 754 (Field, J., dissenting).

403. *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

404. 533 U.S. 678 (2001). For a discussion of this case, see *supra* notes 269–93 and accompanying text.

405. See, e.g., *Welch v. Ashcroft*, 293 F.3d 213, 224–25 (4th Cir. 2002), *abrogated by* *Demore v. Kim*, 538 U.S. 510 (2002); *Hoang v. Comfort*, 282 F.3d 1247, 1255–56 (10th Cir. 2002), *abrogated by Demore*, 538 U.S. 510; *Patel v. Zemski*, 275 F.3d 299, 308–10 (3rd Cir. 2001), *abrogated by Demore*, 538 U.S. 510; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002).

406. 538 U.S. 510.

407. See *id.* at 531 (upholding the INA, 8 U.S.C. § 1226(c) (2012)). As Professor David Cole has observed, *Demore* is the “only non-wartime Supreme Court decision to uphold preventive detention without the procedural safeguards” that generally apply in “preventive detention” contexts, including the detention of foreign nationals suspected of terrorism. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 716 (2009).

408. *Demore*, 538 U.S. at 522 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)).

the other, serves as a warrant for blanket deference to Congress or the President. Disaggregating immigration law would dissolve that presumption, thus extending to detained noncitizens the same constitutional guarantees of individual liberty that apply virtually any other time that the government incarcerates someone.

The particular circumstances surrounding Hyung Joon Kim's detention reveal the speciousness of that presumption. Kim was a long-term permanent resident who had lived in the United States since age six.<sup>409</sup> He had become subject to removal after he was twice caught shoplifting and later convicted of burglary for breaking into a tool shed with some high school friends—all within a ten-month period when he was eighteen and nineteen years old.<sup>410</sup> Because a provision of the INA subjected "aggravated felon[s]" (which Kim was by virtue of his three criminal convictions) to mandatory detention pending removal, and notwithstanding the Government's express determination that he posed neither a flight risk nor a threat to the community, Kim had been detained without bail for more than six months.<sup>411</sup> The Court never explained exactly how Kim's detention bore on foreign relations, war, or republican government.

Kim's challenge centered on the mandatory nature of the detention statute. Kim argued that, as a lawful permanent resident, his Fifth Amendment substantive due process right to individual liberty entitled him to an individualized bond hearing before the Government could confine him at length.<sup>412</sup> Because the Attorney General had essentially conceded that there was no individualized justification,<sup>413</sup> the Government staked its defense of Kim's detention on Congress's plenary authority to govern immigration.<sup>414</sup> The majority acknowledged that the Fifth Amendment entitled aliens to due process of law in deportation proceedings,<sup>415</sup> but denied that due process required the Government to

409. *Id.* at 513.

410. Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *IMMIGRATION STORIES* 343 (David A. Martin & Peter H. Schuck eds., 2005).

411. *See Demore*, 538 U.S. at 513 & n.1, 531. The INS had declared sua sponte during the district court proceeding "that Kim 'would not be considered a threat' and that any risk of flight could be met by a bond of \$5,000." *Id.* at 541 (Souter, J., concurring in part and dissenting in part). For background on the *Demore* case, see Taylor, *supra* note 410, at 343–76.

412. *See Demore*, 538 U.S. at 540; *see also* *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

413. *See Demore*, 538 U.S. at 541 ("The INS has never argued that detaining Kim is necessary to guarantee his appearance for removal proceedings or to protect anyone from danger in the meantime." (footnote omitted)).

414. *See id.* at 528 (majority opinion).

415. *Id.* at 523.

consider the particular circumstances of Kim’s case.<sup>416</sup> Rather, “reasonable presumptions and generic rules” were “not necessarily impermissible exercises of Congress traditional power to legislate with respect to aliens.”<sup>417</sup>

A “generic rule” denying individual bail hearings was thus permissible so long as Congress had evidence that some aliens released on bail would skip their removal hearings and “remain[] at large in the United States unlawfully.”<sup>418</sup> In the context of immigration, that truism was a sufficient answer to the fact that this particular permanent resident did *not* pose a flight risk. Kim’s substantive due process right to freedom from confinement was subordinated to the “generic rule” of mandatory detention,<sup>419</sup> even though (by the Government’s own concession) the rationale for that rule did not apply to his case. “[W]hen the Government deals with deportable aliens,” the Court declared, “the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.”<sup>420</sup>

Disaggregating immigration law would give the lie to the implication that Kim’s detention—and most detentions pending removal are—“vitaly and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”<sup>421</sup> Courts could thus

416. *See id.* at 523–26 (discussing *Carlson v. Landon*, 342 U.S. 524 (1952) and *Reno v. Flores*, 507 U.S. 292 (1993)).

