DEVELOPMENTS IN THE LAW

IMMIGRANT RIGHTS & IMMIGRATION ENFORCEMENT

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INTRODUCTION

Contemporary American immigration law is at war with itself. It imposes hard-line restrictions and punishments upon many immigrants and their families yet, at the behest of some policymakers, embraces humanitarian goals in rhetoric and, at times, even in realized policy outcomes. It is sometimes the product of congressional compromise, but in practice it is often the province of unilateral executive action. Finally, it sometimes caters to state and local efforts to play more pronounced roles in immigration enforcement but, in other instances, commands a federal monopoly on enforcement.

The four chapters that follow engage these substantive and institutional tensions and further pose a fundamental question about the state of immigration law: what is the proper role of the judiciary when it encounters the conflicts and conundrums that these battle lines spawn?

* * *

No single development in the field of immigration better encapsulates and showcases these tensions than the Obama Administration's recent unfurling of its deferred action policy, an invocation of executive prosecutorial discretion to exempt some young undocumented immigrants from potential deportation.[1] Specifically, immigrants qualify if they entered the United States before their sixteenth birthday, had not reached the age of thirty-one by June 15, 2012, have not committed a felony or a series of misdemeanors, and have received a high school diploma, continue to work toward a high school diploma, or have served in the U.S. military.[2] An estimated 1.7 million young persons may benefit from the program.[3]

This solicitousness toward the predicament of young undocumented immigrants had long been manifested in the perennially proposed but never passed DREAM Act,[4] a model for the deferred action poli-

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[1] *See* President Barack Obama, Remarks on Immigration (June 15, 2012) (transcript available at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration); Alejandro Mayorkas, *Deferred Action for Childhood Arrivals: Who Can Be Considered?*, WHITE HOUSE BLOG (Aug. 15, 2012, 11:55 AM), http://www.whitehouse.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered.

[2] *Id.* To qualify, immigrants must also meet specified requirements regarding time spent in the United States. *Id.*

[3] Jeffrey Passel & Mark Hugo Lopez, *Up to 1.7 Million Unauthorized Immigrant Youth May Benefit from New Deportation Rules*, PEW RES. HISP. CENTER (Aug. 14, 2012), http://www.pewhispanic.org/2012/08/14/up-to-1-7-million-unauthorized-immigrant-youth-may-benefit-from-new-deportation-rules.

[4] Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112th Cong. (2011). For a rich narrative of the bill's trials and tribulations since its initial introduction in

cy.[5] In granting qualifying immigrants a path toward citizenship, however, the DREAM Act would go much further than the Obama Administration's half-measure, which offers only temporary relief on a renewable basis and does not guarantee work eligibility.[6]

The announcement of the program, coming just a few months before President Obama's victory in the November 2012 presidential election, provoked both hearty praise[7] and vociferous condemnation.[8] One axis of this controversy closely tracks the first tension in current immigration law: the fight between hardliners and humanitarians.[9] When it comes to debates over prospective immigration policy, hardliners evince little willingness to countenance any proposals for legalizing the status of undocumented immigrants,[10] and many insist on ultimate deportation without exception as the only viable solution.[11] Humanitarians, by contrast, land somewhere along a spectrum of support for amnesty, from limited guest worker programs to full amnesty and a path to citizenship for the unlawfully present.[12]

2001, see generally Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009).

[5] JEANNE BATALOVA & MICHELLE MITTELSTADT, MIGRATION POLICY INST., RELIEF FROM DEPORTATION 9 n.3 (2012), *available at* http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf.

[6] *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 542–43 (2012).

[7] *See, e.g.*, Press Release, Jose H. Gomez, Archbishop of L.A., Chairman, U.S. Conference of Catholic Bishops Comm. on Migration, Statement on the Announcement of Deferred Action for DREAM Eligible Youth (June 15, 2012), *available at* http://www.usccb.org/news/2012/12-110.cfm ("This important action will provide protection from removal and work authorization for a vulnerable group of immigrants who deserve to remain in our country and contribute their talents to our communities."); Julián Castro, TWITTER (June 15, 2012, 10:45 AM), https://twitter.com/JulianCastro/status/213688818660941824 ("Great decision by Pres. Obama on immigration. Congrats to DREAMers.") (statement by Mayor of San Antonio).

[8] *See, e.g.*, *Department of Homeland Security: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary) ("The Administration's amnesty agenda is a win for illegal immigrants, but a loss for Americans.").

[9] These terms are drawn from characterizations of the two sides of the immigration debate in scholarly literature. For "humanitarian," see, for example, Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1798–99 (2010). For "hardliner," see, for example, Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 134 (2009).

[10] *See, e.g.*, REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2012: WE BELIEVE IN AMERICA 25, *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf ("[W]e oppose any form of amnesty . . . .").

[11] *See, e.g.*, Michael Winerip, *Dreaming of Having an American Life in Full,* N.Y. TIMES, Feb. 21, 2011, at A10 (noting that Virginia Governor Bob McDonnell, upon hearing at a town hall that a high-achieving college graduate was an undocumented immigrant, reacted: "People who come here illegally need to be detained, prosecuted and deported" (internal quotation marks omitted)).

[12] *See* Howard F. Chang, Essay, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 466–69 (2002).

Since the 2012 presidential election convincingly demonstrated the potent influence of Hispanic voters — who overwhelmingly supported President Obama's reelection and widely favored a humanitarian solution[13] — developments within both the Republican Party's elected elite[14] as well as the conservative punditry class[15] indicate that the hardliner approach may be on the wane.[16] Indeed, a bipartisan group of leaders in the U.S. Senate has promised a genuine push to pass comprehensive immigration reform in early 2013.[17] President Obama backs its efforts but has promised to release his own proposal if the congressional negotiations stall.[18]

However, stepping outside the debate about prospective policy and into the realm of enforcing the law on the books, the scales are largely tilted toward the hardliner position. Of course, if existing law embodies hardliner sentiments and policy preferences — and it does[19] — this observation should come as no surprise. In fact, however, the stringency and breadth of the contemporary immigration code has the effect of affording the executive substantial discretion to shape immigra-

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[13] *See* Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW RES. HISP. CENTER (Nov. 7, 2012), http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election.

[14] *See, e.g.*, Interview by Martha Raddatz with Sen. John McCain, *This Week* (ABC television broadcast Jan. 27, 2013) (transcript available at http://abcnews.go.com/Politics/week-transcript-sen-john-mccain-sen-robert-menendez/story?id=18316360&page=2) ("I'll give you a little straight talk. Look at the last election. [Republicans] are losing dramatically the Hispanic vote, which we think should be ours . . . .").

[15] *See, e.g.*, James Rainey, *Fox News Star Sean Hannity Suddenly Likes Immigration Reform*, L.A. TIMES (Nov. 9, 2012), http://articles.latimes.com/2012/nov/09/nation/la-na-pn-sean-hannity-immigration-20121109.

[16] *See* Doyle McManus, *Republicans Rediscover the Virtues of Immigration Reform*, L.A. TIMES OPINION L.A. (Jan. 28, 2013, 9:43 AM), http://www.latimes.com/news/opinion/opinion-la/la-ol-op-immigration-reform-20130128,0,4900271.story. *But see* Harry J. Enten, *Five Reasons Republicans Won't Win Latino Voters with Immigration Reform*, THE GUARDIAN COMMENT IS FREE (Jan. 29, 2013, 8:30 AM), http://www.guardian.co.uk/commentisfree/2013/jan/29/immigration-reform-republicans-latino-voters (contending that if Republicans do ultimately back immigration reform, their political rationale for doing so — winning back Hispanic voters — may be overstated).

[17] *See infra* p. 1582.

[18] *See* President Barack Obama, Remarks on Immigration Reform in Las Vegas, Nevada (Jan. 29, 2013), *available at* http://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8_story.html.

[19] *See, e.g.*, *infra* ch. IV, p. 1663 (analyzing two statutes — first, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code), and second, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-128, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.) — with harsh consequences for some immigrants, such as more difficult requirements for obtaining relief from deportation relative to the arduousness prior to the enactment of these laws).

tion policy.[20] Current law makes — astoundingly — about one in three noncitizens in the United States deportable even though it is doubtful federal resources could come close to footing the bill for such a massive deportation operation.[21] About 11.5 million unauthorized immigrants resided in the United States at the beginning of 2011,[22] whereas fewer than 400,000 immigrants were deported between October 2010 and September 2011.[23] Additionally, Congress has given the executive a multifaceted mission that includes not just border security and internal investigative responsibilities, but also, as Chapter II discusses, an employer-sanctions regime that the Department of Homeland Security (DHS) has sidelined over the past decade.[24] The combination of complex, numerous responsibilities and resource constraints thus forces the President to devise a deportation decision rule and enforcement triage strategy that may be informed by humanitarian goals. However, as Chapter III explains, the housing of Immigration and Customs Enforcement (ICE) within a department primarily devoted to stymieing terrorist attacks fosters a proclivity for stringency that may dilute and frustrate humanitarian initiatives advanced by the White House.[25]

In the current Administration's most demonstrable display of hewing toward the hardliner spirit of the law, the rate of deportations during President Obama's first term registered heights unseen under any other president since at least 1892.[26] Justice Brewer proclaimed in dissent over a century ago: "[I]t needs no citation . . . to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property . . . is punishment . . . oftentimes most severe and cruel."[27] That characterization has never rung more true: as Chapter IV details, prolonged detention prior to removal proceedings has be-

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[20] *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

[21] *See id.*

[22] MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011 1 (2012), *available at* http://www.dhs.gov/estimates-unauthorized-immigrant-population-residing-united-states-january-2011.

[23] Brian Bennett, *Obama Administration Reports Record Number of Deportations*, L.A. TIMES (Oct. 18, 2011), http://articles.latimes.com/2011/oct/18/news/la-pn-deportation-ice-20111018.

[24] *See infra* ch. II, p. 1614.

[25] *See infra* ch. III, pp. 1655–57.

[26] *See* Louis Jacobson, *Has Barack Obama Deported More People than Any Other President in U.S. History?*, TAMPA BAY TIMES POLITIFACT.COM (Aug. 10, 2012, 3:07 PM), http://www.politifact.com/truth-o-meter/statements/2012/aug/10/american-principles-action/has-barack-obama-deported-more-people-any-other-pr.

[27] Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

come an increasingly regular fixture of the deported immigrant's experience.[28]

Yet alongside this prevailing harshness,[29] the Obama Administration has made some moves to advance humanitarian norms at the margins of immigration policy. As Chapter I discusses, noncitizens in same-sex unions recognized under state law are ineligible for the relief from deportation that spouses in opposite-sex unions can claim.[30] However, DHS recently instructed ICE officials to consider same-sex relationships when exercising discretion not to deport immigrants with strong family ties to U.S. citizens.[31] This position is just one component of the Administration's (not altogether successful[32]) attempt to prioritize removal of criminal aliens and grant discretionary relief from deportation to immigrants with strong connections to the United States.[33] The current Administration has also cut back on employer raids, a tactic at the center of a Bush Administration operation to make highly visible mass arrests of unauthorized immigrant workers, who were typically forced directly into removal proceedings.[34]

A special exemption for young unauthorized immigrants serving in the military or pursuing a college education had long been thought to provide a potential locus of compromise between some hardliners and humanitarians.[35] Yet the record of failed attempts to enact the DREAM Act over the past decade is a testament to the exaggerated likelihood that this compromise would ever land on the President's desk (absent a fundamental shift in the political climate for immigration reform).[36] Though some would-be mavericks flirted with support

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[28] *See infra* ch. IV, pp. 1660–61.

[29] For a high-level review of the early promise but subsequent disappointment of the Obama Administration in the eyes of many immigration-reform advocates, see MICHAEL DEAR, WHY WALLS WON'T WORK: REPAIRING THE US-MEXICO DIVIDE 118–22 (2013).

[30] *See infra* ch. I, p. 1592.

[31] *See* Memorandum from Gary Mead, Exec. Assoc. Dir., U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., et al., Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships (Oct. 5, 2012), *reprinted in* 89 INTERPRETER RELEASES 1966–67.

[32] *See infra* ch. III, p. 1651.

[33] *See id.*

[34] *See* Brian Bennett, *GOP Seeks Return of Workplace Raids*, L.A. TIMES, Jan. 27, 2011, at A1.

[35] Many humanitarians thought the case of the so-called DREAMers provided the most effective face for the immigration reform campaign because the potential beneficiaries came to the United States as children and are thus almost completely integrated in American culture. *See* Laura Corrunker, *"Coming Out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143, 156–57 (2012).

[36] *See* Elisha Barron, Recent Development, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 632–34 (2011) (describing how "bipartisan support . . . had begun to erode" by the end of the Bush Administration, *id.* at 634). Without the Senate's filibuster rule, however, the DREAM Act likely would have become law in December 2010, when, following passage in the House of Representatives, fifty-five senators voted to advance the Act, short of the sixty votes needed to end debate. Joyce Adams, Development in the

for the legislation, grassroots hardliners were usually successful in steering these individuals back to the party line or at least discouraging any others from joining their fence-sitting colleagues.[37]

The hardliner opposition to the DREAM Act and its more limited unilateral executive cousin, the deferred action policy, could hardly have been in doubt on June 15, 2012, when President Obama unveiled the policy. But the most ardent outcries following the announcement raised an institutional, not substantive, objection.[38] It is this institutional controversy that tracks the second fundamental tension in contemporary immigration law: the tension between insisting on allegiance to the traditional separation of powers model with Congress taking the lead on policymaking[39] and yielding to an alternative model in which the White House shapes the face of immigration policy. Following President Obama's announcement of the deferred action policy, the institutionalist critique emphasized that the move had given short shrift to the separation of powers by unilaterally executing a policy that closely resembled the DREAM Act, despite its repeated failure to muster sufficient support in Congress.[40]

Though the recent decision in *Arizona v. United States*[41] formally turned on the federal-state division of immigration authority, the ma-

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Legislative Branch, *The Dream Lives on: Why the DREAM Act Died and Next Steps for Immigration Reform*, 25 GEO. IMMIGR. L.J. 545, 545 (2011).

[37] *See, e.g.*, Barron, *supra* note 36, at 636 (describing how Senators Orrin Hatch and John McCain, among the original cosponsors of the bill in 2001, pulled their support); Alex Altman, *Can Orrin Hatch Tame the Tea Party?*, TIME SWAMPLAND (Feb. 8, 2011), http://swampland.time.com/2011/02/08/can-orrin-hatch-tame-the-tea-party; *cf, e.g.*, Ed Kilgore, *Why the Tea Party Turned on Perry*, THE NEW REPUBLIC (Oct. 7, 2011), http://www.newrepublic.com/article/the-permanent-campaign/95875/rick-perry-gop-primaries-obama (suggesting that Texas Governor Rick Perry's poll numbers for the Republican presidential nomination plummeted after word spread among voters that he supported a law providing in-state college tuition rates to young unauthorized immigrants).

[38] *See, e.g.*, John Yoo, *Obama Has Pursued a Dangerous Change in the Powers of the President*, FOXNEWS.COM (Oct. 12, 2012), http://www.foxnews.com/opinion/2012/10/12/obama-has-pursued-dangerous-change-in-powers-president (arguing that President Obama overstepped the bounds of presidential power and usurped congressional authority). Based upon this objection, a group of ICE officials and the Governor of Mississippi have sued the Department of Homeland Security to halt the deferred action policy. Amended Complaint at 1–3, 13–24, Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 WL 363710 (N.D. Tex. Jan. 24, 2013), 2012 WL 5199509; *see Bryant Joins Immigration Lawsuit*, MISSISSIPPI'S 64TH GOVERNOR, PHIL BRYANT (Oct. 10, 2012), http://www.governorbryant.com/bryant-joins-immigration-lawsuit/ ("I believe this action by the Obama administration is unconstitutional and circumvents Congress's authority. . . . As governor, I cannot turn a blind eye to the problem of illegal immigration and its costs to Mississippi." (internal quotation marks omitted)).

[39] This model continues to characterize a limited subset of immigration policy: "Congress has kept for itself nearly all the power to enact . . . ex ante screening criteria," such as professional and educational background requirements that determine eligibility for visas. Cox & Rodríguez, *supra* note 20, at 521.

[40] *See* Yoo, *supra* note 38.

[41] 132 S. Ct. 2492 (2012).

jority relied upon an assumption about this institutional tension, leaving little doubt that the majority was comfortable with the executive's exercise of broad discretion in the enforcement of existing immigration law.[42] This recognition marks a turning point in the judicial attitude toward the nature of immigration enforcement.[43] As Chapter I discusses, the Supreme Court has been far from consistent or pellucid in sketching how separation of powers principles interface with immigration policy: the Court sometimes analogizes to the war and foreign relations contexts with some minimum of inherent executive authority in mind; in other instances, the Court sticks with the standard framework in which authority lies initially with Congress, which may delegate responsibilities to the President.[44] Along this axis, the *Arizona* majority's recognition falls closer to the former (given that Congress had hardly spoken clearly to the preemption questions raised in the case).

Even more importantly, *Arizona* may represent one manifestation of a broader shift to judicial realism in immigration decisions. In *Arizona*, the Court took note of the division of immigration responsibilities within the federal government as it has developed in practice. In another example discussed at length in Chapter IV, the Court has recently downplayed the traditional criminal-civil distinction, which has justified providing fewer due process rights to detained and deportable immigrants; instead, the Court has begun to address the penal characteristics of deportation, no matter the practice's traditional label.[45]

However novel the Court's recent recognition, de facto delegation to the executive of broad discretion over enforcement is not new. As discussed above, the tall deportation order formally permitted by current law[46] necessarily means that contemporary immigration policy tells as much a story of nonenforcement as of enforcement. Yet what may be changing, and what may have made the deferred action policy's announcement sound discordant to ears trained to appreciate the harmony of a finely tuned separation of powers, is the executive's in-

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[42] *See infra* ch. III, p. 1650 (drawing attention to Justice Kennedy's blessing of, or at least comfort with, the degree of prosecutorial discretion exercised by the executive); Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.single.html ("For Scalia, because Arizona law does not contradict or even create real tension with federal law, Arizona should win. For Kennedy [and the majority], Arizona law loses because it conflicts with the president's policy.").

