IMMIGRATION "DISAGGREGATION" AND THE MAINSTREAMING OF IMMIGRATION LAW

Kevin R. Johnson[*]

Immigration scholars have written volumes on a remarkable outlier of modern American constitutional law. Originally created by the Supreme Court in the nineteenth century to uphold the now-discredited laws excluding Chinese immigrants from American shores, the "plenary power" doctrine continues to immunize the substantive provisions of the U.S. immigration laws from meaningful judicial review.[1] Despite the intervening constitutional revolution of the twentieth century, this doctrine surprisingly enough remains, as a lawyer might say, "good law."[2] Although "cracks" in its fabric have emerged with the passage of time,[3] the plenary power doctrine today stands out as the most visible modern example of what immigration scholars have characterized as "immigration exceptionalism."[4]

As a historical matter, the plenary power doctrine has facilitated the development of a peculiar set of immigration laws well-known for discriminating against noncitizens. That discrimination historically included, but was not limited to, denying admission into the United States of Asians, the poor, the disabled, and political minorities; the

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* Dean and Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, University of California at Davis School of Law; A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Matthew Lindsay for writing the article that served as the inspiration for this commentary.

1. *See, e.g.*, Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 606–09 (1889); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 853–54 (1987) (criticizing the Supreme Court decisions upholding the discriminatory Chinese exclusion laws). *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002) (arguing for the abandonment of the plenary power doctrine); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996) (examining the Constitution's applicability to noncitizens). For capsule summaries of the plenary power doctrine, see Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008); Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

2. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.") (footnotes omitted).

3. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 164–66 (5th ed. 2009).

4. *See* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1968 (2013); s*ee also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–6 (1998) ("[T]he plenary power doctrine is said to make racial discrimination in the immigration context lawful per se.").

immigration laws also have routinely disadvantaged women.[5] Consider that the immigration laws to this day prohibit entry of a noncitizen "who . . . is likely at any time to become a public charge"; put differently, even if otherwise eligible for a visa, a noncitizen can lawfully be denied admission into the country for being of modest economic means.[6] In contrast, the states cannot take steps to deny entry into their jurisdictions of indigent citizens from other states.[7]

The Supreme Court regularly struggles to rationalize the extremes of American immigration law perpetuated by the plenary power doctrine. In 2001, for example, the Court recognized the extraordinary nature of the indefinite detention of immigrants, which it previously held to be immune from judicial review[8] even though such a result would be patently unconstitutional if the case involved the detention of U.S. citizens. The Court therefore interpreted the immigration statute to avoid the "serious constitutional problem" implicated by indefinite detention.[9]

As this modern example suggests, despite the plenary power doctrine's longevity, the Supreme Court has slowly moved toward an increasingly unexceptional body of immigration law.[10] In so doing, the Court has ensured that ordinary procedural due process norms apply to hearings in which the U.S. government seeks to remove noncitizens from the country.[11] The Court also to a certain degree has extended

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5. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (analyzing the history of discrimination against minorities under the U.S. immigration laws).

6. 8 U.S.C. § 1182(a)(4)(A) (2012).

7. *See* Sáenz v. Roe, 526 U.S. 489, 507, 511 (1999) (holding that a state's limitation of public benefits to newcomers unconstitutionally interfered with the right to travel); Edwards v. California, 314 U.S. 160, 177 (1941) (invalidating a California law prohibiting the bringing of an "indigent person" into the state).

8. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953) (precluding judicial review of the indefinite detention of a long term lawful resident of the United States whose native country would not accept his return).

9. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

10. *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61–62 (2015); *see also* 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, 258 (2000) (predicting the imminent demise of the plenary power doctrine).

11. *See* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); *see also* Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950), *superseded by statute*, Supplemental Appropriation Act, 64 Stat. 1044, 1048, *as recognized in* Ardestani v. I.N.S. ("A deportation hearing involves issues basic to human liberty and happiness and . . . perhaps to life itself."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."); Ng Fung Ho v. White, 259 U.S. 276, 284

substantive rights to undocumented immigrants residing in the United States.[12]

Even with the erosion of the plenary power doctrine, conundrums in the law touching on immigration and immigrants remain. One is, as described above, the glaring disjunction between the full constitutional protections enjoyed by U.S. citizens compared to the constricted rights of noncitizens.[13] In that vein, Professor Jenny Brooke-Condon has critically analyzed the Supreme Court's incongruent Equal Protection doctrine, which requires strict scrutiny review of *state* laws discriminating against lawful permanent residents but extremely deferential review of *federal* laws that do the same.[14] Such disparate treatment is difficult to rationalize as a matter of contemporary constitutional doctrine.[15]

A perspicacious student of constitutional immigration law,[16] Professor Matthew Lindsay, in his latest article on the subject, adds meaningfully to the existing body of scholarship.[17] He analyzes a fundamental question that immigration law scholars have long prodded the courts to answer definitively: In a nation bound by a national constitution, what role, if any, does the U.S. Constitution play in the review of the immigration laws? Over the last two centuries, the Supreme Court has failed to decisively answer that all-important question. At the same time, the Court on a case-by-case basis has inched toward increasingly "normal" judicial review of most immigration

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(1922) (stating that deportation "deprives [the individual] of liberty" and may "result also in loss of both property and life; or of *all that makes life worth living*") (emphasis added).

12. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that Texas law that effectively barred undocumented children from the public schools violated the Equal Protection Clause of the Fourteenth Amendment).

13. *See supra* text accompanying notes 5–9.

14. *See* Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 85–86 (2016). *Compare* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (applying deferential standard of review informed by the plenary power doctrine in upholding a federal law denying health benefits to lawful permanent residents), *with* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (applying strict scrutiny review and invalidating a state law denying public benefits to lawful permanent residents).

15. *See* Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 173–86 (2014) (analyzing the Supreme Court's varying approaches to constitutional review of alienage classifications).

16. *See, e.g.*, 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 (2010) (arguing that, to remain intact, the plenary power doctrine must be founded on a legitimate legal basis); Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743 (2013) (examining the discriminatory roots of the plenary power doctrine and its incongruity with modern constitutional law).

17. *See* Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179 (2016).

decisions.[18]

Professor Lindsay looks at a serious obstacle to abrogation of the plenary power doctrine and a move toward judicial review of the immigration laws, namely

> *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*. [The Article] 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 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.[19]

In making this argument, Professor Lindsay begins by reviewing the law concerning federal power over immigration, including the Supreme Court's jurisprudence surrounding the treatment of immigrants in the United States. He next questions what has come to be viewed as the "natural" plenary power doctrine, showing how its roots and rationale fail to support the blanket immunity of the immigration laws from judicial review. Professor Lindsay proceeds to argue for the dismantling of exceptional immigration law, through what he characterizes as "disaggregating," or removing, matters from the category of immigration law and exercise ordinary review of that law. He discusses how disaggregation might work with respect to public benefits, removal, detention, and other areas touching on immigrants and immigration.[20]

Professor Lindsay identifies important trends in the Supreme Court's contemporary immigration jurisprudence. In recent years, the Court has decided immigration cases in ways so as to avoid applying the plenary power doctrine, thus eluding the challenging task of justifying the blanket immunity from judicial review required by contemporary

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18. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (acknowledging "the limited scope of judicial inquiry into immigration legislation"); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (requiring that the Attorney General provide a "facially legitimate and bona fide" reason for denying entry into the United States by a noncitizen for a temporary visit).

19. Lindsay, *supra* note 17, at 185–86 (emphasis added) (footnote omitted). For a contemporary foreign affairs defense of the plenary power doctrine, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015).

20. *See* Lindsay, *supra* note 17, at 239–59.

constitutional law.[21] The Court has increasingly applied ordinary legal doctrines to immigration cases. For example, applying the normal federal preemption principles,[22] two recent Supreme Court decisions addressed the question whether federal immigration law displaced state laws seeking to regulate immigration.[23] In other cases, the Court has applied ordinary administrative law principles in reviewing agency interpretations of the immigration statute.[24] These decisions reflect pressures on the Court to avoid invoking the plenary power doctrine and its jarring bar to judicial review.[25]

The slow and incremental dismantling of immigration exceptionalism can be understood through application of general jurisprudential theories about the evolution of the law. Incongruities in the law naturally lead to efforts to reconcile legal doctrine.[26] Although practical fears and concerns, such as foreign affairs, national security, and related issues, may seem to militate in favor of immigration "exceptionalism" in extreme cases, the forces of time and intellectual coherence move the law toward doctrinal congruence in the run-of-the-mill immigration cases. That, it would seem, is the future of the exceptional body of law currently known as immigration law.

The Supreme Court's movement toward greater doctrinal consistency has contributed to what Professor Lindsay characterizes as the "disaggregation" of immigration law.[27] He offers two contemporary decisions as examples. In *Zadvydas v. Davis*,[28] the Court found itself

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21. *See infra* text accompanying notes 34–36 (discussing the Supreme Court's ruling in *Kerry v. Din*).

22. *See* Johnson, *supra* note 10, at 78–81, 86–91.

23. *See* Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (striking down on federal preemption grounds the core of Arizona's controversial immigration enforcement law known as S.B. 1070); Chamber of Commerce of the United States v. Whiting, 563 U.S. 582, 587 (2011) (upholding Arizona business licensing law allowing for the imposition of penalties on the employers of undocumented immigrants).

24. *See, e.g.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203–07 (2014) (plurality opinion) (applying standard administrative law deference to agency interpretation of ambiguous provision of immigration statute); Judulang v. Holder, 132 S. Ct. 476, 490 (2011) (rejecting agency interpretation of a provision of the immigration statute pursuant to ordinary administrative law principles). *See generally* Johnson, *supra* note 10 (reviewing Supreme Court's immigration decisions from 2009–2013 and finding a trend toward unexceptional immigration law).

25. *Cf.* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 370–71, 375 (2013) (noting that the rights of noncitizens often are lost in the focus on federalism and administrative law doctrines in court decisions).

26. *See generally* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988) (analyzing the evolution of common law and the influence of social propositions on the formation, and changes in, legal doctrine).

27. *See* Lindsay, *supra* note 17, at 226–39.