417. *Id.* at 526 (quoting *Reno*, 507 U.S. at 313). A half-century earlier, before immigration became entangled with criminal law to the extent that it has today, the Court suggested otherwise. Detention was “necessarily a part of [the] deportation” process because some “aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.” *Carlson*, 342 U.S. at 538. But “[o]f course purpose to injure could not be imputed generally to all aliens subject to deportation.” The federal immigration statutes at issue thus had vested the federal courts with “discretion” to judge that the circumstances required the detention of a particular alien without bail. *Id.*

418. *Demore*, 538 U.S. at 528. The meaning of that evidence was hotly disputed. *See id.* at 562–68 (Souter, J., concurring in part and dissenting in part).

419. *Id.* at 526, 528 (majority opinion) (quoting *Reno*, 507 U.S. at 313).

420. *Id.* at 528.

421. *Id.* at 522 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976)). Scholars have issued persuasive challenges to the Court’s continued insistence that the detention of noncitizens pending removal is properly classified as “civil.” Professor César Cuauhtémoc García Hernández argues, for example, that even prior to the 1996 reforms, in the 1980s and early 1990s, Congress understood immigration detention “as a central tool in the nation’s burgeoning war on drugs.” César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014). By “drastically expand[ing] the executive branch’s power—and at times obligation—to confine people pending immigration proceedings,” Congress created a “legal architecture that, in contrast with the prevailing legal characterization, is formally punitive.” *Id.*; *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (arguing that “excessive immigration detention” ushered in by the increasing

approach the detention of noncitizens for what it often is: The extended incarceration by the U.S. government of persons entitled to the protection of the Fifth Amendment.<sup>422</sup> Justice David Souter's dissenting opinion modeled what it would mean to take Kim's constitutional liberty interest seriously; and, by extension, what an unexceptional immigration power would look like. "The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty . . . lying at the heart of due process,"<sup>423</sup> Justice Souter declared.

The analytical starting point is the right itself: All persons within U.S. jurisdiction are entitled to the protection of the Due Process Clause. The Constitution's protection of liberty and property is particularly compelling with regard to long-term permanent residents (LPRs), Justice Souter reasoned, because LPRs are encouraged by the immigration laws

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"convergence" of immigration and criminal law have "evolved into a quasi-punitive system of *imincarceration*"). The implication, and perhaps premise, of such accounts is that the "civil" label is doing the legal and analytical work of exempting the confinement of noncitizens from constitutional safeguards. In some respects, of course, it is; but the problem runs deeper than mislabeling. As Justice Souter's dissent in *Demore v. Kim* makes clear, in various nonimmigration contexts, due process entitles persons threatened with involuntarily civil commitment to individualized consideration of their potential dangerousness before they are "locked away." *Demore*, 538 U.S. at 551–52 (Souter, J., concurring in part and dissenting in part). Considered in this light, the question becomes why noncitizens detained for extended periods pending removal are not entitled to the same individualized consideration as other *civilly* detained persons. The answer, this Article argues, lies in the inherent sovereignty rationale for plenary federal power, and particularly the presumptive connection between immigration regulation and foreign affairs and national security.

422. That deprivation of liberty, moreover, often has serious "cascading" effects on a noncitizen's ability to bring a substantive challenge to his removal order. As legal scholar Mark Noferi explains, an LPR subject to mandatory detention

may never have a chance to meaningfully challenge [his removal] determination with counsel. He may be detained in substandard conditions for months or years—often far more time than he served for the crime—due to massive immigration court backlogs and the absence of speedy trial protections. Worse, his detention without counsel will deny him a fair chance to challenge his deportation from family, work, and property in the United States . . . .

Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 66 (2012) (footnote omitted). Indeed, "[t]hose who are represented and not detained at the time of [their] merits hearing are twenty-five times more likely to obtain a successful outcome as those who [are] unrepresented and detained." *Id.* at 75.