[43] *See* Posner, *supra* note 42 (characterizing the preemption ruling as a more significant entry in the separation of powers canon, where the decision marks the growth of the "imperial presidency" in the immigration arena, than in federalism doctrine).

[44] *See infra* ch. I, pp. 1587, 1601–02; *see also* Cox & Rodríguez, *supra* note 20, at 474–83.

[45] *See infra* ch. IV, pp. 1665–72.

[46] *See supra* p. 1570.

creasing willingness to formalize the exercise of this discretion and shape it into codified, concrete policies that resemble legislation.[47]

Executive enforcement has been, in many respects, traditionally characterized by ad hoc decisionmaking and the nontransparent setting of deportation priorities.[48] By contrast, the deferred action policy lays out generally applicable criteria and sets up a formal application process.[49] Moreover, announced by President Obama and published on the White House website, it could not have been more transparent.[50] Additionally, the Obama Administration went further than past administrations in specifying the precise contours of its approach to prosecutorial discretion by releasing the Morton Memoranda,[51] which directed officers to undertake comprehensive review of the backlog of removal cases and spelled out priority factors for either deportation or relief from deportation.[52] This trend favoring codification and transparency in executive branch immigration policy, though possessing a legislative flavor superficially at odds with separation of powers norms, actually helps to counteract some of the worst defects of largely untrammeled executive discretion (such as inconsistency with the rule of law and a lack of effective political accountability safeguards).

A third major fault line in contemporary immigration law falls between state governments, which have attempted to enforce (or at least influence the enforcement of) federal immigration law,[53] and the federal government, itself veering between support for a federal enforcement monopoly and willingness to delegate responsibilities to states and localities.[54] The Supreme Court's 2012 decision in *Arizona* high-

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[47] *See* Posner, *supra* note 42 (noting that what distinguished the deferred action policy from similar goals under the Bush administration "was how explicit [President Obama] made it").

[48] *See* Cox & Rodríguez, *supra* note 20, at 536 ("The public cannot clearly grasp what the Executive is doing when it appears to be tolerating unauthorized immigration and engaging in seemingly haphazard enforcement of the immigration laws.").

[49] *See* Olivas, *supra* note 6, at 543–46 & n.415 (comparing deferred action under the new policy, which establishes a formal application process and specifies eligibility criteria, to deferred action under previous law, which offered no application process but instead allowed officials to grant deferred action as a discretionary remedy after an immigrant's unlawful status came to the attention of enforcement officers).

[50] *See* Mayorkas, *supra* note 1.

[51] *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 125 (2012).

[52] *See* Olivas, *supra* note 6, at 495–503.

[53] *See* Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of* Chamber of Commerce v. Whiting *for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 86–89 (2012).

[54] *See, e.g.*, Adrian J. Rodríguez, Note, *Punting on the Values of Federalism in the Immigration Arena? Evaluating Operation Linebacker, a State and Local Law Enforcement Program Along the U.S.-Mexico Border*, 108 COLUM. L. REV. 1226, 1243 & n.102 (2008) (describing the Justice Department's inconsistent approach to questions of state and local authority to make arrests for civil immigration offenses).

lighted a classic state-federal conflict as well as the federal propensity for self-contradiction.[55] Arizona's S.B. 1070,[56] the law that took center stage in the case, led to copycat laws in other states[57] and "ignited a firestorm of denigration" across the country.[58] The statute sought to enlarge the state's direct role in immigration enforcement by, inter alia, according state police officers the authority to make warrantless arrests of those suspected of being removable noncitizens[59] and, as Chapter II reviews in detail, making it a state crime for undocumented immigrants to engage in unauthorized work.[60] The Court axed both efforts at the behest of the Supremacy Clause.[61]

But another provision of the Arizona law survived, in part because of federal self-contradiction on the matter. The federal government maintained that this section (colloquially known as the "show me your papers" provision[62]), which requires state law enforcement to check the immigration status of anyone suspected of unlawful presence,[63] interfered with federal enforcement.[64] But the Court drew attention to the manner in which federal policy — by statute as well as executive enforcement initiatives — encouraged such status verification so long as it was not abused in practice.[65] For example, ICE staffs a round-the-clock law enforcement support center to assist state and local verification efforts,[66] and the Secure Communities program goes as far as mandating that state police submit arrestee data for immigration-status verification in many circumstances.[67]

Even when the federal government adopts a straightforward position and despite the limits the Court has now placed on states' ability to play a direct role in immigration enforcement, states retain a substantial capacity to frustrate federal policies indirectly.[68] The deferred

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[55] *See* Arizona v. United States, 132 S. Ct. 2492, 2505–08 (2012).

[56] 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).

[57] *See* Cianciarulo, *supra* note 53, at 88–89.

[58] Nicholas D. Michaud, Note, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1114 & n.198 (2010).

[59] *Arizona*, 132 S. Ct. at 2505 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (Supp. 2012)).

[60] *See infra* ch. II, pp. 1622–23.

[61] *See Arizona*, 132 S. Ct. at 2503–07; *see also infra* ch. II, pp. 1623–24.

[62] Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1812 (2012).

[63] ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

[64] *Arizona*, 132 S. Ct. at 2508.

[65] *Id.* at 2508–10.

[66] *Id.* at 2508.

[67] *See infra* ch. III, pp. 1647–48.

[68] *See generally* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012) (describing how some state immigration efforts detract from federal initiatives by "commandeering" federal resources — that is, by forcing the federal government to expend resources it otherwise would not).

action policy points to a prime example. Though the measure undeniably secures greater protection against deportation for young undocumented immigrants in the near term, states can curtail benefits that an immigrant with legal status would otherwise enjoy. For example, the governors of Arizona and Nebraska have determined that beneficiaries of the new policy cannot obtain drivers' licenses,[69] even though federal law expressly permits states to grant licenses to recipients of deferred action[70] and at least thirty-three states have decided to do so.[71] Moreover, most states prohibit public universities from offering resident tuition rates to undocumented immigrants.[72] Conversely, states may push immigration policy in a proimmigrant direction with so-called "sanctuary" policies, which seek to minimize cooperation with federal immigration enforcement.[73]

Given the tensions and contradictions in contemporary immigration policy, the proper commission of the Court when treading into this field is by no means straightforward. May the Justices wash their hands of such confusion and leave it to the political branches to sort out? Or should the Court take a more ambitious tack, avoiding a stand on the substantive direction of immigration policy but tending the balance of institutional power by, for example, boosting the supremacy of federal over state law or favoring presidential discretion over strict demands for congressional involvement? Perhaps the Court should go even further, taking the (admittedly limited) steps available to it to ensure that immigration policy heed substantive norms that the Justices esteem? The four chapters that follow engage these complicated questions and provide both descriptive analysis of how the Court

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[69] As of February 2013, Arizona and Nebraska were the only two states that had deemed deferred action recipients ineligible for drivers' licenses. NAT'L IMMIGRATION LAW CTR., WILL INDIVIDUALS GRANTED DEFERRED ACTION UNDER THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) POLICY BE ELIGIBLE FOR DRIVER'S LICENSES? 2 (2013), *available at* http://www.nilc.org/document.html?id=831.

[70] The REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified as amended in scattered sections of 8 and 49 U.S.C.), requires states to verify immigration status before granting drivers' licenses that qualify for federal requirements to show a driver's license. *Id.* § 202(a)(1), 202(c)(2)(B), 119 Stat. at 312–13 (codified at 49 U.S.C. § 30301 note (2006)). The law then lists immigration statuses — including "approved deferred action status" — that qualify for the federal standard. *Id.* § 202(c)(2)(B), 119 Stat. at 313. But the statute does not require states to issue drivers' licenses to any qualifying individual. Nonetheless, a governor's decision to deny licenses may violate state law. *See, e.g.*, Memorandum in Support of Motion for Preliminary Injunction at 3–6, Ariz. Dream Act Coalition v. Brewer, No. 2:12-cv-02546-DGC (D. Ariz. Dec. 14, 2012), *available at* http://www.aclu.org/files/assets/1-aclu__memorandum_iso_pi-12-14-_asj_edits___2_.pdf (explaining that under Arizona state law, legal federal immigration status is sufficient for license eligibility).

[71] NAT'L IMMIGRATION LAW CTR., *supra* note 69, at 2.

[72] Olivas, *supra* note 6, at 544.

[73] *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 128–29 (2012).

has struggled with these issues and normative arguments for how the Court should approach the tensions of immigration law going forward.

Chapter I examines the evolution of the plenary power doctrine, which purports to strictly limit the judiciary's impact on immigration matters. That is, in constitutional challenges to the federal government's immigration policy, the Court has traditionally granted the government greater latitude to govern free of heightened constitutional restraint.[74] Tracing the plenary power doctrine's rise and, by some indications, recent fall, the Chapter sketches two visions of the doctrine. According to the first account — the political branches theory — the plenary power is an unenumerated source of authority shared by Congress and the executive over immigration and deserves a unique degree of deference from the courts.[75] The second vision, by contrast, grounds the doctrine in the practical inadequacies of the judiciary, such as a dearth of expertise over immigration policy, rather than in any constitutionally commanded institutional arrangement.[76]

The Chapter then applies these frameworks to analyze a recent development in the plenary power doctrine: the Obama administration's position that the Defense of Marriage Act[77] (DOMA), as applied to the eligibility of noncitizen same-sex spouses of American citizens for relief from deportation, should receive ordinary constitutional scrutiny, not special plenary power deference.[78] Ultimately concluding that, under either vision of the doctrine, courts should not defer to the executive's legal determination on the scope of plenary power review, the Chapter nonetheless contends that the plenary power doctrine should not cabin review of the statute.[79] Crucially, from the analytic perspective adopted by the Chapter, Congress did not take steps to invoke the plenary power doctrine expressly.[80]

Chapter II illustrates how in one area — preemption doctrine, and more specifically, preemption of state immigrant employment regulations — the Court has moved, albeit inconsistently, from the strongly noninterventionist mood exemplified by its invocation of the plenary power to an aggressive yet nonaggrandizing posture. This stance manifests itself in the Court's avoidance of minimalist holdings unambiguously available to it and its effort instead to manage the distribution of power over immigration policy between states and the federal government. In the 2010 *Arizona* decision, the Court, without even men-

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[74] *See infra* ch. I, pp. 1584–86.
[75] *See id.* at 1586–87.
[76] *See id.* at 1588.
[77] 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).
[78] *See generally infra* ch. I, pp. 1592–607.
[79] *See id.* at 1603–07.
[80] *See id.* at 1598–601.

tioning the traditional presumption against preemption of state law, tossed aside the marquee employment regulation of S.B. 1070 (the criminalization of unauthorized immigrant labor), even though the relevant preemption clause in the federal statute did not expressly reach the state provision in question.[81] Had the majority been more sympathetic to one of the traditional underpinnings of the plenary power — that the complex political and policy dynamics of the immigration field make it a poor fit for judicial intervention[82] — it may have feared the uncertain policy impact an aggressive preemption ruling would have had. This anxiety would likely have led the Court to enforce only the narrow coverage of the preemption clause on its face and to pass the buck to Congress to preempt the Arizona initiative.[83] Thus, although Justice Kennedy's opinion strove for rhetorical balance between the "extensive and complex" federal power over immigration[84] and Arizona's legitimate concerns about bearing the "consequences of unlawful immigration,"[85] it seemed to leave little doubt about where the locus of immigration power should primarily lie.

Yet a major preemption ruling the term just before *Arizona* — *Chamber of Commerce v. Whiting*[86] — casts doubt on the notion that a majority on the Court has fully theorized a position on either immigration federalism or, more broadly, judicial immigration interventionism. In *Whiting*, the Court downplayed institutional considerations, instead confining its analysis to a textualist interpretation of the relevant federal preemption clause.[87] Using this method of interpretation, the Court upheld two Arizona employment regulations: license revocation for businesses that employ unauthorized immigrant workers and mandatory use of E-Verify, a verification system set up but not mandated by the federal government.[88] Chapter II, after comprehensively reviewing and offering a typology of state efforts to regulate the employment of unauthorized immigrants,[89] explains why the interpretative methodologies deployed by the Court in *Arizona* and *Whiting* are irreconcilable.[90] The Chapter then concludes that in the wake of this pair of decisions, reform of employment regulation at the federal level may have become a heavier lift politically because the status quo rep-

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[81] *See* Arizona v. United States, 132 S. Ct. 2492, 2504–05 (2012); *infra* ch. II, pp. 1623–24.
[82] *See supra* p. 1577.
[83] *See infra* ch. II, pp. 1626–27 (explaining why the ruling is inconsistent with textualism).
[84] *Arizona*, 132 S. Ct. at 2499.
[85] *Id.* at 2500.
[86] 131 S. Ct. 1968 (2011).
[87] *See infra* ch. II, p. 1626.
[88] *See id.* at 1621–22.
[89] *See id.* at 1615–24.
[90] *See id.* at 1624–28.

resents a partial win for both hardliners at the state level and humanitarians at the national level.[91]

In limited and sometimes creative ways, the Court has inched even beyond its occasional role as institutional kingmaker to influence the substantive direction of immigration policy.[92] One relevant lever the Court controls is the scope of due process rights that immigrants may exercise to contest their treatment and ultimate deportation. For example, in *Zadvydas v. Davis*,[93] the Court ruled — notwithstanding plenary power conventions[94] — that unlimited detention in the immigration system would transgress minimal due process guarantees.[95] This expansion of due process rights for noncitizen immigrants sets policy directly by changing detention practices, even if only at the margins.

A more subtle, and perhaps not even intentional, course correction to immigration policy came as a result of *Padilla v. Kentucky*.[96] There, the Court held that the Sixth Amendment requires prosecutors to inform the criminally accused that by accepting a plea deal, they may face deportation.[97] This ruling has forced prosecutors and the criminal defense bar to learn about complex and previously obscure corners of immigration law.[98] In turn, this learning effect broadens the base of individuals aware of (and potentially ready to support reform of) the enforcement regime's legal triggers for deportability, which many policymakers and scholars have disparaged as unfair and unwise.[99]

The remaining chapters explain how the Court could go even further in reining in the hardliner tendencies of contemporary immigration policy and urge it to do so. Chapter III focuses on the availability of the Fourth Amendment exclusionary rule in removal hearings. The

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[91] *See id.* at 1629–32.

[92] As Chapter II notes, however, immigration hardliners have lost trust in the willingness of the federal government to wield a strong hand in immigration enforcement, and humanitarians have come to expect nonenforcement to remain a major plank of federal immigration policy. *Id.* at 1631–32. For this reason, the lines have blurred between the Court's institutional balancing and its substantive policymaking.

[93] 533 U.S. 678 (2001).

[94] *See infra* ch. I, p. 1589.

[95] *Zadvydas*, 533 U.S. at 690.

[96] 130 S. Ct. 1473 (2010).

[97] *Id.* at 1478.

[98] *See* Norman L. Reimer, *Inside NACDL: The* Padilla *Decision: Was 2010 the Year Marking a Paradigm Shift in the Role of Defense Counsel — or Just More Business as Usual?*, 34 CHAMPION 7, 7–8 (2010).

[99] For a summary and criticism of the "crimmigration" phenomenon, in which an increasing number of crimes — even minor offenses — trigger deportation eligibility, see Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 655–57, 665–74 (2011).

Chapter first introduces *INS v. Lopez-Mendoza*,[100] in which the Supreme Court held that immigrant petitioners in removal proceedings ordinarily cannot pursue suppression remedies for Fourth Amendment violations.[101] It then goes on to provide a critical analysis of two areas in which the lower courts have struggled to apply *Lopez-Mendoza*: first, the availability of the exclusionary rule in cases of "egregious" Fourth Amendment violations and second, the availability of suppression remedies for offenders arrested by state or local officers before transfer into federal enforcement custody.[102] Next, the Chapter argues that recent developments have undermined assumptions crucial to *Lopez-Mendoza*'s holding; in so doing, the Chapter appropriates the *Lopez-Mendoza* ruling as a lens to evaluate a variety of important developments in immigration policy. In light of those developments, as well as the degree to which *Lopez-Mendoza* insulates the immigration bureaucracy from independent Fourth Amendment scrutiny, the Chapter makes the case for revisiting and overruling *Lopez-Mendoza*.[103] Doing so would have the potential to alter immigration enforcement strategy by, for example, discouraging officials from endorsing practices like early-morning home raids that carry a disproportionately high risk of Fourth Amendment violations.[104]

Chapter IV highlights the effectiveness of legal representation for immigrants in removal hearings. The Chapter concludes that, even if guaranteeing representation to all immigrants in such proceedings as a matter of constitutional right represents too ambitious or costly a step, it would nonetheless be prudent to extend the due process guarantee of attorney representation to legal permanent residents as well as to especially vulnerable groups of alien respondents.[105] Expanding state-proffered legal representation would directly shift immigration policy by forcing Congress to increase funding on immigration enforcement or to reallocate its spending priorities.[106] Moreover, the doctrinal shift may go some length toward formalizing the "deliberately simple, . . . streamlined" nature of the deportation system that the Court has, in the past, accepted as a given,[107] but may in fact be as much a function of the Court's underenforcement of Fifth Amendment due process protections in the immigration context as of the political

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[100] 468 U.S. 1032 (1984).

[101] *See infra* ch. III, pp. 1636–38.

[102] *See id.* at 1638–49.

[103] *See id.* at 1649–57.

[104] *See id.* at 1653.

[105] *See infra* ch. IV, pp. 1672–79.

[106] *See* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MPI INSIGHT, April 2005, at 1, 13, *available at* www.migrationpolicy.org/insight/Insight_Kerwin.pdf; *infra* ch. IV, pp. 1672–73.