28. 533 U.S. 678 (2001).

unable to simply ignore the divergence between ordinary constitutional law and sanction the indefinite detention of a noncitizen without any judicial review.[29] Consequently, it interpreted the immigration statute to avoid invoking the plenary power doctrine and allowed for judicial review. Similarly, the Court in *Padilla v. Kentucky*[30] found that the Sixth Amendment right to counsel could not be artificially constricted so as to not require an attorney to advise a noncitizen of the immigration consequences of a criminal conviction—namely, possible removal from the United States—pursuant to a plea agreement.

In *Disaggregating "Immigration Law,"* Professor Lindsay analyzes one of the techniques employed by the Supreme Court for normalizing immigration law.[31] In fact, the Court seems to be slowly moving in the direction of making constitutional immigration law consistent with mainstream law. In that vein, it has applied ordinary statutory interpretation and administrative law principles in immigration cases.[32] Generally applicable procedural due process doctrine has become the accepted norm in immigration removal cases.[33] All in all, the pressure to bring the cases of immigrants and immigration into the mainstream shows few signs of abating.

The mainstreaming of immigration law is far from complete, however. In fact, the Supreme Court continues to struggle with the elimination of the plenary power doctrine. In *Kerry v. Din*,[34] for example, the Court avoided addressing the question of the continued vitality of the doctrine of consular nonreviewability, a close cousin of the plenary power doctrine, which immunizes from judicial review the

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29. *Id.* at 682; *see supra* text accompanying notes 8–9. Two years later, the Court stepped back from its holding in *Zadvydas* in *Demore v. Kim*, 538 U.S. 510, 522, 531 (2003), and upheld the detention of an immigrant convicted of a crime while awaiting removal. *See* Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly, in* IMMIGRATION STORIES 343, 344–45 (David A. Martin & Peter H. Schuck eds., 2005) (contending that the Court's decision in *Demore v. Kim* was a product of the post-September 11, 2001 "war on terror," and the Court was reluctant to interfere with the U.S. government's detention of noncitizens who it viewed as a threat to public safety).

30. 559 U.S. 356, 374 (2010).

31. *See* Lindsay, *supra* note 17, at 224–61.

32. *See supra* text accompanying notes 21–25.

33. *See supra* text accompanying note 11 (noting that the Supreme Court, in a series of cases, has required that removal proceedings comply with Due Process); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 895–911 (2015) (contending that the Supreme Court's due process jurisprudence has produced a body of law weakening immigration and national security exceptionalism); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1656–79 (1992) (analyzing reliance by the Supreme Court in immigration cases on procedural due process norms as "surrogates" for substantive constitutional protections).

34. 135 S. Ct. 2128 (2015).

visa decisions of State Department consular officers.[35] The doctrine is hopelessly out of step with modern due process law, which requires judicial review of almost all governmental decisions in which a person's property or liberty interests are at stake.[36]

In the October 2016 Term, the Court has the opportunity to address the continuing vitality of the plenary power doctrine.[37] The question presented is the constitutionality of a federal law that, for purposes of U.S. citizenship, treats a child born abroad whose *father* is a U.S. citizen differently from (and more negatively than) a child born abroad whose *mother* is a U.S. citizen.[38] Such a gender-based distinction in all likelihood would not survive minimal review if found in virtually any law other than an immigration and nationality law.[39] Applying Professor Lindsay's concept of disaggregation, the Court simply could place the case into the gender discrimination category, remove it from exceptional immigration law, and invalidate the gender distinction.

Professor Lindsay ultimately raises the all-important question whether there should be an "exceptional" body of immigration constitutional law at all. By increasingly applying ordinary principles of judicial review to immigration matters and narrowing the definition of "immigration laws" subject to deferential review, the Supreme Court has begun the process of dismantling immigration exceptionalism. Professor Lindsay's analysis suggests that the end of the plenary power doctrine is simply a matter of time.

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35. *See* Emily C. Callan & John Paul Callan, *The Guards May Still Guard Themselves: An Analysis of How* Kerry v. Din *Further Entrenches the Doctrine of Consular Nonreviewability*, 44 CAP. U.L. REV. 303, 304-05 (2016).

36. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (holding that the Due Process Clause requires a hearing before the termination of Social Security benefits); Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) (holding to the same effect for the termination of welfare benefits).

37. *See* Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016). The Court has repeatedly faced, but not finally resolved, these issues in recent times. *See* Nguyen v. INS, 533 U.S. 53, 71 (2001) (upholding in 5–4 decision a gender distinction in derivative citizenship laws); Miller v. Albright, 523 U.S 420, 445 (1998) (to the same effect); *see also* Flores-Villar v. United States, 564 U.S. 210 (2011) (affirming, by an equally divided Court, a court of appeals ruling that discrimination against U.S. citizen father in derivative citizenship law did not violate the Constitution); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2385–88 (2016) (analyzing implications of *Nguyen* and *Miller* from a feminist perspective).

38. *See* 8 U.S.C. §§ 1401, 1409.

39. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 557 (1996) (finding unconstitutional state-sponsored exclusive male education at the Virginia Military Institute).