423. *Demore*, 538 U.S. at 541 (Souter, J., concurring in part and dissenting in part). As the Court has stated in a related context, "'[i]n our society liberty is the norm,' and detention without trial 'is the carefully limited exception.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

to “establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen.”<sup>424</sup> The “attachments fostered” through a host of legal mechanisms are “all the more intense for LPRs brought to the United States as children,” who, like Kim, may lack meaningful familial or linguistic connections to their country of citizenship and who often grow up “considering the United States as home just as much as a native-born, younger brother or sister entitled to United States citizenship.”<sup>425</sup> In short, Kim’s constitutional liberty interest was scarcely distinguishable from that of a U.S. citizen.

In light of Kim’s clear constitutional right and because freedom from physical restraint lies at the core of the liberty protected by the Due Process Clause, Justice Souter continued, “the Fifth Amendment permits detention only where ‘heightened, substantive due process scrutiny’ finds a ‘sufficiently compelling’ governmental need.”<sup>426</sup> The fact that Kim’s physical confinement took place in the context of a removal proceeding did not make it any less a deprivation of constitutional liberty. To determine what process is due before “someone is locked away,”<sup>427</sup> Justice Souter thus looked outside the immigration context to pretrial detention of criminal defendants and to involuntary civil commitment.<sup>428</sup> Based on that frame of reference, he concluded that “due process requires a ‘special justification’ for physical detention that ‘outweighs the individual’s constitutionally protected interest in avoiding physical restraint’ as well as ‘adequate procedural protections.’”<sup>429</sup>

When liberty is the rule and confinement the exception, there must be a “sufficiently compelling” governmental interest to justify” detention, and the “class of persons subject to confinement must be commensurately narrow and the duration of confinement limited.”<sup>430</sup> “By these standards,” Justice Souter concluded, “Kim’s case is an easy one.”<sup>431</sup> The statute’s fatal flaw was its denial to Kim, and to other noncitizens in removal proceedings, of individualized consideration. Instead, the statute “select[ed] a class of people for confinement on a categorical basis and den[ied] members of that class any chance to dispute the necessity of putting them away.”<sup>432</sup> Constitutional liberty “would mean nothing if citizens and comparable residents could be shorn of due process by this

424. *Demore*, 538 U.S. at 543–44.

425. *Id.* at 544–45. As Justice Souter noted, Kim’s mother was a citizen and his father and brother were LPRs. *Id.* at 545.

426. *Id.* at 549 (quoting *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O’Connor, J., concurring)).

427. *Id.* at 551.

428. *See id.* at 550–51.

429. *Id.* at 557 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001)).

430. *Id.*

431. *Id.* at 558.

432. *Id.* at 551–52.

sort of categorical sleight of hand.”<sup>433</sup> This is the heightened scrutiny absent from the majority opinion and from the plenary power doctrine generally.

### C. *Toward an Unexceptional Immigration Power*

The transition to a constitutionally unexceptional immigration power is unlikely to be accomplished all at once in a dramatic act of judicial overturning. Rather, the developments documented in this Part suggest what constitutional theorist David Strauss has termed a “common law” model of constitutional change.<sup>434</sup> As Strauss explains, the formal overturning of anachronistic or otherwise undesirable constitutional rules typically occurs less as a radical break with precedent than as a ratification of doctrinal changes that have already taken place.<sup>435</sup> Strauss describes a process of doctrinal evolution in which a problematic rule becomes hollowed out over time. In order to avoid objectionable outcomes in particular cases, Strauss explains, courts adopt various exceptions to the rule or subtly modify the terms of its application, all the while affirming their continued fidelity to the existing rule.<sup>436</sup>

By way of illustration, Strauss describes the decline of the so-called “separate but equal” doctrine. In the four decades before the Court decided *Brown v. Board of Education*, he explains, it issued a string of decisions declaring that the racially segregated facility challenged in each case was not in fact equal.<sup>437</sup> As a consequence, by the time *Brown* was before the Court, “the trend was unequivocal: it had been decades since the Court had actually found a system of segregation that it believed satisfied the principle of separate but equal.”<sup>438</sup> Even as *Plessy v. Ferguson*’s precedential authority remained undiminished in theory, the “separate but equal” principle for which it stood was “in a shambles.”<sup>439</sup> In short, though the Court’s decision in *Brown* is often viewed as a dramatic triumph of constitutional principle, the “rule” of *Brown*—that separate educational facilities are inherently unequal—was announced only after decades of decisions had rendered “separate but equal” a hollow shell.<sup>440</sup>

The legal developments analyzed in Section III.A suggest that the decline of the inherent sovereignty model may be following a similar course. *Zadvydas* and *Padilla* unsettled key premises of the contemporary

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433. *Id.* at 552.

434. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 36–37 (2010).

435. *See id.* at 35, 79, 85.

436. *See id.* at 85–92.

437. *See id.*

438. *Id.* at 90.

439. *Id.* at 85.

440. *Id.* at 90.

plenary power doctrine: The presumptive nexus between immigration and foreign policy, and the classification of removal as a mere “civil” process, respectively.<sup>441</sup> In *Zadvydas*, in particular, the Court showed great solicitude toward a noncitizen’s constitutional liberty interest, thus implanting a bedrock constitutional value into a doctrinal setting—immigration law—where such norms typically find little purchase.<sup>442</sup> Moreover, while those two decisions have received disproportionate attention from scholars and advocates, they are hardly outliers in the Supreme Court’s recent immigration jurisprudence.<sup>443</sup> As Dean Kevin Johnson observes, for the past five Terms the Court has adopted a remarkably unexceptional posture when reviewing immigration-related lawmaking and enforcement, typically applying ordinary, “generally applicable principles of statutory interpretation, rules of deference to administrative agencies, and . . . [a strong presumption against] retroactive application of changes in the law and [conventional] federal preemption,” while virtually never invoking the plenary power doctrine.<sup>444</sup>

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441. See *supra* Subsection III.A.1.

442. See *supra* note 281 and accompanying text.

443. For example, in rejecting a 2001 equal protection challenge to a citizenship statute favoring non-marital children born abroad to U.S. citizen mothers over non-marital children born abroad to U.S. citizen fathers, the Court conspicuously did not avert to plenary power, and instead reviewed the provision under the “intermediate scrutiny” framework that it customarily applies to governmental discrimination on the basis of sex. *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 56–57, 60 (2001).

444. Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Unexceptionalism*, 68 OKLA. L. REV. 57, 111–12 (2015). For example, the Court has on multiple occasions rejected BIA interpretations of statutory removal provisions that improperly expanded the meaning of “aggravated felony.” See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1686–87 (2013) (holding that under the proper interpretation of a federal removal statute, a noncitizen convicted in state court of marijuana possession with intent to distribute was not convicted of an “aggravated felony”); *Judulang v. Holder*, 132 S. Ct. 476, 379 (2011) (rejecting as “arbitrary and capricious” the BIA’s “policy for deciding when resident aliens may apply to the Attorney General for relief from deportation”); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580, 2581–82 (2010) (holding, contrary to the BIA’s position, that for second or subsequent simple drug possession offenses to qualify as “aggravated felonies,” the prosecutor must have charged the “existence of the prior simple possession conviction before trial, or before a guilty plea”). Even when the Court has sided with the government and against the noncitizen, Dean Johnson explains, it has done so by way of conventional statutory construction and administrative law principles, rather than the kind of broad, reflexive deference that historically has characterized judicial review of federal immigration-related lawmaking and enforcement. See Johnson, *supra*, at 127–29. Finally, as noted above, in federal preemption cases such as *Arizona* and *Whiting*, the Court applied conventional conflict preemption rules, essentially analyzing the challenged laws as ordinary regulations of labor, business, or crime rather than “immigration laws” per se. See *supra* notes 101–10 and accompanying text. Based on such decisions, Dean Johnson concludes that the Court has “silently moved away from anything that might be characterized as an immigration exceptionalism,” and imagines a plausible future in which the plenary power doctrine is relegated to history. Johnson, *supra* at 64. But see *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015)

If the Court continues this broad trend—of scrutinizing the government’s invocation of foreign affairs or national security; of reading statutes creatively to subject federal immigration law to “important constitutional constraints”; of eroding the constitutional salience of the civil–criminal distinction and giving legal weight to the often-enormous human consequences of removal; and of deciding most immigration cases on legally unexceptional grounds—it is not difficult to imagine a future in which the inherent sovereignty rationale has become a shell of its former self, occasionally recited ceremonially but rarely, if ever, determining the outcome of particular cases. When that day arrives and a majority of the Court is prepared to acknowledge that the plenary power doctrine has faded into irrelevance, the *Chinese Exclusion Case* and *Fong Yue Ting* will appear as decayed artifacts of a bygone era.