[107] INS v. Lopez-Mendoza, 468 U.S. 1032, 1048 (1984).

branches' preferences. Any objection to the provision of counsel that emphasizes costs and efficiency, to some degree, rings hollow given the federal government's demonstrated willingness to abide massive immigrant detention costs,[108] the increasing formality and complexity of removal-hearing procedures,[109] and the likelihood that attorney representation may sometimes reduce costs by either eliminating unnecessary delays in navigating the immigration-court system or explaining to immigrants that their cases stand little chance of succeeding.[110]

Nevertheless, the Chapter takes the cost and efficiency objections as serious and significant.[111] Yet even accounting for these critiques, it goes on to justify an expansion of some judicially recognized representation rights and — significantly — remedies outside the courts. The Chapter grounds its support for these recommendations in the demonstrated advantage afforded to immigrants with representation in removal hearings, the increasing legal sophistication necessary to access formal opportunities for relief from removal, and the Court's flirtation with turning away from a formalist criminal-civil distinction.[112]

Beyond making a plea for judicial intervention, the Chapter outlines four practical reforms that advocates of immigrant representation could press legislators and regulators to adopt.[113] Among them are expansion of prehearing group orientation programs to teach detained immigrants about their legal rights and the repeal of limits on Legal Services Corporation funding for immigrant representation.[114] In expanding its search for solutions beyond judicial doctrine and recognizing the political branches' tepid commitment to and chronic underfunding of the criminal public defender regime, the Chapter possesses an acute awareness of the limits of judicial intervention in the formulation of immigration policy. To a discussion that begins in Chapter I with the uncertainty prompted by an emergent Supreme Court jurisprudence treading beyond the plenary power border that the Court was traditionally loathe to cross, Chapter IV's exploration of remaining boundaries marks an edifying end.

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[108] NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 2–4 (2012), *available at* http://immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

[109] *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 116 (2012); *infra* ch. IV, pp. 1663–65.

[110] *See* Noferi, *supra* note 109, at 118 & n.401.

[111] *See infra* ch. IV, pp. 1672–73.

[112] *See id.* at 1663–72.

[113] *See id.* at 1679–82.

[114] *See id.* at 1680–82.

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The field of immigration law is rapidly changing. The myriad developments of recent years combined with the complicated tensions they engender led the editors of the *Harvard Law Review* to vote in favor of featuring the field in this edition of *Developments in the Law*. Yet even as this volume goes to print, "[c]hange is in the air,"[115] and far more radical changes may be on the horizon.

On January 28, 2013, a bipartisan group of eight U.S. senators announced that they had reached a deal on the outlines of comprehensive immigration reform.[116] The package would allow unauthorized immigrants to register to obtain a noncitizen legal status entitling them to work in the country; then, after ensuring new border security measures were in place, the proposal calls for a slow path to citizenship for immigrants currently living in the country.[117]

Among other features of the proposal are mandatory verification of job applicant work eligibility using a federal database and establishment of a guest worker system to fill low-skill and agricultural jobs.[118] Incorporating elements of the DREAM Act, the proposal would also offer young immigrants a quicker road to gaining citizenship.[119] Details remain to be ironed out — in particular, the arduousness and length of the citizenship application process for undocumented immigrants currently residing in the United States — but by most accounts, a comprehensive deal along these lines has a reasonable chance of passing.[120]

The chapters that follow thus capture a moment of conflict and confusion, one that may give way to relative coherence but meanwhile, one that has put to the test assumptions about the proper role of the judiciary in immigration affairs and helps chart a course for prospective interventions.

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[115] *Immigration Reform: Washington Learns a New Language*, ECONOMIST, Feb. 2, 2013, at 21, 21.

[116] *Id.*

[117] Press Release, Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet & Flake, Bipartisan Framework for Comprehensive Immigration Reform 1–3 (2013), *available at* http://www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html?ref=politics.

[118] *See id.* at 4–5.

[119] *Id.* at 3.

[120] *See Lexington: Jumping Off the Fence*, ECONOMIST, Jan. 19, 2013, at 34.

CHAPTER ONE

Plenary Power, DOMA, and Executive Deference

The federal Defense of Marriage Act[1] (DOMA), which defines marriage as the union of a man and a woman, is currently under attack in the Supreme Court.[2] While the main focus is federal discrimination against U.S. citizens in same-sex marriages, litigants in lower courts have also challenged the application of DOMA to immigration enforcement.[3] DOMA prevents U.S. citizens who are married to aliens of the same sex from petitioning to have their alien spouses admitted under special privileges for immediate relatives. These DOMA challenges, even if they would present strong arguments that DOMA fails heightened constitutional scrutiny in most applications, may nonetheless fail in the immigration context due to the plenary power doctrine, under which courts defer to the political branches' decisions in immigration law. In one such case, *Lui v. Holder*,[4] the Department of Justice (DOJ) argued on behalf of the plaintiffs that the plenary power doctrine should not apply to DOMA's immigration effects.[5]

This Chapter assesses the implications of this litigation position on the plenary power doctrine and DOMA. Examining the plenary power doctrine as applied to DOMA's constitutionality in the immigration context sheds light on the underlying source and motivation for the plenary power doctrine and highlights the continuing role that DOMA might play in the lives of binational same-sex couples. Specifically, this Chapter explores two interesting plenary power issues highlighted by the DOMA litigation. First, DOMA's silence on immigration raises the question of whether courts should apply the plenary power doctrine when the enacting branches have not explicitly stated that the statute applies in an immigration context. Second, because the executive and legislative branches have taken opposing views on the constitutionality of DOMA, the litigation poses the unique question of how courts should apply the plenary power doctrine when the executive branch argues for an interpretation in litigation against the legislative

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[1] 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

[2] *See* Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307).

[3] *See, e.g.*, Lui v. Holder, No. 2:11-CV-01267-SVW (JCGx), 2011 U.S. Dist. LEXIS 155909 (C.D. Cal. Sept. 28, 2011); Notice of Motion and Motion for Preliminary Injunction, Aranas v. Napolitano, No. SACV12-01137 CBM (AJWx) (C.D. Cal. Aug. 23, 2012).

[4] No. 2:11-CV-01267-SVW (JCGx), 2011 U.S. Dist. LEXIS 155909.

[5] Defendants' Opposition to Bipartisan Legal Advisory Group's Motion to Dismiss at 23 n.17, *Lui*, 2011 U.S. Dist. LEXIS 155909 (No. 2:11-CV-01267-SVW (JCGx)) [hereinafter Opposition to BLAG].

branch. This Chapter considers these issues by reference to two different visions of the plenary power.

Section A provides background on the plenary power doctrine and two potential bases for that doctrine. Section B looks at the DOMA litigation, including *Lui v. Holder*. Section C suggests that courts require evidence of an affirmative intent, such as a clear statement, that the political branches sought to take advantage of the plenary power before applying the doctrine. Section D discusses the extent to which a court should credit the executive's interpretation of the applicability of the plenary power doctrine. Section E provides a brief conclusion.

A. Introduction to the Plenary Power Doctrine

1. The Origins of the Plenary Power. — The plenary power acts as a "shield" against what could otherwise be meritorious individual rights claims sounding in the equal protection and substantive due process components of the Fifth Amendment.[6] While the Constitution provides Congress the power to "establish an uniform Rule of Naturalization,"[7] it does not mention plenary power over immigration. Rather, the Supreme Court first identified such a plenary power in the late 1800s in response to congressional regulation of Chinese immigration.[8] In the *Chinese Exclusion Case*,[9] the Supreme Court upheld the Chinese Exclusion Act[10] against a challenge arguing that Congress could not pass such a law.[11] The Court relied on principles of national independence and sovereignty in holding that Congress has the power to regulate immigration.[12] The power of exclusion "cannot be granted away or restrained on behalf of any one."[13] Determinations by the federal government in the immigration realm were "conclusive upon the judiciary."[14] Thus, the Supreme Court would not review laws or

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[6] *See* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 204 (2009).

[7] U.S. CONST. art. I, § 8, cl. 4.

[8] *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889); Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 7 (David A. Martin & Peter H. Schuck eds., 2005) (discussing how concerns over Asian immigration led to federal control of immigration). Before the development of federal immigration regulation and the creation of the plenary power doctrine, the states exercised more control over who could enter their territories. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834 (1993); *see also* Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., concurring in part and dissenting in part) (observing each state's "inherent power to exclude persons from its territory").

[9] 130 U.S. 581.

[10] Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). The Act prevented Chinese laborers from immigrating to the United States. *Id.*

[11] *The Chinese Exclusion Case*, 130 U.S. at 589.

[12] *See id.* at 603–05.

[13] *Id.* at 609.

[14] *Id.* at 606.

decisions by the political branches in the immigration context.[15] While the *Chinese Exclusion Case* focused on Congress's ability to exclude, the Court in *Fong Yue Ting v. United States*[16] extended the plenary power to the federal government's authority over deportation.[17] These early cases suggested that immigration decisions made by Congress and the executive branch were immune from judicial review.[18]

The Court continued to expand the plenary power, upholding the executive's authority to exclude an alien without a hearing in *United States ex rel. Knauff v. Shaughnessy*.[19] In that case, the immigration authorities excluded an alien, without a hearing, upon determining that her admission might be "prejudicial to the interests of the United States"[20] and that a hearing would risk disclosure of confidential information.[21] The delegation of the power to exclude by Congress to the President was not overbroad because "[t]he right to [exclude aliens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[22] The Court also reaffirmed its adherence to the plenary power doctrine: "[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[23]

In modern plenary power cases, courts have reviewed immigration laws, but have subjected them to only the most deferential standard — rational basis review.[24] These cases have also expanded the types of legislation that might succumb to the plenary power doctrine. In *Mathews v. Diaz*,[25] a lawful resident alien who had been in the United States for fewer than five years challenged a Medicare law that granted enrollment eligibility in Medicare Part B to any resident citizen over sixty-five, but allowed aliens to enroll only if they had been admitted for permanent residence and had resided in the United States

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[15] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 551–52 (1990).

[16] 149 U.S. 698 (1893).

[17] *See id.* at 707.

[18] The Court did make an exception for procedural due process rights, extending those rights to deportation proceedings. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 31 (1982) (implying that resident aliens are entitled to "exclusion proceedings" that are "fair"); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100–01 (1903). For a discussion of whether procedural due process includes the right to court-appointed counsel, or the right to effective assistance of counsel, in removal proceedings, see *infra* ch. IV, pp. 1665–72.

[19] 338 U.S. 537 (1950).

[20] *Id.* at 540.

[21] *Id.* at 541.

[22] *Id.* at 542.

[23] *Id.* at 543.

[24] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792–96 (1977).

[25] 426 U.S. 67 (1976).

for five years.[26] The Court upheld the classification under rational basis review, stating that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[27] Additionally, the Court rationalized the plenary power doctrine by analogizing to the political question doctrine, as "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[28] The Court also discussed how "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other,"[29] including all of Title 8 of the U.S. Code, which contains many of the immigration laws.[30]

Courts have extended *Mathews* to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[31] (PRWORA), which distinguishes between different classes of aliens in allocating Medicaid benefits.[32] Because Medicaid is a state-federal partnership, PRWORA gives individual states some discretion in determining which aliens receive benefits, as long as those aliens are not specifically excluded from receiving benefits under PRWORA. In *Soskin v. Reinertson*,[33] the Tenth Circuit held that, under the plenary power, rational basis review applied, and the fact that the state administered the program was immaterial because Congress had specifically authorized it.[34] Congress's powers "with respect to aliens derived from specific constitutional provisions as well as from the inherent powers of a sovereign nation."[35] The Tenth Circuit noted that the plenary power did not rely only on the Naturalization Clause, and that PRWORA and *Mathews* had no necessary link to naturalization.[36] Thus, *Soskin* and *Mathews* illustrate the wide range of applications of the plenary power.

2. *Two Visions of the Plenary Power.* — In applying the plenary power doctrine, courts may rely on two different visions of the plenary

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[26] *Id.* at 69–70.
[27] *Id.* at 79–80.
[28] *Id.* at 81–82 (footnote omitted).
[29] *Id.* at 78.
[30] *Id.* n.12.
[31] Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).
[32] 8 U.S.C. § 1601 (2006).
[33] 353 F.3d 1242 (10th Cir. 2004).
[34] *Id.* at 1254–55.
[35] *Id.*
[36] *Id.* at 1256. Some courts have found that state law implementing PRWORA fails strict scrutiny, following the Supreme Court's precedent in *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *See, e.g.*, Aliessa *ex rel.* Fayad v. Novello, 754 N.E.2d 1085, 1098–99 (N.Y. 2001). For a more thorough discussion of this issue, see *Developments in the Law — Jobs and Borders*, 118 HARV. L. REV. 2171, 2247 (2005).

power: a political branches model and/or judicial deference model. Professor Stephen Legomsky states:

> The doctrine can be visualized in either of two ways: (1) the statute is upheld on the merits because the substantive power of Congress is so great that the statute is assumed to be constitutional; or (2) the courts have unusually limited power to review the constitutionality of immigration statutes (or none at all).[37]

The political branches model conforms to the general view that Congress and the President have the plenary power in the immigration context through inferences from the foreign affairs power and inherent sovereignty.[38] From the early cases such as the *Chinese Exclusion Case* to more recent cases such as *Soskin*, courts have frequently invoked foreign affairs and inherent sovereignty as reasons to defer to the political branches' actions in immigration.[39] A few plenary power decisions ground their constitutional reasoning in part on the Naturalization Clause, even though that Clause discusses neither immigration generally nor the plenary power.[40] The Supreme Court has recognized that the plenary power in the immigration context is not only supported by the Naturalization Clause, but also extends from powers over "foreign relations and international commerce, and . . . the inherent power of a sovereign to close its borders."[41] The Court has not been clear as to which source is the primary one for the plenary power, often discussing the sources together.[42] While scholars have generally agreed that Congress has the primary immigration power,[43] there are also arguments for an inherent executive power over immigration.[44]

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[37] Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–17 (2000).

[38] *See* Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

[39] *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261, 273.

[40] *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10–11 (1982).

[41] Plyler v. Doe, 457 U.S. 202, 225 (1982).

[42] T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 863 (1989) (discussing how the early plenary power decisions were based in foreign affairs and international law); Adam B. Cox, Essay, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1673 (2007) ("Instead, the Court has for over a century made conflicting and ambiguous pronouncements about the source of federal immigration authority.").

[43] *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 192 (6th ed. 2008).

[44] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–43 (1950); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 483–85 (2009). Federal immigration law is not the only vehicle for immigration regulation, as there is some space for state immigration law. Recent decisions in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), and *Arizona v. United States*, 132 S. Ct. 2492 (2012), demonstrate the coexist-

The political branches model is not the only way to understand the plenary power doctrine. Professors Alexander Aleinikoff and Cornelia Pillard contend that the plenary power doctrine is an example of judicial deference through underenforcement of constitutional norms: courts are not fully reviewing the constitutionality of immigration statutes for reasons of institutional deference.[45] This analysis suggests that the Court is not applying a different set of substantive rules to immigration, but rather "partially suspend[ing]" the regular framework.[46] The fact that the Court applies lenient review in immigration decisions does not mean that the political branches should do the same when determining the constitutionality of immigration statutes. According to Aleinikoff and Pillard, "[i]f the political branches parrot the courts' lenient scrutiny, everyone has deferred to everyone else, and nobody has done the full-fledged constitutional analysis."[47] This judicial deference leaves the political branches with the chief responsibility to determine the constitutionality of immigration statutes.[48] Aleinikoff and Pillard extend this duty to the Solicitor General as well, who should be more vigilant in refusing to defend unconstitutional statutes to counter this judicial underenforcement.[49] Further, under the judicial deference thesis, the duty should extend to the DOJ when arguing before lower courts, because the Solicitor General would not argue those cases. If a court decided that the plenary power doctrine did not apply to a case, then the court should undertake a full constitutional analysis.

3. The Confused State of the Plenary Power Today. — While the plenary power has been invoked in a range of immigration cases, in the last decade the Supreme Court has not been clear on the status of the plenary power doctrine.[50] Recent cases from the Court and from lower courts have applied varying levels of scrutiny, or avoided the plenary power doctrine, without providing a clear rule for future courts to follow. For example, in *Nguyen v. INS*,[51] the Court analyzed

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ence of federal and state regulation of unauthorized immigrant employment. *See infra* ch. II, pp. 1615–24.

[45] Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v Albright, 1998 SUP. CT. REV. 1, 34–35.

[46] *Id.* at 34.

[47] *Id.* at 55; *see also* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128–29 (1993) (discussing circular buck-passing).

[48] Pillard & Aleinikoff, *supra* note 45, at 53–54.

[49] *Id.* at 58–60. For a general discussion of the executive's duty to defend statutes, see Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012).

[50] *Compare* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002) (arguing that Nguyen v. INS, 533 U.S. 53 (2001), and Zadvydas v. Davis, 533 U.S. 678 (2001), spell the end of the plenary power doctrine), *with* Nina Pillard, Comment, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002) (arguing that the courts still apply the plenary power doctrine but do not do so explicitly).

[51] 533 U.S. 53 (2001).

an equal protection claim under intermediate scrutiny, not rational basis review, in upholding a gender classification in immigration law.[52] The case involved a statute that granted U.S. citizenship to essentially all individuals born outside the United States to an unwed citizen mother and noncitizen father, but imposed significant requirements on individuals born outside the United States to an unwed citizen father and noncitizen mother.[53] Because the statute was constitutional under intermediate scrutiny, the Court noted that it "need not assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power."[54] Thus, the Court avoided the plenary power issue. In her *Nguyen* dissent, Justice O'Connor argued that the Court applied a weakened form of equal protection intermediate scrutiny.[55] She also concluded that *Nguyen* did not call for an application of the plenary power because the case involved a decision about whether an individual was a citizen and because the plenary power doctrine had traditionally been applied only in cases involving the admission or deportation of persons known to be aliens.[56] The Court, however, has not formally adopted this limitation on the plenary power.

In *Zadvydas v. Davis*,[57] the Court interpreted a statute on detention of aliens due for deportation to avoid addressing any constitutional issue, but noted that the plenary power had limitations.[58] Under the statute, if an alien is ordered removed, the government generally deports the alien within ninety days.[59] If the alien is not removed in ninety days, the alien "may be detained beyond the removal period."[60] Because "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem,"[61] the Court read in a limitation, restricting "detention to a period reasonably necessary to bring about that alien's removal from the United States."[62] The Court rejected the government's plenary power argument, stating that the "power is subject to important constitutional limitations," and that it was "focus[ing] upon those limitations."[63] However, the Court gave little guidance as to what those limitations are and how they apply to indefinite deten-

[52] *See id.* at 60–61.
[53] *Id.* at 59–60.
[54] *Id.* at 72–73.
[55] *Id.* at 97 (O'Connor, J., dissenting).
[56] *Id.* at 96–97.
[57] 533 U.S. 678 (2001).
[58] *Id.* at 689–90, 695.
[59] *Id.* at 682.
[60] *Id.* (quoting 8 U.S.C. § 1231(a)(6) (2006)).
[61] *Id.* at 690.
[62] *Id.* at 689.
[63] *Id.* at 695.

tion. The Court cited *INS v. Chadha*,[64] but that case focused on the proper procedure for passing laws (bicameralism and presentment), which did not appear to be an issue in *Zadvydas*.[65] The Court also cited the *Chinese Exclusion Case* as supporting the limitation of the plenary power, but that case is the foundation for the plenary power doctrine and has been used to support many of the Court's plenary power cases, not to apply limitations to the doctrine.[66] Thus, the Court, while ostensibly setting limits on the plenary power, did not provide clear guidance on the limits of that power.

The Court narrowed its holding in *Zadvydas* only two years later in *Demore v. Kim*.[67] The challenged statute allowed the Attorney General to detain aliens convicted of certain offenses prior to their removal proceedings, even if they did not pose a flight risk or a danger to the community.[68] The Court upheld the statute, distinguishing *Zadvydas* on two grounds: First, the removal of the aliens in *Zadvydas* was "no longer practically attainable,"[69] whereas in *Demore* the aliens were being held "pending" removal proceedings.[70] Second, the detention period in *Zadvydas* was indefinite, while in *Demore* it was short[71] — "roughly a month and a half in the vast majority of cases."[72] The Court also reaffirmed its commitment to the plenary power doctrine (though without mentioning the phrase): "[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."[73] The differing views on the plenary power in these recent cases have muddled the plenary power doctrine, causing confusion in the lower courts.[74]

This confusion is evident in lower court cases deciding which level of scrutiny to apply to immigration statutes. The Fourth Circuit in *Johnson v. Whitehead*[75] applied rational basis to a classification that

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[64] 462 U.S. 919 (1983).

[65] *Zadvydas*, 533 U.S. at 695.

[66] *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 383 (2002) ("Most curiously, the Court cites the *Chinese Exclusion Case*, a case at the foundation of the plenary power doctrine . . . .").

[67] 538 U.S. 510 (2003).

[68] *See id.* at 513–14.

[69] *Id.* at 527 (internal quotation marks omitted).

[70] *Id.* at 527–28.

[71] *Id.* at 528.

[72] *Id.* at 530.

[73] *Id.* at 522.

[74] *See* Recent Case, 125 HARV. L. REV. 1522, 1527–28 (2012). Professor Margaret Taylor has argued that *Demore*'s outcome is a result of its timing — the first post-9/11 immigration case. *See* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES, *supra* note 8, at 343, 344–45.

[75] 647 F.3d 120 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1005 (2012).

granted out-of-wedlock children citizenship upon the mother's naturalization, but not upon the father's.[76] The court relied on *Fiallo v. Bell*[77] in applying rational basis review under the plenary power, not the heightened standard applied in *Nguyen*.[78] The dissent argued that the higher scrutiny of *Nguyen* should apply because Johnson sought citizenship, not just an immigration status.[79]

The Ninth Circuit in *United States v. Flores-Villar*[80] applied intermediate scrutiny in upholding a statute requiring citizen fathers to wait five years before transmitting citizenship to a child born out of wedlock to a noncitizen, with no similar restriction on mothers.[81] The court noted that "we do not need to decide which level of review is the most appropriate," but assumed intermediate scrutiny would apply.[82] The court, ostensibly applying intermediate scrutiny, held that the statute's choice of means "is sufficiently persuasive in light of the virtually plenary power that Congress has to legislate in the area of immigration and citizenship."[83] The Supreme Court affirmed *Flores* in a per curiam opinion by an equally divided Court. However, since such an opinion is not "entitled to precedential weight,"[84] *Flores* does not help in discerning the Court's position on the plenary power. Between this equally divided affirmance and the denial of certiorari in *Johnson*, the Court has not provided a clear decision on whether the plenary power doctrine has changed at all and what standard should be applied.[85]

Scholars echo this confusion over the current status of the plenary power. After the Court decided *Nguyen* and *Zadvydas*, Professor Peter Spiro argued that "the grave has been dug" for the plenary power because the recent decisions did not invoke the doctrine.[86] Spiro locates the demise of the doctrine in changing international conditions. He argues that foreign relations are not as risky as they were when the plenary power doctrine originated, and therefore court intervention does not pose the issues that it did in the early twentieth century.[87]

[76] *Id.* at 126–28.

[77] 430 U.S. 787 (1977).

[78] *Johnson*, 647 F.3d at 126–27. *But see* Grant v. U.S. Dep't of Homeland Sec., 534 F.3d 102 (2d Cir. 2008) (applying *Nguyen* in upholding same statute).

[79] *Johnson*, 647 F.3d at 132 (Gregory, J., dissenting).

[80] 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 131 S. Ct. 2312 (2011) (per curiam).

[81] *Id.* at 993.

[82] *Id.* at 996 n.2.

[83] *Id.* at 996.

[84] Neil v. Biggers, 409 U.S. 188, 192 (1972).

[85] *See* Jessica Portmess, Comment, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After* Flores-Villar, 61 AM. U. L. REV. 1825, 1843 (2012).

[86] Spiro, *supra* note 50, at 340.

[87] *See id.* at 352–53.

However, Pillard responds that the Court has merely driven the doctrine "underground."[88] She argues that the watered-down intermediate scrutiny in *Nguyen* could be the plenary power by another name, indicating that the doctrine does still influence the Court's decisions, even if the Court does not always invoke it explicitly.[89]

B. Plenary Power and the Defense of Marriage Act

In 1996, Congress passed DOMA.[90] Section 3 of DOMA states that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[91] These definitions apply when "determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States."[92] While the Act does not specifically mention immigration or aliens, the Immigration and Nationality Act[93] (INA) does not define either "spouse" or "marriage" within its provisions. DOMA, therefore, affects immigration enforcement because U.S. citizens and permanent residents can petition to have a foreign national classified as an "immediate relative" for visa purposes.[94] "Immediate relative" includes "spouse."[95] The Board of Immigration Appeals (BIA) has determined that "spouse" is to be defined according to DOMA.[96] Therefore, "spouse" can mean only an individual of the opposite sex from the petitioning party. This definition prevents U.S. citizens in same-sex relationships from having their spouses granted a visa under the "immediate relative" provision. As DOMA has come under constitutional attack in recent years, challenges in the immigration context have arisen. The question of whether the plenary power applies in such cases has not yet been decided, and it raises interesting questions about the doctrine.

Windsor v. United States,[97] the current DOMA challenge before the Supreme Court, was brought by a plaintiff who was the surviving spouse from a same-sex marriage and was denied a spousal deduction on federal estate taxes because of DOMA.[98] A narrow Supreme Court

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[88] Pillard, *supra* note 50, at 836.
[89] *See id.* at 846–47.
[90] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).
[91] 1 U.S.C. § 7.
[92] *Id.*
[93] 8 U.S.C. §§ 1101–1537 (2006 & Supp. V 2011).
[94] 8 C.F.R. § 204.1(a) (2012).
[95] *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2006 & Supp. V 2011).
[96] *See In re* Lovo-Lara, 23 I. & N. Dec. 746, 748–49 (B.I.A. 2005).
[97] 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307).
[98] *Id.*

decision in that case would not extend to DOMA's application in immigration contexts where the plenary power might apply because DOMA's immigration consequences are not before the Court[99] and the usual practice is to weigh constitutional challenges on an as-applied basis.[100] DOMA, through its application to immigration, could still have a significant impact on many couples in the United States if the Court does not strike down DOMA entirely. Almost 30,000 same-sex binational couples, in which one partner is not a U.S. citizen, live in the United States.[101] As a result of the effect DOMA could still have on these couples, there has been an increase in lawsuits addressing DOMA's immigration provisions,[102] and several members of Congress have proposed bills overturning DOMA that would treat binational same-sex married couples the same as heterosexual couples.[103]

Recently, in *Lui v. Holder*, plaintiff Handi Lui, a male citizen of Indonesia, married Michael Roberts, a male U.S. citizen, in Massachusetts. Roberts filed a Form I-130 petition with the United States Customs and Immigration Services (USCIS) for a visa for Lui as an "immediate relative."[104] USCIS denied the petition.[105] Roberts appealed the petition to the BIA, which dismissed his appeal.[106] Lui and Roberts filed suit in the United States District Court for the Central District of California claiming that the denial violated the INA's nondiscrimination provision and that applying DOMA to prevent Lui from being classified as an "immediate relative" violated their constitutional rights to due process and equal protection.[107]

The Department of Justice, representing the United States as the defendant in Lui's suit, filed a brief opposing the motion to dismiss by the Bipartisan Legal Advisory Group for the House of Representatives (BLAG).[108] The DOJ's brief argued that DOMA should be subjected

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[99] The district court held that DOMA was unconstitutional "as applied" to the plaintiff. Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012). The question presented to the Supreme Court is whether DOMA is unconstitutional. Petition for a Writ of Certiorari Before Judgment, United States v. Windsor, No. 12-307 (U.S. Sept. 11, 2012), 2012 WL 3991414.

[100] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 162–63 (6th ed. 2009).

[101] Ariel Eure, *The Defense of Marriage Act and Undocumented Immigrants*, CENTER FOR AM. PROGRESS (Aug. 1, 2012), http://www.americanprogress.org/issues/immigration/news/2012/08/01/11986/the-defense-of-marriage-act-and-undocumented-immigrants.

[102] *See, e.g.*, Complaint, Blesch v. Holder, No. 12-cv-1578 (E.D.N.Y. Apr. 2, 2012).

[103] *See* Eure, *supra* note 101.

[104] Lui v. Holder, No. 2:11-CV-01267-SVW (JCGx), 2011 U.S. Dist. LEXIS 155909, at *1 (C.D. Cal. Sept. 28, 2011).

[105] *Id.* at *2.

[106] *Id.* at *2–3.

[107] *Id.* at *3.

[108] Opposition to BLAG, *supra* note 5. The DOJ no longer defends DOMA in federal court. Letter from Eric Holder, Attorney Gen., U.S. Dep't of Justice, to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011

to a heightened standard of scrutiny and that the court should declare DOMA unconstitutional.[109] The DOJ also noted that even though this case arises in the immigration context, the plenary power doctrine should not apply.[110] Even if the court agreed that higher scrutiny applied to DOMA generally, the applicability of the plenary power doctrine would still determine whether the statute received rational basis review (if the doctrine applied) or a higher level of scrutiny (if it did not apply) in the immigration context.

The DOJ did not disagree with the use or applicability of the plenary power in previous cases, but argued that it was unsuitable for this case. The DOJ provided several reasons why plenary power deference should not be given in this case: First, "[u]nlike the immigration and nationality statutes that gave rise to prior equal protection challenges, neither DOMA nor its legislative history suggests that DOMA was enacted as an exercise of Congress's plenary power to regulate immigration and naturalization."[111] Second, "unlike other statutes that include explicit references to the immigration and nationality laws or otherwise regulate aliens in the United States, DOMA contains no such provisions."[112] Third, none of "the responsible federal agencies identified an immigration specific purpose or need for DOMA."[113] Given these factors, the DOJ urged the court not to defer to Congress as it would in a usual immigration plenary power case.[114]

The District Court upheld the constitutionality of DOMA.[115] It ignored the DOJ's plenary power argument and relied heavily on *Adams v. Howerton*,[116] which held that Congress could "confer spouse status . . . only upon the parties to heterosexual marriages."[117] Though

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/February/11-ag-223.html. Because the DOJ does not defend DOMA, BLAG (composed of the House Speaker, Majority Leader, Majority Whip, Minority Leader, and Minority Whip) voted 3–2 to hire outside counsel to defend DOMA. Molly K. Hooper, *House Leaders Vote to Intervene in DOMA Defense*, THE HILL (Mar. 9, 2011, 5:43 PM), http://thehill.com/blogs/blog-briefing-room/news/148521-house-leaders-vote-to-intervene-in-doma-defense. BLAG intervened as a defendant. *See Lui*, 2011 U.S. Dist. LEXIS 155909, at *2.

[109] Opposition to BLAG, *supra* note 5, at 5.

[110] *Id.* at 23 n.17.

[111] *Id.* (citation omitted).

[112] *Id.* (citations omitted).

[113] *Id.*

[114] *Id.* BLAG, in its initial motion to dismiss and reply to the opposition of the plaintiff and the DOJ, did not address the plenary power argument, relying instead on other arguments that rational basis review would be appropriate. *See* Intervenor-Defendant's Consolidated Reply to Plaintiffs' and the Executive Branch Defendants' Oppositions to Intevenor-Defendant's Motion to Dismiss, Lui v. Holder, No. 2:11-CV-01267-SVW (JCGx), 2011 U.S. Dist. LEXIS 155909 (C.D. Cal. Sept. 28, 2011).

[115] *Lui*, 2011 U.S. Dist. LEXIS 155909, at *8.

[116] 673 F.2d 1036 (9th Cir. 1982).

[117] *Lui*, 2011 U.S. Dist. LEXIS 155909, at *6 (quoting *Adams*, 673 F.2d at 1042).

Adams predated DOMA, that did not affect the result because DOMA and *Adams* used the same definition of marriage.[118]

Even though the court rejected the constitutional claim, the DOJ's litigation position regarding the plenary power doctrine raises issues about the nature of the doctrine and suggests some useful ways for courts to go about applying it in the future. The remainder of this Chapter analyzes two of those issues. Section C evaluates the advantages of requiring a textual hook in immigration statutes. And section D assesses the dilemma of whether to defer to the executive branch's interpretation of the plenary power's applicability in litigation against the legislative branch. It concludes that deference is appropriate only when foreign affairs are implicated.

C. Affirmative Intent to Trigger the Plenary Power

DOMA's silence on immigration raises the issue of how courts should apply the plenary power doctrine when the political branches have not been clear on whether they intended to invoke the doctrine. In order to resolve this issue, courts should require some indication of the enacting political branch's affirmative intent, at the time of enactment, to take advantage of the plenary power. This framework is supported by the DOJ's brief, which argues that the plenary power doctrine would not apply to DOMA immigration cases because, among other reasons, DOMA does not discuss immigration.[119] The two visions of the plenary power provide different justifications for courts to look for an affirmative intent to trigger the doctrine. The framework may ensure that the branches hold themselves out as politically accountable before courts grant plenary power deference to their decisions. Additionally, expressing intent to invoke the doctrine indicates to the judiciary that the branches may have performed the necessary constitutional analysis. In applying this analysis to DOMA, courts would likely find the plenary power doctrine inapplicable.

One analogue to requiring the enacting branch to indicate an intent to benefit from the plenary power is the so-called "jurisdictional hook" in Commerce Clause jurisprudence.[120] The logic in the two contexts is similar. Where courts substantially defer to Congress's legislation, Congress should indicate that the legislation is connected to the power it is invoking.[121] In Commerce Clause cases, the jurisdictional hook can be achieved by writing into the statute that the goods or activities

[118] *Id.* at *8.

[119] Opposition to BLAG, *supra* note 5, at 23 n.17.

[120] *See* United States v. Lopez, 514 U.S. 549, 561–62 (1995).

[121] *Cf. id.* at 561 (stating that the "jurisdictional element . . . would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

affected must have traveled in interstate commerce.[122] Often this hook will limit the statute's application to interstate activities, rendering it constitutional under the Commerce Clause.[123] The purpose of the hook in Commerce Clause cases is to make sure that the legislation has a relationship to interstate commerce, as well as to limit the statute's effect to interstate commerce.[124] In the immigration context, such a hook would have a similar purpose: ensuring that the statute has a relationship to immigration and limiting the statute only to the immigration context.

Political accountability is one of the rationales for the hook under the Commerce Clause,[125] especially given that the hook is often not a meaningful limitation in Commerce Clause cases.[126] Professor Thomas Merrill explains that requiring a "clear statement rule would assure that Congress is held accountable for squaring its assertions of power with the powers conferred upon it by the text of the Constitution."[127] Forcing Congress to be explicit "enhance[s] the political and procedural checks on federal lawmaking in a number of sensitive areas,"[128] of which immigration could be one. In the immigration context, it may often be apparent that the statute is about immigration, and a specific mention that the plenary power is being used may be unnecessary. However, in cases like *Mathews v. Diaz*, where the link to prototypical immigration laws is more tenuous, requiring that Congress include language discussing the link to immigration may be helpful to courts. This idea is not limited to the Commerce Clause — it has also been suggested for the taxing power, though the Court's decision in *National Federation of Independent Business v. Sebelius*[129] does not support it.[130]

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[122] *See* United States v. Alderman, 565 F.3d 641, 647–48 (9th Cir. 2009).

[123] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 472 (2005).

[124] *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005) (stating that a jurisdictional element "serv[es] as a nexus between a particular piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue").

[125] *See* Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 847 (2005); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1425 (1994) ("[A] clear statement rule . . . ensure[s] that Congress has considered the ramifications of regulating core state functions and . . . has acknowledged its responsibility for changing the traditional allocation of authority.").

[126] *See, e.g.*, United States v. Rodia, 194 F.3d 465, 472 (3d Cir. 1999).

[127] Merrill, *supra* note 125, at 847.

[128] Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 16 (2004).

[129] 132 S. Ct. 2566 (2012).

[130] *Compare id.* at 2594 ("It is of course true that the Act describes the payment as a 'penalty,' not a 'tax.' But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power." (cita-

Another possible solution could be to insist on a clear statement rule for the reasons invoked in *Gregory v. Ashcroft*.[131] There the Court required a clear statement if Congress wanted to disturb the federal-state power balance in the regulation of areas of traditional state concern.[132] The importance of protecting federalism and state sovereignty justified the requirement of a clear statement by Congress before intruding on state zones of authority.[133] This clear statement rule was not derived from any specific constitutional text, but rather from the Constitution's creation of a limited federal government with remaining power left to the states.[134] This logic could be extended to immigration, where courts could require a clear statement because of the importance of separation of powers and specifically, judicial protection of individual rights–based claims. Just as the clear statement rule in *Gregory* was derived from the Constitution's emphasis on federalism, so too does the Constitution emphasize the separation of powers and a commitment to individual rights. Protecting individual rights under equal protection and substantive due process is a traditional area of judicial concern, and the plenary power doctrine intrudes on a court's ability to evaluate individual rights claims in the immigration context. To limit the other branches' intrusion on the judiciary, courts could require a clear statement that a statute applies to immigration before deferring to the political branches.