### CONCLUSION

This Article has argued that the Supreme Court should abandon the long-standing presumption that the regulation of noncitizens comprises a discrete, constitutionally privileged domain of distinctly political subject matter that is inextricably linked to foreign affairs and national security. As Section I.A explains, that presumption functions as the logical lynchpin of the modern plenary power doctrine, under which the authority to regulate immigration is inherent in national sovereignty, untethered from the Constitution and buffered against judicial review.

Notwithstanding its aura of naturalness and inevitability, the constitutional exceptionalism of the federal immigration power is a relatively recent invention and has always been an object of dissent and protest among the Justices. As Part II demonstrates, at the time of the nation’s founding and for nearly a century thereafter, American policy makers and judges did not conceive of immigration per se as a substantively or constitutionally discrete subject of lawmaking. The decidedly unexceptional manner in which both state and federal law regulated noncitizens migrating to and residing within the United States defies the constitutional singularity of a distinct class of exclusively federal immigration laws. The immigration cases decided at the height of the Cold War, in turn, reflect the continued absence of judicial consensus about the metes and bounds of the federal immigration power. Although those cases solidified the principle of plenary federal power, they are equally notable for their vigorous dissents insisting that the consignment

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(grounding broad deference to the Executive regarding the issuance of immigrant visas in plenary federal power over immigration). See generally Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMP. 2122–23 (observing that *Kerry v. Din* reflects a Court that is not yet prepared to “discard the plenary power doctrine entirely,” but also uncomfortable with the wholesale insulation of substantive immigration law from constitutional review, and suggesting that the Justices may be “confused and divided about how to bring the doctrine down for a gentle landing”).

of immigration exclusively to the political departments of the federal government, free from judicially enforceable constitutional constraints, is fundamentally inconsistent with constitutional liberty and the rule of law.

Part III then demonstrated how mainstream constitutional norms have encroached in recent decades into constitutional immigration law. Cases such as *Zadvydas* and *Padilla* unsettled key premises of immigration exceptionalism. The *Zadvydas* majority not only declined to defer to the President in a removal matter, instead placing the burden on the Government to provide a specific, constitutionally weighty justification for *Zadvydas*'s indefinite detention; it also specifically considered and rejected the Government's asserted foreign policy rationales for judicial deference. The *Padilla* majority, in turn, blurred the boundary between civil deportation and criminal punishment in a way that necessarily diminishes that boundary's constitutional saliency. *Zadvydas* and *Padilla* thus bespeak the dissatisfaction on the Court with both the underlying logic and practical consequences of the plenary power doctrine; moreover, they signal a refusal among some Justices to be bound by the categorical presumptions that currently justify deference to the "political" judgment of Congress or the President. Disaggregating immigration law would dissolve those presumptions and subject immigration-related lawmaking and enforcement—including but not limited to the administration of federal benefits, removal, and detention—to the same constitutional guarantees of individual liberty and equality that apply when Congress regulates commerce among the several states or taxes and spends for the general welfare.

Although the disaggregation of immigration law would fundamentally transform the constitutional landscape within which Congress and the President govern immigration, such a transformation is unlikely to be accomplished through some audacious act of judicial overturning. As Part III suggests, the impulse already exists in the important, if indirect, influence of mainstream constitutional norms on the Court's immigration decisions; in the Justices' skepticism toward the categorical presumption that immigration is part and parcel of foreign affairs and national security; and in the Justices' willingness to press the government to justify the deference that it customarily receives as a matter of course. In the absence of a precipitous mass migration to the United States or another catastrophic episode of foreign terrorism, this trend is likely to continue.<sup>445</sup>

At present, that impulse is visible at the margin of the Court's immigration jurisprudence, expressed most directly in dissents but occasionally also seeping into its majority decisions in the context of criminal defense or through statutory construction. By disaggregating immigration law once and for all, the Court can give full expression and effect to that impulse, and thus end noncitizens' century-long constitutional exile.

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445. Johnson, *supra* note 444, at 65–66.