The Supreme Court's decision in *Hampton v. Mow Sun Wong*[135] supports the intent-to-trigger framework. In *Hampton*, the Civil Service Commission, an agency of the federal government, implemented regulations that allowed only U.S. citizens and Samoan natives to be employed in certain federal service positions.[136] The plaintiffs were aliens who challenged these regulations under the Fifth Amendment after being terminated from their positions for not being citizens.[137] While the Civil Service Commission argued that the plenary power doctrine applied, the Court did "not agree . . . that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[138] The Court analyzed the plaintiffs'

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tion omitted)), *with id.* at 2651 (joint dissent) ("The issue is not whether Congress had the power to frame the minimum-coverage provision as a tax, but whether it did so." (emphasis omitted)).

[131] 501 U.S. 452 (1991).

[132] *See id.* at 460–61.

[133] *See id.* at 461; John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 409–10 (2010).

[134] *See* Manning, *supra* note 133, at 410.

[135] 426 U.S. 88 (1976).

[136] *Id.* at 90.

[137] *Id.* at 91–93.

[138] *Id.* at 101.

claim under procedural due process.[139] Because the government was "assert[ing] an overriding national interest as justification for a discriminatory rule[,] . . . due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."[140] Evidence of that intent could be that an agency has "responsibility for fostering or protecting that interest."[141] And "[a]lternatively, if the rule were expressly mandated by the Congress or the President, [the Court] might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption."[142] Thus, the Court's language suggests that an express mandate might be necessary for a court to apply the plenary power doctrine.

Just as in Commerce Clause jurisprudence, the presence or absence of the "hook" in immigration statutes should not be dispositive of whether the political branches receive plenary power deference. As the Supreme Court stated in *United States v. Morrison*,[143] "a jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce."[144] It is still up to courts to decide whether the plenary power doctrine applies, but in cases where it is not clear, the presence of a "hook" may allow courts to see more clearly the connection to immigration and force Congress to be politically accountable.

DOMA's lack of any indication of an intent to trigger the plenary power doctrine suggests that the doctrine should not apply. The textual hook argument distinguishes DOMA from almost all other immigration provisions, and the lack of a severability clause in DOMA supports the argument that Congress did not enact DOMA subject to its plenary power over immigration.

Most of the previous plenary power cases involved statutes that explicitly affected provisions in the immigration or nationality laws, such as the INA. For example, cases involving gender classification, such as *Nguyen v. INS* and *Fiallo v. Bell*, dealt with laws passed under the INA.[145] DOMA does not refer to the INA or any other immigration statute.

Some cases do not involve laws that explicitly address immigration, but those statutes at least mention immigration or aliens. In *Mathews v. Diaz*, the Court upheld a statute that involved the distribution of

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[139] *See id.* at 103.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] 529 U.S. 598 (2000).
[144] *Id.* at 612 (emphasis added).
[145] *See* Nguyen v. INS, 533 U.S. 53, 59–60 (2001); Fiallo v. Bell, 430 U.S. 787, 788 (1977).

Medicare benefits between different classifications of aliens.[146] In that decision, the Court noted other statutes that classified based on citizenship and the legitimacy of those classifications.[147] Such statutes regulate aliens by limiting certain benefits only to citizens, thus drawing a distinction between citizens and aliens within the statute. DOMA does not contain any distinction between different classifications of aliens or between aliens and citizens.

A related argument in favor of the DOJ's position is the lack of a severability clause in DOMA. The Supreme Court has held that a severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision."[148] While severability clauses are generally not dispositive in deciding whether to sever a statutory provision, courts give them "significant weight."[149] The question is not so much whether the immigration applications would be severable, but more what the lack of a severability clause says about whether a court should give plenary power deference. A severability clause stating that the immigration aspects of the statute should stand if the rest of the statute were found unconstitutional might indicate that Congress was exercising its plenary powers over immigration in DOMA.

Even accepting all the factors in the litigation position, a court could still find that DOMA's immigration implications would be subject to the plenary power doctrine. DOMA arguably indirectly affects admission of aliens, one of the core areas of immigration doctrine, suggesting that Congress had an intent to regulate aliens.

One could argue that DOMA's application in the immigration context affects a core issue of immigration: the admission and exclusion of aliens.[150] Scholars have argued that there exists an "inside/outside" model of immigration, where the treatment of aliens "inside" the immigration process may be subject to the plenary power doctrine, but aliens "outside" that process are protected under more normal constitutional principles.[151] Immigration laws that affect admission are gener-

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[146] *See* Mathews v. Diaz, 426 U.S. 67, 70 (1976).

[147] *See id.* at 78 n.12.

[148] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987).

[149] *See* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 646 n.28 (2008).

[150] *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("[P]ower to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments [which are] largely immune from judicial control.").

[151] *See, e.g.*, Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV 1047, 1059–61 (1994). Professor Linda Bosniak notes that while the inside/outside model can be useful, this analysis misses the nuances of the immigration doctrine on issues "inside" immigration, especially if the plenary power doctrine is waning. *Id.* at 1063. Additionally, the model "overstate[s] the status of aliens on the so-called 'outside.'" *Id.*

ally considered "inside" and subject to the plenary power.[152] One could reasonably conclude that DOMA affects admission.[153]

Without a valid visa, an alien may not enter the United States. The granting of a Form I-130 petition is "only the first step in helping a relative [of a U.S. citizen or permanent resident] immigrate to the United States."[154] The second step is to apply for an immigration visa if abroad, or file the Form I-485 if residing in the United States, to adjust the alien's status to long-term permanent resident.[155] If an alien is classified as an immediate relative of a U.S. citizen (or long-term permanent resident) under Form I-130, that alien is not subject to limits on the number of visas.[156] Form I-130 does not guarantee admission because section 212 of the INA lists several criteria that render an alien inadmissible, which could be applied even if the Form I-130 petition is granted.[157] However, even aliens deemed inadmissible under section 212 can apply for a discretionary waiver if they are married to a U.S. citizen.[158] Thus, while the granting of a Form I-130 petition does not guarantee admission to an alien, it does improve his or her chances.[159]

While a court could reasonably apply the plenary power doctrine to DOMA, a more justifiable result would be to require some intent to trigger the doctrine, similar to the proposal in the DOJ's brief. In *Lui v. Holder*, requiring some intent to trigger the plenary power by Congress would have resulted in the court following the executive's interpretation and not applying the plenary power doctrine. This analysis would not have changed the result in *Lui* because the court did not rely on a plenary power theory. The analysis would have a meaningful impact if a court decided that DOMA's classification merited higher

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[152] *See* Motomura, *supra* note 15, at 565.

[153] *But see* Portmess, *supra* note 85, at 1654 (arguing that DOMA and its relationship to immigration through the I-130 visa process do not affect admissions because the visa process is distinct from the immigration process).

[154] *I-130, Petition for Alien Relative*, U.S. DEP'T OF HOMELAND SEC., http://www.uscis.gov/i-130 (last updated Jan. 28, 2013).

[155] *See* 8 U.S.C. § 1201(a) (2006); *id.* § 1255 (2006 & Supp. V 2011).

[156] *Id.* § 1151(b)(2)(A)(i) (2006 & Supp. V 2011).

[157] *Id.* § 1182. These criteria include issues regarding health, criminal activity, and national security. *Id.*

[158] *See, e.g.*, *id.* § 1182(a)(9)(B)(v).

[159] The advantages of marital status become clear when considering the process for admission of aliens. The INA focuses on family relationships when granting "green cards" for lawful permanent residency. For example, in 2011, sixty-five percent of new lawful permanent residents (688,089 of the over one million total) were granted that status based on a familial relationship. *See* RANDALL MONGER & JAMES YANKAY, U.S. DEP'T OF HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2011, at 3 tbl.2 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf. By comparison, only 139,339 aliens were given lawful permanent residency under the employment-based preference category of admission. *Id.* at 3. Additionally, the cap on the employment-based preference category has decreased. *Id.*

scrutiny; not applying the plenary power would then mean that the case would be decided under heightened scrutiny, not rational basis.

D. Deference to Executive Interpretations of the Plenary Power Doctrine

Because the DOJ has argued that the plenary power does not apply in *Lui*, the case raises the interesting questions of whether and how courts should defer to one branch's interpretation of the doctrine.[160] This section focuses on executive branch arguments about the applicability of the plenary power and whether they should receive special deference from courts. First, the section provides background on the separation of powers in the immigration context, concluding that Congress is generally viewed as holding the power to effect immigration policy even though the President has some inherent authority. Given this background, the section proposes two frameworks, under the political branches model and the deference model respectively, that can assist courts with this issue. Under the political branches model, courts should look at whether the statute implicates foreign affairs, and if so, defer to the executive's interpretation of the plenary power's application. Under the deference model, only executive interpretations from the time of enactment, not from a later date, deserve deference.

In *The President and Immigration Law*, Professors Adam Cox and Cristina Rodríguez consider the lack of judicial and scholarly discussion on the separation of powers in the immigration context, finding that while the conventional story is that Congress retains the immigration power, the President has exercised authority in immigration through his "inherent authority, formal delegation, and de facto delegation."[161] The theory of inherent presidential authority in immigration is most clearly stated in *United States ex rel. Knauff v. Shaughnessy*, in which the Supreme Court observed that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of the nation."[162] In *Hampton v. Mow Sun Wong*, the Court indicated that either the legislative or executive branch could have immigration authority. If Congress or the President had enacted the rule promulgated by the Civil Service Commission, then the Court would have applied a

[160] *See* Cox, *supra* note 42, at 1673 ("Constitutional immigration law provides little guidance about the distribution of immigration authority between Congress and the executive."); Cox & Rodríguez, *supra* note 44, at 460 ("The jurisprudential and scholarly focus on the distribution of power between courts and the political branches, though important, has obscured a second separation-of-powers issue: the question of how immigration authority is distributed between the political branches themselves.").

[161] Cox & Rodríguez, *supra* note 44, at 546.

[162] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S 537, 542 (1950).

deferential standard.[163] In fact, the President later issued an Executive Order[164] to that effect that has been upheld by the lower courts.[165]

However, because Congress has occupied much of the immigration space through the INA, there is not much room for the executive to exercise independent authority.[166] Rather, the executive's power over immigration has increased with the rise of the modern administrative state and decline of the nondelegation doctrine. Even though Congress has maintained control over formal rules of admission and deportation, it has engaged in "de facto delegation" of screening powers to the President, who can shape immigration policy through the use of prosecutorial discretion.[167] The current immigration system gives the President the authority to deport, or not to deport, many illegal immigrants.[168] President Obama's administration has used this prosecutorial discretion frequently. For example, Secretary of Homeland Security Janet Napolitano wrote to Representative Nancy Pelosi that Immigration and Customs Enforcement (ICE) will consider same-sex relationships to be family relationships when deciding whether to deport an immigrant.[169] Such prosecutorial discretion allows the executive to mitigate the impact of DOMA on immigration.

INS v. Chadha provides an example of the executive and legislative branches taking opposite positions in an immigration case. *Chadha* involved the "legislative veto," a device that allowed one house of Congress to veto an executive branch action.[170] In *Chadha*, a lawfully admitted alien overstayed his visa, but an immigration judge suspended his deportation.[171] The House of Representatives then exercised its statutory veto by passing a resolution overruling the suspension of deportation.[172] The executive argued that the House's action violated the principle of separation of powers, while Congress argued that its plenary power over immigration justified this invocation of the legisla-

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[163] *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

[164] Exec. Order No. 11,935, 3 C.F.R. 146 (1977).

[165] *See* Mow Sun Wong v. Campbell, 626 F.2d 739, 746 (9th Cir. 1980).

[166] *See* Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (en banc) (stating that while the executive branch may have some inherent authority over immigration, "[i]n practice . . . the comprehensive character of the INA vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress"), *aff'd*, 472 U.S. 846 (1985).

[167] Cox & Rodríguez, *supra* note 44, at 510–11.

[168] *See infra* ch. III, p. 1658 (discussing Justice Kennedy's opinion in *Arizona* that prosecutorial discretion is a "fundamental aspect of the American immigration system").

[169] Letter from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to Hon. Nancy Pelosi, U.S. House of Representatives (Sept. 27, 2012), *available at* http://www.metroweekly.com/poliglot/12-3384%20Pelosi%20S1%20signed%20response%2009.27.12.pdf.

[170] INS v. Chadha, 462 U.S. 919, 923 (1983).

[171] *See id.* at 923–24.

[172] *See id.* at 925–27.

tive veto.[173] The Court held that the legislative veto was unconstitutional, violating the constitutional requirements of bicameralism and presentment.[174] While the Court agreed that "[t]he plenary authority of Congress over aliens . . . is not open to question,"[175] the issue at hand was "whether Congress has chosen a constitutionally permissible means of implementing that power."[176] Thus, *Chadha* suggests that Congress, not the President, is the primary wielder of the plenary power.

1. Political Branches Model and Treaty Interpretation. — If the plenary power doctrine is based on the political branches model, then there are some arguments for courts' deference to executive statutory interpretation. One potential analogue to the immigration context is treaty interpretation. While treaties contain obvious differences from immigration legislation,[177] such a comparison may provide a useful starting point for a court.

Courts are often tasked with interpreting treaties.[178] In doing so, courts can defer to interpretations by both the Senate and the President. The Senate can attach reservations to treaties,[179] which the President must include in the treaty and which are binding on the courts, as are Senate declarations or interpretations that are provided to the President.[180] Courts have also used the legislative history of the treaty proceedings, mainly in situations where the President took one position before the Senate and another position in later litigation.[181] While declarations, reservations, and legislative history may be used by courts in interpreting treaties, "[i]nterpretation by the Senate of a treaty after it has been concluded may have no special authority."[182]

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[173] *See id.* at 940–41.

[174] *See id.* at 945–46, 956–59.

[175] *See id.* at 940.

[176] *See id.* at 941.

[177] The main difference is that the Constitution expressly grants the President the "Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. However, the Senate must give its "Advice and Consent," which requires "two thirds of the Senators present [to] concur." *Id.* The House of Representatives plays no role in the treaty process, and thus treaties do not face the bicameralism and presentment requirements of statutes.

[178] *See* Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (stating that "courts interpret treaties for themselves" but also accord "great weight" to executive interpretation).

[179] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (1987) [hereinafter RESTATEMENT].

[180] David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 958 (1994).

[181] *Id.* at 959.

[182] RESTATEMENT § 326 cmt. a; *see also* Fourteen Diamond Rings v. United States, 183 U.S. 176, 180 (1901) ("The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."); Bederman, *supra* note 180, at 960 ("[L]ater senatorial interpretations of international agreements are accorded no deference at all by the courts." (emphasis omitted)).

Thus, the Senate's ability to influence a court's decision on a treaty is limited to its debate of and consent to the treaty.

In contrast, courts often look to the President for guidance on how to interpret a treaty.[183] While deference to the President is not written in the Constitution, nor a product of doctrine from the early years of the United States, there are plausible policy reasons why deference is appropriate.[184] First, the President "is the country's 'sole organ' in its international relations and is responsible for carrying out agreements with other nations."[185] The executive's expertise in foreign affairs (especially relative to that of the courts), as well as the need for flexibility, provides a rationale for deference.[186] Second, the President is responsible for negotiating treaties. Thus, "the meaning given [to treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."[187] The first reason provides an analogy to immigration; the second reason does not.

While treaties differ procedurally from other kinds of legislation, including immigration-related statutes, they have some similarities to immigration statutes due to the foreign affairs implications of both areas. For example, in *Knauff* the Supreme Court rested its statement of inherent executive authority in immigration on its decision in *Curtiss-Wright* and the power of the executive in foreign affairs.[188] The Supreme Court in *Harisiades v. Shaughnessy*[189] stated 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."[190] Scholars have agreed that immigration may sometimes have foreign policy implications.[191] Thus, interpretations of immigration statutes have some effect in the foreign affairs realm. The very same policy rationales for deferring to the executive in the context of treaty interpretation would also apply in determining which branch to defer to in

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[183] RESTATEMENT § 326 reporters' note 2 ("Increasingly, [the Supreme Court] has invited the Solicitor General to file an *amicus* brief giving the views of the Executive Branch."). Courts overwhelmingly adopt the executive interpretations of treaties. *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1755 (2007) (discussing one study in which fifty-three of sixty-seven cases deferred to the executive's interpretation, and "nearly half of the cases that rejected the executive's interpretation were later reversed").

[184] Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 790 (2008).

[185] RESTATEMENT § 326 cmt. a; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (discussing the executive's foreign affairs power).

[186] *See* Sullivan, *supra* note 184, at 790.

[187] Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

[188] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[189] 342 U.S. 580 (1952).

[190] *Id.* at 588–89.

[191] *See, e.g.*, Legomsky, *supra* note 39, at 262.

conflicts over the applicability of the plenary power. However, because some areas of immigration are less relevant to foreign policy than others, courts may not always want to look to treaty interpretation as a model. For example, issues dealing with the benefits received by aliens under Medicare may not implicate foreign affairs in the same way as do issues related to admission or exclusion.[192]

A court may also be reluctant to grant the same deference to executive interpretations of immigration statutes because the executive branch's role in immigration legislation does not involve the negotiation with foreign powers that treaty-making does. In one sense the roles of the branches are reversed in treaties: the President negotiates and signs the treaty, and the Senate can be viewed as having a veto power over the agreement.[193] This structure is not present in immigration legislation.

While treaty interpretation doctrine provides some interesting analogies, courts should not provide extra deference to the executive's interpretation of whether the plenary power doctrine applies unless the case has some clear bearing on foreign relations. Professor Legomsky has critiqued courts' linking of immigration to foreign affairs in all contexts because "it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations."[194] Likewise, although DOMA's restrictions as applied in the immigration context could lead to friction with U.S. allies that recognize same-sex marriage and permit U.S. citizens to become naturalized if they marry domestic citizens,[195] the impact on foreign relations will likely be too small and attenuated to merit application of special deference to executive interpretations of DOMA.

Applying this analysis in *Lui v. Holder* would have resulted in the court declining to defer to the executive's interpretation. There is no indication that DOMA implicates foreign affairs, and as such the executive's interpretation should not receive any special deference. Of course, a court could separately decide that the plenary power does not apply, for example, due to reasons discussed in section C.

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[192] *See* Neuman, *supra* note 8, at 1897 (discussing the origins of conflating immigration and foreign policy, and arguing that where immigration involves issues of crime, poverty and disease, "the equation of immigration with foreign policy is a fiction").

[193] *See* ABRAHAM D. SOFAER, U.S. DEP'T OF STATE, THE ABM TREATY PART II: RATIFICATION PROCESS (1987), *reprinted in* 133 CONG. REC. 12,881, at 12,891 (1987).

[194] Legomsky, *supra* note 39, at 262.

[195] *See, e.g.*, *Determine Your Eligibility — Sponsor Your Spouse, Partner or Children*, CITIZENSHIP & IMMIGR. CAN., http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp (last updated Oct. 26, 2012) (describing how Canadian citizens may sponsor their same-sex partners for permanent resident status).

2. Judicial Deference and the Plenary Power. — The examples in the literature focus on plenary power deference when one branch has affirmatively acted in the immigration sphere, through legislation or executive action, and is given deference by a court. However, DOMA cases raise the issue of how a court should view a branch's interpretation that the plenary power should not apply, and the timing of that interpretation. These questions are important if one agrees that the plenary power doctrine traces its roots to the Court's deference to the political branches to make the relevant determinations on constitutionality in the first instance.[196]

If the constitutionality of immigration legislation is to be fully enforced by the political branches, then courts should take seriously a branch's argument at the time of enactment (Time One) that the plenary power doctrine does not apply. When a branch advances that argument, it suggests that the branch may not have performed a full constitutional review of the statute at issue because it assumed that the courts would perform the full review.[197] Thus, if a political branch did not engage in the requisite constitutional analysis, courts should not apply the plenary power, but should perform an independent constitutional analysis. If the courts apply the plenary power in a situation where the political branches did not do the full constitutional analysis, "circular buck-passing"[198] would result, in which the branches defer to each other and no full review occurs.

Courts should undertake a different analysis when political branches advance similar arguments for a statute at a time after enactment (Time Two). For example, a Time Two administration may want to argue that the plenary power should not apply to immigration legislation enacted under a Time One administration. However, the Time Two interpretation should not be given deference because that would enable a future administration to affect the level of judicial review of previously enacted legislation, even if that legislation had been given full constitutional review during its enactment. Courts should instead independently look at Time One to see if the political branches performed the adequate constitutional analysis. Thus, a Time Two interpretation is largely irrelevant for receiving deference from courts.

While the Obama Administration has performed extensive constitutional analysis of DOMA's immigration effects, this analysis occurred at Time Two — well after DOMA's passage. Thus, the Obama Administration's analysis is not the one envisioned under the judicial deference theory. Under that theory, the Clinton Administration would

[196] *See* Pillard & Aleinikoff, *supra* note 45, at 59–60.

[197] *Cf. id.* at 54–55 (discussing Congress's tendency to avoid grappling with the constitutionality of immigration legislation, even when it has explicitly invoked the plenary power doctrine).

[198] Strauss, *supra* note 47, at 128–29.

have had to have reviewed DOMA's constitutionality in the immigration sphere at Time One and either vetoed the bill or registered an objection if it found a constitutional problem. In that situation, a court might have deferred to that Administration's interpretation that the plenary power should not apply. Applying this theory to *Lui*, a court should not defer to the executive's Time Two interpretation but rather look at Time One to see if the proper constitutional analysis was performed. In analyzing Time One to see if the political branches performed the proper constitutional analysis, courts could use the intent-to-trigger framework in section C to help answer that question. If, under the section C framework, a court finds no intent by the political branches to take advantage of the plenary power, then it is unlikely that a proper constitutional analysis has already been performed, and the court should not apply the plenary power doctrine but rather engage in its own independent constitutional analysis.

E. Conclusion

The intent-to-trigger approach suggests that the courts should look for some indication that the political branches were thinking about immigration before giving plenary power deference. In *Lui v. Holder*, this approach would require following the executive's assertion that the plenary power doctrine does not apply. With regard to the disagreement between the branches, this Chapter argues that the executive branch's current position, because it does not involve foreign affairs, or at least not to the extent necessary to compel courts to adopt a deferential posture of review, should not be entitled to special deference. Additionally, this position is analytically irrelevant because it comes at Time Two, after enactment, and therefore cannot be justified by the deference model of the plenary power doctrine. While this result may make the section C and D analyses seem contradictory, a court should come to the same conclusion under both. Even though a court should not defer to the executive's interpretation at Time Two, it should apply an analysis similar to intent-to-trigger when looking at Time One in determining if the proper constitutional analysis was performed. Thus, a court is likely to determine that the plenary power doctrine should not apply in the absence of any intent to trigger it.

The intersection of the plenary power doctrine and DOMA highlights interesting issues regarding the plenary power and the separation of powers. DOMA may provide an opportunity for courts to clarify the doctrine. As evidenced by the actual decision in *Lui*, as well as by recent Supreme Court cases that do not explicitly reference the plenary power, these analyses may not be relevant. However, many courts still apply the plenary power doctrine either explicitly or implicitly, and these issues will likely arise again.

CHAPTER TWO

STATE AND LOCAL REGULATION OF UNAUTHORIZED IMMIGRANT EMPLOYMENT

Employment is at the heart of the controversy surrounding illegal immigration. Employment is both the cause of the vast majority of illegal immigration — "magnet" is the inevitable metaphor[1] — and, in the view of those who contend that unauthorized immigrant workers take jobs from and drive down the wages of authorized workers, the harm.[2] For the past thirty-five years, therefore, federal law has penalized the employment of unauthorized immigrants.[3] The practical impact of the federal regime, however, has long been in doubt. In the middle of the last decade, as part of a general tide of subfederal laws addressing immigration, states and localities began to target the employment of unauthorized immigrants through their own laws. These efforts have resulted in an array of litigation in the federal courts, culminating in two recent Supreme Court decisions — the first two in thirty-five years to address the permissible role of states in regulating unauthorized immigrant employment.[4] The first decision, *Chamber of Commerce v. Whiting*,[5] upheld an Arizona law that both imposes potentially devastating business-licensing sanctions on employers who knowingly hire unauthorized workers and requires all employers to use an internet-based verification database to determine worker eligibility. The second, *Arizona v. United States*,[6] struck down an Arizona law

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[1] *E.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (quoting H.R. REP. NO. 99-682, pt. 1, at 45 (1986)) (internal quotation marks omitted); COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 63, U.S. IMMIGRATION POLICY 65 (2009), *available at* http://i.cfr.org/content/publications/attachments/Immigration_TFR63.pdf; U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 50 (1994).

[2] This latter point is, of course, a deeply contested claim, and ascertaining its validity is outside the scope of this piece. But given that a variety of nonpartisan bodies have accepted at least a limited version of the claim, *see, e.g.*, SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS 39–41 (1981) [hereinafter SELECT COMM'N REPORT]; U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-88-13BR, ILLEGAL ALIENS: INFLUENCE OF ILLEGAL WORKERS ON WAGES AND WORKING CONDITIONS OF LEGAL WORKERS 1–2 (1988), it cannot be ignored in considering the politics of immigration law.

[3] This piece uses the adjective "unauthorized" to refer specifically to work authorization, as defined in 8 U.S.C. § 1324a(h)(3) (2006), not to unlawful presence. Even lawfully present aliens may be unauthorized to work. *See* 8 C.F.R. § 274a.12 (2012) ("Classes of aliens authorized to accept employment.").

[4] The previous decision was *De Canas v. Bica*, 424 U.S. 351 (1976).

[5] 131 S. Ct. 1968 (2011).

[6] 132 S. Ct. 2492 (2012).

that targeted employees themselves by making it a misdemeanor for unauthorized immigrants to work or seek work.

The holdings of *Whiting* and *Arizona* — the former a victory for immigration federalism, the latter a victory for federal primacy — are certainly compatible in the most basic sense: the decisions do not present conflicting commands to the lower courts. But it is difficult to regard the two cases as embodying a single, consistent approach to statutory preemption. The result is a distribution of enforcement power wholly satisfying to neither side of the debate, but which may make federal legislative reform somewhat less likely, except perhaps as part of truly comprehensive immigration reform.

Section A of this Part explores the history of modern federal and state regulation of immigrant employment. Section B examines the recent efforts by states and localities to regulate immigrant employment and the ensuing litigation that has culminated in *Whiting* and *Arizona*. Section C looks more closely at the preemption analysis in these two decisions and struggles to find interpretive coherence. Section D suggests that, although this interpretive dissonance has created a policy landscape that fully satisfies no one, by giving both sides of the debate over immigration federalism some measure of victory, these decisions may make legislative reform addressing immigrant employment marginally less likely. Section E concludes.

A. *The Modern History of Immigrant Employment Regulation*

Although federal law has long required that aliens receive authorization before they may work — either by virtue of their immigration status or through individualized permission[7] — for most of the twentieth century federal law did not require employers to avoid hiring unauthorized workers.[8] The Immigration and Nationality Act (INA) as originally passed in 1952[9] contained no provision to penalize the hiring of such workers. On the contrary, the Act expressly stated that the general prohibition on harboring aliens did not encompass employment[10] — an exception dubbed the "Texas Proviso" after the Texas ag-

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[7] *See, e.g.*, 8 C.F.R. § 212a.1 (1958) (revoked 1965); *id.* § 214.2(c) (1952) (amended 1958).

[8] In 1974, Congress amended the Farm Labor Contractor Registration Act of 1963 to include civil and criminal sanctions for farm-labor contractors who knowingly employed unauthorized immigrants. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, secs. 11(a), 13, 88 Stat. 1652, 1655–66 (1974) (repealed 1983). But the vast majority of employers were not subject to any penalties until 1986. *See infra* p. 1612.

[9] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006 & Supp. V 2011)).

[10] *Id.* § 274(a), 66 Stat. at 229 ("*Provided, however*, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.").

ricultural interests that were dependent on Mexican migrant workers.[11] Nor were unauthorized workers themselves directly penalized, civilly or criminally, though a nonimmigrant alien might jeopardize his permission to remain in the country by engaging in unauthorized employment.[12]

Federal law did not penalize employers of unauthorized workers (or the workers themselves), but it also did not clearly preempt *states* from establishing their own regimes of employer sanctions. In the 1970s, several states moved in to fill this legislative void. The most important instance of such state action was the 1971 passage of California Labor Code section 2805.[13] Section 2805 prohibited California employers from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."[14] A 1974 civil action under the statute ultimately made its way to the U.S. Supreme Court, where the respondents, farm-labor contractors, argued that the California law was preempted. The Court's 1976 decision in *De Canas v. Bica*[15] became the most important analysis of the validity of state regulation of immigrant employment for the next thirty-five years.

In analyzing section 2805, the *De Canas* Court first addressed whether California's law was inherently invalid as an invasion of Congress's exclusive power over immigration — whether the law was, in the terminology of later commentators, structurally preempted.[16] The Court held that it was not, noting that state laws with "some purely speculative and indirect impact on immigration" were not constitutionally proscribed.[17] The Court then proceeded to consider whether the law was nonetheless preempted by any of the four forms of statutory preemption,[18] bearing in mind the background presumption against preemption of state legislation in a traditionally state-

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[11] *See* COMPTROLLER GEN., ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES 43 (1980).

[12] 8 C.F.R. § 214.2(c) (1952) (amended 1958); *see also* Wei v. Robinson, 246 F.2d 739, 746 (7th Cir. 1957) (pointing to immigrant's decision to take unauthorized employment as evidence that he had "impaired his [immigration] status").

[13] 1971 Cal. Stat. 2847 (repealed 1988).

[14] *Id.* sec. 1, § 2805(a).

[15] 424 U.S. 351 (1976).

[16] *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 808–09 (2008).

[17] *De Canas*, 424 U.S. at 355; *see id.* at 355–56.

[18] First, Congress can expressly preempt state law through statutory text ("express" preemption). Second, federal legislation in a given field may be so pervasive that preemption is implied ("field" preemption). Third, compliance with both state and federal law may be impossible ("impossibility" or "conflict" preemption). Finally, state law may stand as an obstacle to the full effectuation of federal law ("implied conflict" or "obstacle" preemption). *See* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 175–76 & nn.34–39 (2011).

occupied domain.[19] First, the Court held the California law was not expressly preempted, as the INA contained no relevant express preemption provisions at the time of *De Canas*.[20] Second, the Court rejected the claim of field preemption because, although the INA was comprehensive in some respects, it evinced only "a peripheral concern with employment of illegal entrants,"[21] not a clear congressional desire for "exclusivity of federal regulation in this field."[22] Third and finally,[23] the Court examined whether the California law stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24] Without concluding definitively whether the California law presented a "purposes and objectives" obstacle, the *De Canas* Court strongly implied that the California courts could construe the law to avoid implied conflict preemption.[25]

Although *De Canas* effectively abrogated several lower court decisions that had found the California and similar state laws unconstitutional,[26] and although several more states passed laws akin to California's in the following years,[27] *De Canas* did not in fact usher in an era of state-enforced employer sanctions. Notwithstanding the Court's legal imprimatur, states simply did not enforce their employer-sanctions laws with any vigor. A 1980 Comptroller General report could identify only a single successful action under such state laws — a Kansas suit resulting in a $250 fine — and two pending Massachusetts actions.[28] Several years later, Louisiana brought a successful action under its employer-sanctions law,[29] but overall, state enforcement in the late 1970s and the 1980s was "virtually nonexistent."[30]

At the same time, Congress was slowly moving toward comprehensive federal immigration reform that seemed likely to include employer

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[19] *See De Canas*, 424 U.S. at 357 (requiring evidence that preemption was "the clear and manifest purpose of Congress" (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963)) (internal quotation marks omitted)).

[20] *See id.* at 357–62.

[21] *Id.* at 360.

[22] *Id.* at 361.

[23] The Court, understandably, did not consider impossibility preemption.

[24] *De Canas*, 424 U.S. at 363 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (internal quotation mark omitted).

[25] *See id.* at 363–65 (noting that section 2805 spoke of aliens "not entitled to lawful residence," a category not necessarily coextensive with aliens not authorized to work under federal law).

[26] *See* Nozewski Polish Style Meat Prods. v. Meskill, 376 F. Supp. 610, 611 (D. Conn. 1974); Dolores Canning Co. v. Howard, 115 Cal. Rptr. 435, 442 (Ct. App. 1974).

[27] *E.g.*, 1977 Fla. Laws 1192; 1979 La. Acts 1498; 1977 Vt. Acts & Resolves 320; 1977 Va. Acts 651.

[28] COMPTROLLER GEN., *supra* note 11, at 46. The nonenforcement of California's section 2805 itself is described in *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1394 (9th Cir. 1986).

[29] *See* Garcia v. State Dep't of Labor, 521 So. 2d 608, 610 (La. Ct. App. 1988).

[30] COMPTROLLER GEN., *supra* note 11, at 45; *see also* Kathleen M. Johnson, Note, *Coping with Illegal Immigrant Workers: Federal Employer Sanctions*, 1984 U. ILL. L. REV. 959, 968–69.

sanctions. In 1978, Congress created the Select Commission on Immigration and Refugee Policy, charged with examining all aspects of immigration law and policy and making reform recommendations to the President and Congress.[31] In 1981, the Commission published its report, which recommended that the hiring of unauthorized immigrant workers be made a violation of federal law: "Without an enforcement tool to make the hiring of undocumented workers unprofitable, efforts to prevent the participation of undocumented/illegal aliens in the labor market will continue to meet with failure."[32] The Commission had also considered the possibility of employee sanctions, but a majority of the members opposed such penalties. Unauthorized workers would already face deportation, and "[t]o further penalize [their] employment will simply complicate and further slow an already overburdened legal process."[33] Notably, the Commission did not address what role, if any, states should play in enforcing employer (or employee) sanctions.[34]

After five more years of legislative wrangling, Congress passed and President Reagan signed the Immigration Reform and Control Act of 1986[35] (IRCA). Among the many ways in which it changed U.S. immigration law,[36] IRCA created a system of employer sanctions along the lines suggested by the Select Commission. All employers were now forbidden from knowingly hiring unauthorized immigrants and were required to verify the work authorization of all applicants by examining certain documents, such as birth certificates, passports, and social security cards.[37] This verification system became known as the "I-9 system" after the government form employers were required to complete.[38] The law specified in some detail how claims of violations were to be brought and adjudicated, and it established a system of mandatory escalating civil fines for violations.[39] Employers who engaged in a "pattern or practice" of violations would face criminal penalties.[40]

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[31] Act of Oct. 5, 1978, Pub. L. No. 95-412, § 4, 92 Stat. 907, 907–09.

[32] SELECT COMM'N REPORT, *supra* note 2, at 62.

[33] *Id.* at 66.

[34] A separate staff report of the Commission acknowledged the existence (but nonenforcement) of several state employer-sanctions laws, but it did not comment on the future role of states. *See* SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT 565 n.* (1981).

[35] Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). For a discussion of the development of IRCA, see NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986, at 3–22 (1987).

[36] For a summary of IRCA's main provisions, see MONTWIELER, *supra* note 35, at 23–30.

[37] 8 U.S.C. § 1324a (2006).

[38] *See* Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., Form I-9, Employment Eligibility Verification (revised Aug. 7, 2009), *available at* http://www.uscis.gov/files/form/i-9.pdf.

[39] 8 U.S.C. § 1324a(e).

[40] *Id.* § 1324a(f).

One danger of placing the burden of not hiring unauthorized immigrants on employers was, as the Select Commission had recognized, that some employers might simply discriminate against applicants who "look or sound foreign."[41] To combat this danger, Congress included in IRCA a provision prohibiting "[u]nfair immigration-related employment practices," such as discrimination on the basis of national origin.[42] Employers found to have engaged in such practices would be ordered to cease and desist, and might face fines roughly comparable to those imposed for knowingly hiring unauthorized workers.[43]

IRCA also contained an express preemption clause that would come to play a major role in later litigation. The clause stated that IRCA's employer sanctions "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[44] The scope of the savings clause — "other than through licensing and similar laws" — was neither explained in the law itself nor discussed in any detail in the legislative history.[45]

Although the employer sanctions and verification requirements at the heart of IRCA constituted a "sea change" in U.S. immigration law,[46] they did not effect a sea change in actual rates of illegal immigration. The undocumented immigrant population in 1980 was likely between 2.5 and 3.5 million.[47] Almost 3 million undocumented immigrants received lawful permanent resident status through IRCA's amnesty program, yet by 1992 the undocumented population had climbed

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[41] SELECT COMM'N REPORT, *supra* note 2, at 66.

[42] 8 U.S.C. §§ 1324b, 1324b(a)(1)(A).

[43] *Id.* § 1324b(g)(2). Justice Breyer, dissenting in *Whiting*, contended that IRCA "limits or removes any incentive to discriminate on the basis of national origin by setting [unauthorized hiring and] antidiscrimination fines at equivalent levels." Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1989–90 (2011) (Breyer, J., dissenting). As originally passed, however, IRCA's unauthorized hiring and antidiscrimination fines were not set at matching levels. *Compare* 8 U.S.C. § 1324a(e)(4)(A) (1988) (unauthorized hiring fines), *with id.* § 1324b(g)(2)(B) (antidiscrimination fines). Moreover, the antidiscrimination fines have always been discretionary, *id.* § 1324b(g)(2)(B), whereas the unauthorized hiring fines have been mandatory, *id.* § 1324a(e)(4)(A).

[44] 8 U.S.C. § 1324a(h)(2) (2006).

[45] The following is the only discussion of the savings clause in the legislative history:

> [IRCA's penalties] are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in [IRCA]. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

[46] Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 193.

[47] Jeffrey S. Passel, *Undocumented Immigration*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 181, 188 (1986).

back to 3.4 million.[48] By 2000, it was 7 million,[49] and by 2006, over 11 million.[50] The efficacy of IRCA's employer sanctions seemed doubtful in the 1990s;[51] by the late 2000s, criticism was nearly universal.[52]

IRCA's employer-sanctions regime has been unsuccessful for several reasons. A number of the documents that applicants can provide (and employers must inspect) to verify work authorization status are easy to counterfeit or can be used by others without detection.[53] Federal immigration enforcement has also been focused far more on border security than on worksite investigations,[54] such that, despite occasional high-profile workplace raids,[55] many employers are not meaningfully deterred by the unlikely prospect of fines.[56] The combination of document fraud and ineffectual enforcement makes it all the more tempting for employers to rely on cheap unauthorized labor — especially if they expect their competitors to do the same.[57]

As noted above, the most obvious sense in which IRCA's employer-sanctions regime failed is in not stemming the tide of illegal immigration into the United States. But there are also at least two harms worth noting. First, the danger of liability apparently led to increased workplace discrimination, at least in the early years of IRCA's imple-

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[48] OFFICE OF POLICY & PLANNING, U.S. IMMIGRATION & NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 1, 2 n.1 (2003), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/Ill_Report_1211.pdf.

[49] *Id.* at 1.

[50] DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE 19 (2006).

[51] *See* U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 1, at 52; U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 2 (1999) [hereinafter GAO, SIGNIFICANT OBSTACLES].

[52] *See, e.g.*, COUNCIL ON FOREIGN RELATIONS, *supra* note 1, at 65 ("In practice . . . the employer sanctions provisions have not been adequately enforced . . . ."); MEISSNER ET AL., *supra* note 50, at 46 ("[I]mplementation of employer sanctions has been notoriously ineffective."); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 78 ("No commentator on immigration policy . . . claims that employer sanctions have been effective."); Wishnie, *supra* note 46, at 195 ("Employer sanctions have failed and should be abandoned.").

[53] *See* GAO, SIGNIFICANT OBSTACLES, *supra* note 51, at 9–10; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 15–18 (2005) [hereinafter GAO, WEAKNESSES].

[54] *See* COUNCIL ON FOREIGN RELATIONS, *supra* note 1, at 67 (noting that less than two percent of the U.S. Immigration and Customs Enforcement (ICE) 2009 budget went to workplace enforcement); GAO, WEAKNESSES, *supra* note 53, at 30–32 (noting ICE's decreased focus on worksite enforcement in the wake of 9/11); *see also* Wishnie, *supra* note 46, at 209–11.

[55] *See* COUNCIL ON FOREIGN RELATIONS, *supra* note 1, at 67.

[56] *Id.* at 65 (suggesting many employers saw sanctions as simply the "cost of doing business").

[57] *See* MEISSNER ET AL., *supra* note 50, at 46; Wishnie, *supra* note 46, at 213–14.

mentation.[58] Second, employers who have turned a blind eye to document fraud and unauthorized workers can use the threat of reverification to silence worker claims of unlawful employment or labor practices.[59] This danger increased in 2002, when the Supreme Court held that an unauthorized immigrant, fired illegally for union-organizing activities, was not eligible for back pay or reinstatement under the National Labor Relations Act.[60] Lax enforcement of employer sanctions thus has done little to reduce illegal immigration while increasing the danger of worker exploitation.

B. Recent State Efforts to Regulate Unauthorized Immigrant Employment

Over the past decade, states and localities — frustrated by the federal government's inability to curtail illegal immigration and the burdens it places on them — have taken measures of their own. In 2005, the states enacted 39 laws related to immigration; in 2006, the number climbed to 84; in 2007, it shot up to 240 and then remained around 200 for the next four years.[61] Many of these laws have sought to effect "attrition through enforcement," that is, the enforcement of immigration law in all possible contexts by all levels of government for the purpose of making life for undocumented immigrants so difficult that they "self-deport."[62]

For states and localities seeking to make life difficult for undocumented immigrants, the "magnet" of employment was a natural target.[63] And *De Canas* suggested strongly that state regulation of immigrant employment was fundamentally sound as a matter of federalism.

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[58] *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990). The GAO has not released any post-1990 studies on the correlation between employer sanctions and discrimination.

[59] *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 414 n.27 (1995) ("The *real* burden of employer sanctions, however, is not borne by employers. In practice, employer sanctions empower employers to terrorize their workers."); Wishnie, *supra* note 46, at 211–13.

[60] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).

[61] NAT'L COUNCIL ON STATE LEGISLATURES, 2012 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES 2 (2012), *available at* http://www.ncsl.org/Portals/1/Documents/immig/2012ImmigrationReportJuly.pdf. These figures exclude legislative resolutions.

[62] *See generally* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008); Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008) [hereinafter Kobach, *Reinforcing*]. Former law professor and current Kansas Secretary of State Kris Kobach is both the drafter and courtroom defender of numerous state laws targeting unauthorized immigrants. *See This American Life: Reap What You Sow*, Chicago Public Radio (Jan. 27, 2012), *available at* http://www.thisamericanlife.org/radio-archives/episode/456/reap-what-you-sow (interviewing Kobach in the first segment, "Alien Experiment").

[63] *See* Kobach, *Reinforcing*, *supra* note 62, at 470 ("Indeed, if there is a silver bullet in addressing the problem of illegal immigration, [preventing unauthorized employment] is it.").

But after IRCA, federal law did regulate unauthorized employment extensively, so the uncertain sweep of federal law's preemptive effect became critical. IRCA's preemption clause clearly forbade states from simply fining employers for unauthorized hiring, but perhaps other measures were permissible. The various attempts by states and localities to discern the bounds of preemption fall into three categories: (1) defining the breadth of "sanctions" in IRCA's preemption clause; (2) testing the scope of IRCA's savings clause; and (3) discovering what, if any, limitations lie wholly outside IRCA's preemption clause.

1. The Breadth of "Sanctions." — IRCA's preemption clause forbids state and local governments from "imposing civil or criminal *sanctions*" on those who employ unauthorized immigrants.[64] Recognizing that this language bars laws that directly penalize unauthorized hiring, many states enacted statutes intended to dissuade employers through more indirect means that would not amount to "sanctions." Oklahoma, for example, was one of several states to create a new form of employment discrimination action: if an employer discharged an authorized worker while retaining an employee whom the employer knew (or should have known) was an unauthorized immigrant, the discharged worker could bring a discrimination action seeking reinstatement, backpay, and attorneys' fees.[65] The proponents of these state causes of action argued for their validity on several grounds. First, in the case of Oklahoma's cause of action, which addressed only termination of a current employee,[66] the law did not actually impose any consequences on employers simply for hiring unauthorized immigrant workers; an employer could hire *only* unauthorized workers, do so intentionally, and still not come within the ambit of the law.[67] Proponents further argued that even if an employer was successfully sued under the law, the private plaintiff's remedy would not amount to a "sanction" as the term was used in IRCA; several courts had already said as much, albeit in a different type of tort action.[68]

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[64] 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

[65] OKLA. STAT. tit. 25, § 1313(C) (2011) (cause of action); *id.* § 1350(G)–(H) (remedies).

[66] By contrast, Alabama's comparable law also made it a discriminatory practice "to fail to hire a job applicant" in such circumstances. ALA. CODE § 31-13-17(a) (2011).

[67] *See* Opening Brief of Appellants Edmonson et al. at 45–46, Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010) (No. 08-6127), 2008 WL 4126857, at *45–46.

[68] *See* Response Brief for Appellees and Principal Brief for Cross-Appellants Alabama and Governor Bentley at 68, United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) (Nos. 11-14532-CC & 11-14674-CC), 2011 WL 6961697, at *68 [hereinafter Brief for Alabama] (citing Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 239–40 (2d Cir. 2006)); Brief of Appellant, City of Hazleton at 49–50, Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010) (No. 07-3531), 2008 WL 3989646, at *49–50 [hereinafter Brief of Hazleton] (citing Jie v. Liang Tai Knitwear Co., 107 Cal. Rptr. 2d 682, 690 (Ct. App. 2001)). *Madeira* and *Jie* both involved suits brought *by* unauthorized immigrants against employers who had engaged in unlawful employment practices.

A second type of law that several states enacted forbade businesses from deducting from their state taxes the wages of unauthorized workers.[69] With the exception of Alabama, which required knowing violators to pay ten times the amount of the deduction,[70] most of these states did not impose any specialized penalties relating to this prohibition.[71] Like the new employment discrimination actions, these laws arguably did not create any negative consequences for simply hiring unauthorized immigrants. Moreover, proponents argued, a tax deduction is not a right; the denial of a deduction is not a "sanction" but merely the withholding of a reward.[72]

Instances of both types of law, however, have been enjoined by federal courts as expressly preempted by IRCA. In *Chamber of Commerce v. Edmondson*,[73] the Tenth Circuit confronted Oklahoma's new employment discrimination cause of action. The court rejected the state's contention that, because the law served compensatory rather than purely punitive ends, it was not a "sanction."[74] The court noted that the dictionary definition of "sanction" is not limited to punitive measures,[75] and IRCA's use of both "penalty" and "sanction" indicated that it too intended "sanction" to encompass nonpunitive measures.[76] The Oklahoma statute's remedies were a "restrictive measure" designed "to prevent some future activity," and therefore were "sanctions."[77] Further, because the sanctions could fall only on employers who retained unauthorized workers, they were imposed "upon those who employ . . . unauthorized aliens," within the meaning of IRCA's preemption clause.[78] In *United States v. Alabama*,[79] the Eleventh Circuit upheld the preliminary injunction of Alabama's similar employ-

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Both decisions held that the award of damages to the unauthorized workers was not preempted by IRCA. *See Madeira*, 469 F.3d at 223; *Jie*, 107 Cal. Rptr. at 686–90.

[69] ALA. CODE § 31-13-16; COLO. REV. STAT. § 39-22-529 (2012); GA. CODE ANN. § 48-7-21.1 (2009); S.C. CODE ANN. § 12-6-1175 (2011 Supp.).

[70] ALA. CODE § 31-13-16(b).

[71] *See* statutes cited *supra* note 69.

[72] Brief for Alabama, *supra* note 68, at 66–67.

[73] 594 F.3d 742 (10th Cir. 2010).

[74] *Id.* at 765.

[75] *Id.* ("[A] restrictive measure used to punish a specific action or to prevent some future activity." (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2009 (1993)) (internal quotation marks omitted)).

[76] *Id.* The court likened the statute's remedies to sanctions under Federal Rule of Civil Procedure 11. *Id.* at 765–66.

[77] *Id.* at 765.

[78] *Id.* at 766 (quoting 8 U.S.C. § 1324a(h)(2)).

[79] 691 F.3d 1269 (11th Cir. 2012).

ment discrimination statute, which, according to the court, "at its core is clearly intended to punish the employment of unauthorized aliens."[80]

In the same decision, the Eleventh Circuit also upheld the injunction of Alabama's prohibition on deducting unauthorized workers' wages from state taxes. The court agreed with *Edmondson*'s relatively broad reading of "sanction," finding further justification for that construction in the existence of IRCA's savings clause.[81] Given a properly capacious definition of "sanction," Alabama's tax provision clearly qualified: it was "functionally indistinguishable from a monetary sanction imposed on persons who employ unauthorized aliens because it denie[d] employers an otherwise available tax deduction on account of an employee's immigration status."[82] That such employers lost money through higher taxes rather than through fines was a "distinction without a difference."[83]

2. *The Scope of IRCA's Savings Clause.* — *Edmondson* and *Alabama* suggest that almost any state or local disincentives aimed at employers and "contingent on the employment of an unauthorized alien"[84] are forbidden "sanctions." If there are no methods of influencing employers that are outside the reach of IRCA's preemption clause, what methods are permitted by the exception within it? Numerous states and localities have enacted employer-sanctions regimes designed to qualify as "licensing and similar laws" within the meaning of IRCA's savings clause. Two instances are noteworthy.

In 2006, the city of Hazleton, Pennsylvania, enacted a series of municipal ordinances targeting illegal immigration, one of which made it unlawful for any business entity to knowingly employ unauthorized aliens, as defined by federal law and determined by federal authorities.[85] Violators were given three business days to correct the violation by terminating the unauthorized employee; after the third day the city would suspend the employer's permit to do business in the city until

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[80] *Id.* at 1290–91. The court also rejected Alabama's reliance on *Madeira* and *Jie*. The causes of action under which the plaintiffs in those cases had recovered were "wholly removed from any contingency of employing an unauthorized alien"; that the plaintiffs were unauthorized immigrants was simply incidental. *Id.* at 1291; *see id.* at 1291–92.

[81] *Id.* at 1289–90 ("If Congress had shared Alabama's narrow definition of a sanction, it would not have needed to clarify that licensing laws were permitted, since they would not be contemplated as a sanction in the first place." *Id.* at 1290.).

[82] *Id.* at 1290.

[83] *Id.*

[84] Chamber of Commerce v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010).

[85] Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance § 4.A (Sept. 21, 2006) [hereinafter IIRA] (making illegal the employment of "unlawful worker[s]"), *amended by* Ordinances 2006-40 and 2007-7; *id.* § 3.E (defining "unlawful worker" to include "an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3)"); *id.* § 4.B (outlining enforcement procedures). Hazleton's IIRA is reprinted in full in Brief of Hazleton, *supra* note 68, at 103–15.

the violation was corrected.[86] Second and subsequent violations would result in an automatic twenty-day permit suspension.[87] The ordinance also required all recipients of significant city contracts or grants to use the federal government's Basic Pilot Program (since renamed E-Verify), an Internet-based verification system designed to supplement the I-9 system.[88] After an employer enters the data gathered by the I-9 process, E-Verify cross-references several federal databases and then immediately either confirms the worker's authorization or provides a tentative nonconfirmation, which the employee then has the opportunity to correct by contacting the appropriate federal authorities before termination is permitted.[89] While federal law encourages widespread use of E-Verify, it does not require the system's use; indeed, the statute that created the program forbids the Secretary of Homeland Security from making it mandatory.[90]

The next year, Arizona, the state that appears to have experienced the highest rate of illegal immigration in recent years,[91] passed the Legal Arizona Workers Act[92] (LAWA), which contained two key components. First, like Hazleton's ordinance, LAWA prohibited the intentional or knowing employment of unauthorized workers and punished violations through licensing sanctions.[93] "License" was defined very broadly: "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state."[94] Also, and again like Hazleton's ordinance, LAWA incorporated the federal definition of "unauthorized alien" and required a federal determination of unauthorized status in each particular case, though neither law required a federal adjudication finding a violation of IRCA.[95] LAWA, however, did not provide employers with an opportunity to cure violations and mandated the *permanent* revocation of

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[86] IIRA, *supra* note 85, § 4.B.
[87] *Id.* § 4.B(7).
[88] *Id.* § 4.D. For a description of the E-Verify system, see *E-Verify*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., http://www.dhs.gov/e-verify (last updated Nov. 29, 2012).
[89] *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 862 (9th Cir. 2009) (describing the E-Verify process), *aff'd sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).
[90] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-546, 3009-656 (codified as amended at 8 U.S.C. § 1324a note (2006)).
[91] *See* OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl.35 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.
[92] 2007 Ariz. Sess. Laws 1312 (codified as amended at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to 23-214 (2012)).
[93] ARIZ. REV. STAT. ANN. § 23-212.
[94] *Id.* § 23-211(9)(a).
[95] *Id.* § 23-211(11); *id.* § 23-212(H).

repeat offenders' licenses.[96] Second, LAWA required that *all* Arizona employers, public and private, use E-Verify to confirm the work authorization of new employees.[97]

Parallel challenges to the two laws made their way through the federal courts starting in 2007. After Hazleton's ordinance was struck down by the district court,[98] the city appealed to the Third Circuit, which affirmed the injunction of the employment provisions, albeit on somewhat different grounds.[99] The court agreed with the city that the ordinance was not expressly preempted by IRCA: the ordinance's system of business-permit suspensions was a "licensing law" and therefore within IRCA's savings clause.[100] But the absence of express preemption did not foreclose implied preemption if the ordinance was "an obstacle" to federal law.[101] According to the court, IRCA embodied a "careful balance" of three "competing policy objectives": "effectively deterring employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as 'foreign' from discrimination."[102] Hazleton's ordinance "substantially undermine[d] this careful balance" because "[i]t further[ed] the first of these federal objectives at the expense of the others."[103] By creating its own, separate system of adjudicating unauthorized hiring, and by effectively compelling the use of E-Verify, Hazleton had significantly increased employer burdens, yet it had done nothing to deter the increased employment discrimination that would likely result.[104] Because the ordinance upset the balance of congressional objectives, it was impliedly preempted.[105]

Meanwhile, both a federal district court and the Ninth Circuit had reached the opposite conclusion regarding Arizona's LAWA,[106] and the Supreme Court had granted certiorari.[107] The Court's decision on LAWA in *Chamber of Commerce v. Whiting* would be its first examination of state regulation of unauthorized immigrant employment since *De Canas*. The Court's answer to whether the principles of *De Canas* still remained viable in the wake of IRCA, and its general approach to

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[96] *Id.* § 23-212(F) (knowing violations); *id.* § 23-212.01(F) (intentional violations).
[97] *Id.* § 23-214(A).
[98] Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).
[99] Lozano v. City of Hazleton, 620 F.3d 170, 176 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).
[100] *See id.* at 207–10.
[101] *See id.* at 210.
[102] *Id.* at 210–11.
[103] *Id.* at 211.
[104] *See id.* at 212–13 (separate adjudication); *id.* at 214–16 (E-Verify); *id.* at 217–18 (discrimination).
[105] *See id.* at 219.
[106] *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860–61 (9th Cir. 2009), *aff'g* Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008).
[107] Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010) (granting certiorari).

preemption in *Whiting*, would presumably shed light on the validity of other state attempts to curb unauthorized employment and illegal immigration more broadly.

As it turned out, the Supreme Court rejected the attack on LAWA. LAWA's licensing-sanctions regime was not expressly preempted: Arizona's broad interpretation of "license" was compatible with common definitions of the term, as well as its usage in other federal laws.[108] As for the challengers' claim that the phrase "licensing and similar laws" was intended to cover only a narrow band of activities such as state licensing of farm-labor contractors,[109] the Court found "no such limit . . . remotely discernible in the statutory text."[110] Turning to implied conflict preemption, the Court said that the existence of IRCA's savings clause proved that Congress did not intend to exclude the states entirely from regulating immigrant employment.[111] Moreover, LAWA did adhere to federal exclusivity in the relevant sense, insofar as it relied entirely on federal definitions and determinations of who is an unauthorized worker.[112] As for the "careful balance" argument that had been so important in *Hazleton*, the Court first doubted whether LAWA would so radically tip the scales toward discrimination.[113] But more fundamentally, the Court contended that the petitioners and dissent had ignored that federalism itself was a policy to be weighed in the balancing. The balance struck in that regard "was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions — those imposed 'through licensing and similar laws.'"[114] The Court did not expressly invoke the presumption against preemption, but it concluded that the petitioners' evidence did not meet the "high threshold" necessary for implied conflict preemption.[115]

The Court set a similarly high bar for the claim that the E-Verify mandate was impliedly preempted. That claim rested primarily on the fact that Congress made the use of the system voluntary for most em-

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[108] Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977–81 (2011).

[109] *Id.* at 1979. As noted, *supra* note 8, farm-labor contractors had been subject to federal sanctions for hiring unauthorized workers even before the passage of IRCA. The federal law imposing those sanctions said expressly that they were intended to supplement state regulation of farm-labor contractors. The essence of the challengers' theory, then, was that IRCA's savings clause was intended only to continue that particular carve-out from preemption. *Whiting*, 131 S. Ct. at 1979–80.

[110] *Whiting*, 131 S. Ct. at 1980.

[111] *Id.* at 1981.

[112] *Id.* at 1981–82.

[113] *See id.* at 1984.

[114] *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

[115] *Id.* at 1985 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

ployers and even expressly forbade the Secretary of Homeland Security from requiring anyone to use it. But according to the Court, these self-imposed restrictions on the *federal* government did not mean that *states* were forbidden to require E-Verify's use. The statutory text creating the program "contains no language circumscribing state action."[116] The petitioners' other obstacle preemption arguments were undermined by the federal government's position that it wanted more employers to use E-Verify, that the system was reliable, and that the system could handle the increased usage.[117] The Court held that the E-Verify mandate, like the licensing sanctions, was not preempted.[118]

Not surprisingly, two weeks after this clear victory for state regulation of immigrant employment, the Court vacated the Third Circuit's *Hazleton* decision, remanding for reconsideration in light of *Whiting*.[119]

3. Employee Sanctions and Preemption Beyond the Preemption Clause. — In addition to laws like LAWA that were intended to fit within IRCA's savings clause, several states tried to move wholly outside IRCA's preemption clause by introducing laws aimed not at employers, but at employees, about whom the preemption clause says nothing.[120] One form of employee-oriented regulation that raised no clear preemption problem was the prohibition of roadside solicitation of day labor.[121] The legislators passing such laws may in fact have intended them to discourage illegal immigration,[122] but facially they are not alienage laws subject to preemption concerns. Several have, however, been struck down on First Amendment grounds.[123]

In addition to such a roadside-solicitation prohibition, Arizona enacted a more controversial and targeted employee sanction as part of its 2010 Support Our Law Enforcement and Safe Neighborhoods Act,[124] commonly known as S.B. 1070. Section 5(C) of S.B. 1070 made it a misdemeanor "for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee

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[116] *Id.*

[117] *Id.* at 1986.

[118] *See id.* at 1985–87.

[119] City of Hazleton v. Lozano, 131 S. Ct. 2958 (2011).

[120] *See supra* p. 1613.

[121] *E.g.*, ALA. CODE § 31-13-11(f)–(g) (2011); ARIZ. REV. STAT. ANN. § 13-2928(A)–(B) (Supp. 2012).

[122] *See* Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1060–61 (D. Ariz. 2012) (noting that Arizona's prohibition on day-labor solicitation was part of a larger statute, the avowed purpose of which was to deter illegal immigration).

[123] *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 940–41 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1566 (2012); *Friendly House*, 846 F. Supp. 2d at 1062.

[124] 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

or independent contractor in this state."[125] In addition to any First Amendment infirmities section 5(C) might have had, it was also clearly an alienage law and thus arguably preempted by federal immigration law. The federal government challenged section 5(C) and several other provisions of S.B. 1070 on preemption grounds in a suit that reached the Supreme Court just a year after *Whiting*. While many commentators noted that *Whiting* did not necessarily mandate any particular outcome of the challenge to S.B. 1070,[126] *Whiting* could plausibly be read as suggesting that the Court would not readily find implied conflict preemption, even in the context of immigration law.[127]

But in fact, in *Arizona v. United States*, the Court struck down three of the four disputed provisions of S.B. 1070, two of them (including section 5(C)) on implied conflict preemption grounds.[128] In rejecting Arizona's defense of section 5(C), the Court began by noting how much the legal landscape had shifted since *De Canas*. IRCA had created a "comprehensive framework" for combatting unauthorized immigrant employment, one that notably "does not impose federal criminal sanctions on the employee side."[129] Although the text of IRCA's preemption clause does not mention employee sanctions, this silence did not dictate the outcome of the preemption inquiry: "[T]he existence of an 'express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles' or impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause."[130] The Court concluded that section 5(C) was an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[131] because Congress had not simply failed to address employee sanctions, it had consciously *chosen* not to

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[125] *Id.* § 5(C)–(D), 2010 Ariz. Sess. Laws. at 456 (codified as amended at ARIZ. REV. STAT. ANN. § 13-2928(C), (F)).

[126] *See, e.g.*, *The Supreme Court, 2010 Term — Leading Cases*, 125 HARV. L. REV. 172, 299 (2011); Pratheepan Gulasekaram, *No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws*, AM. CONSTITUTION SOC'Y 2 (Oct. 4, 2011), http://www.acslaw.org/sites/default/files/Gulasekaram_-_No_Exception_to_the_Rule.pdf. *Whiting* was decided on May 26, 2011, roughly six weeks after the Ninth Circuit handed down *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

[127] *See* John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y 569, 586 (2012); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 340.

[128] *See* Arizona v. United States, 132 S. Ct. 2492, 2503–05 (2012) (striking down section 5(C)); *id.* at 2505–07 (striking down section 6); *see also id.* at 2501–03 (striking down section 3 on the basis of field preemption).

[129] *Id.* at 2504.

[130] *Id.* at 2504–05 (second alteration in original) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000)).

[131] *Id.* at 2505 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (internal quotation mark omitted).

sanction employees. According to the Court, "IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work — aliens who already face the possibility of employer exploitation because of their removable status — would be inconsistent with federal policy and objectives."[132] In short, and arguably in some tension with its analysis in *Whiting*, the Court concluded that section 5(C) "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens."[133]

In light of *Arizona*, states are clearly prohibited from imposing *criminal* employee sanctions, as the Eleventh Circuit recognized in striking down Alabama's equivalent law shortly after *Arizona*.[134] *Arizona* did not squarely address whether states could impose civil fines on unauthorized employees, but there is reason to doubt the Court would be any more hospitable to civil sanctions on employees. The same historical sources that the Court relied on in determining Congress's preemptive intent could also be read to foreclose civil fines.[135] And because Congress did impose certain civil sanctions on employees,[136] there is a plausible argument that Congress made a "deliberate choice"[137] not to impose other civil sanctions on employees. Under *Arizona*, that choice carries preemptive effect that would bar states from imposing civil fines on unauthorized employees.

C. Arizona*,* Whiting*, and Interpretive Coherence*

In terms of practical application by lower court judges, the combination of *Whiting* and *Arizona* (and *Edmondson* and *Alabama*) presents no real difficulty. State licensing sanctions aimed at employers are acceptable; state sanctions aimed at employees are not. It is hard to imagine a state law that would put the holdings in genuine conflict. But it is also hard to see any consistent method of statutory preemp-

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[132] *Id.* at 2504.

[133] *Id.* at 2505; *see also* Richard Samp, *The Constitutionality of S.B. 1070*, SCOTUSBLOG (July 11, 2011, 9:28 AM), http://www.scotusblog.com/2011/07/the-constitutionality-of-s-b-1070 ("If don't-upset-the-balance arguments did not succeed in *Whiting*, it is difficult to see why they would fare any better in the context of S.B. 1070.").

[134] United States v. Alabama, 691 F.3d 1269, 1283 (11th Cir. 2012).

[135] For example, when the Select Commission said employee sanctions would be "unnecessary and unworkable," SELECT COMM'N REPORT, *supra* note 2, at 66, *quoted in Arizona*, 132 S. Ct. at 2504, it was not referring specifically to *criminal* sanctions but rather to penalties generally. The point here is not that it is practically difficult to distinguish civil from criminal penalties — though there is a strong argument that deportation does not fit neatly in either category, *see infra* ch. IV, pp. 1669–70 — but simply that the legislative history does not evince a particular concern with which form penalties take.

[136] For example, an alien who engages in unauthorized work may thereby become ineligible to have her status adjusted to lawful permanent resident. *See Arizona*, 132 S. Ct. at 2504 (citing 8 U.S.C. § 1255(c)(2), (c)(8) (2006)).

[137] *Id.*

tion analysis at work in both *Whiting* and *Arizona*.[138] Viewed through any of several interpretive frameworks, the cases seem difficult if not impossible to reconcile.

1. Purposivist and Textualist Approaches. — One might first look at the decisions through the interpretive lens of purposivism, a key presumption of which is that legislators are "reasonable persons pursuing reasonable purposes reasonably."[139] On this view, a court should reject an interpretation that suggests the legislature has written a statute that undermines its own purpose. But according to Justice Breyer, who is perhaps the strongest adherent of purposivism currently on the Court,[140] the *Whiting* majority's interpretation of IRCA's savings clause presupposed just such legislative self-defeat.

Justice Breyer's purposivist critique was premised on the complexity and precision of IRCA's statutory framework. The Act's precisely defined penalties, elaborate procedure for adjudicating alleged violations, and complementary antidiscrimination machinery all evidenced Congress's intent to place on employers a highly calibrated system of incentives.[141] Congress could not reasonably have left states the authority to recalibrate the system however they wished:

> Why would Congress, after deliberately limiting ordinary penalties to the range of a few thousand dollars per illegal worker, want to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses? Why would Congress, after carefully balancing sanctions to avoid encouraging discrimination, want to allow States to destroy that balance? . . . Why would Congress want to write into an express preemption provision — a provision designed to prevent States from undercutting federal statutory objectives — an exception that could so easily destabilize its efforts?[142]

The answer, of course, was that Congress did not want to do any of these things, and hence the majority must have misunderstood the meaning of "licensing and similar laws."[143] Justice Breyer then explained that construing the phrase to refer only to the licensing of labor contractors would not only be consistent with the history of

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[138] For an analogous argument that different parts of the *Arizona* decision are hard to reconcile, see *The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV 176, 333–37 (2012).

[139] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[140] *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 135 (dubbing Justice Breyer "the current Court's most traditional purposivist"); Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1726 (2006) (book review) (noting that Justice Breyer "is evidently influenced by the famous legal process materials, compiled by Henry Hart and Albert Sacks").

[141] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1988–90 (2011) (Breyer, J., dissenting) (noting at the outset the need to "understand the basic purposes . . . of the Act," *id.* at 1988).

[142] *Id.* at 1992.

[143] *See id.*

unauthorized-employment regulation but also prevent the Act from "undermining" itself.[144]

For textualists, by contrast, *Whiting* is a model of preemption analysis. The majority relied heavily on the statutory text in analyzing both the express and implied preemption claims[145] (and faulted the dissents for failing to do so[146]) and eschewed reliance on legislative history.[147] Moreover, although the *Whiting* majority did not raise it, textualist scholars have a response to Justice Breyer's purposivist argument about the implausibility of self-defeating statutory language: because legislation is the product of compromise, it should be *expected* that it will often be imperfect.[148] A statute's "apparently odd contours may reflect unknowable compromises or legislators' behind-the-scenes strategic maneuvers."[149] On this view, members of Congress could have included IRCA's savings clause, despite recognizing the danger that states might use it at cross-purposes with federal policy, in order to attain the political support necessary to pass IRCA. Those members might have hoped that states would not enact such laws even as they recognized that the language of the savings clause naturally bears the broad meaning *Whiting* recognized.

If *Whiting* was a textualist model, *Arizona*'s preemption analysis of section 5(C) was anything but. No statutory text directly addressed whether states could enact criminal employee sanctions, but the existence of a preemption provision that *did not* bar such state action at least supported a textual inference that it was permitted.[150] Even if such an inference were tenuous, the textualist would not expect statutory silence to overcome the presumption against preemption; but the *Arizona* majority never mentioned the presumption.[151] Instead, the majority inferred that Congress consciously *chose* not to penalize unauthorized employees, and indeed did not want them penalized generally, on the basis of legislative history.[152] Reliance on legislative histo-

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[144] *Id.* at 1995; *see also id.* at 1993–95.

[145] *See id.* at 1977–81 (majority opinion).

[146] *Id.* at 1981 n.6 ("It should not be surprising that the two dissents have sharply different views on how to read the statute. That is the sort of thing that can happen when statutory analysis is so untethered from the text.").

[147] *See id.* at 1980 (contending that the arguments against consulting legislative history "are particularly compelling here").

[148] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–19 (2003).

[149] *Id.* at 2395; *see also id.* ("[A] legislative classification can seem absurd (in a policy sense) but still be rational (in a process sense) as a means of assuring passage of the overall legislation.").

[150] *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992).

[151] *See* Arizona v. United States, 132 S. Ct. 2492, 2530 (2012) (Alito, J., concurring in part and dissenting in part) (chiding the majority for giving "short shrift to our presumption *against* preemption").

[152] *See id.* at 2504 (majority opinion). *But see id.* at 2520 (Scalia, J., concurring in part and dissenting in part) ("There is no more reason to believe that this rejection was expressive of a de-

ry is perfectly appropriate in the view of traditional purposivists,[153] but problematic in the eyes of textualists.[154] The "stale"[155] legislative history at issue in *Arizona* seems like a particularly poor tool for determining congressional intent. In short, for the textualist, the Court not only permitted evidence of unenacted congressional intent to trump statutory (albeit silent) text,[156] but also relied on dubious evidence to discern that intent. For the purposivist, the Court appropriately looked at all evidence in order to give the "careful balance struck by Congress"[157] the due consideration it failed to show in *Whiting*.

2. *Preemption as Delegated Lawmaking.* — Another way of thinking about preemption issues, one not inherently purposivist or textualist, is in terms of delegated lawmaking. On this view, it is likely that members of Congress have no actual intent regarding particular instances of arguable preemption; it is practically impossible for Congress to consider all the preemptive issues federal legislation might involve, not least because Congress cannot know what laws states might pass in the future.[158] In light of this absence (and indeed impossibility) of actual intent, it makes sense to drop the pretense that courts undertaking preemption analysis are merely interpreting statutes and instead to recognize that they are actually creating federal common law[159] — creation theoretically authorized by congressional delegation.[160] The key questions then become when to recognize such a delegation and how to determine its scope. At one end of the spectrum, one might presume that Congress always implicitly delegates to the courts the authority to sweep away state laws that are obstacles to the purposes of a federal law, as best the courts can discern it. Something like this view seems to undergird the Court's willingness to look for implied conflict

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sire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States.").

[153] *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., joined by Breyer, J., concurring) ("[I]t is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.").

[154] Manning, *supra* note 140, at 114.

[155] *Arizona*, 132 S. Ct. at 2530 (Alito, J., concurring in part and dissenting in part). The Court cited the Select Commission's Report and two statements of individual congressmen, materials antedating the passage of IRCA by five, thirteen, and fifteen years, respectively. *See id.* at 2504 (majority opinion).

[156] *Cf.* Manning, *supra* note 140, at 114 ("Texts enacted pursuant to the constitutionally prescribed processes of bicameralism and presentment trump unenacted purposes for which no legislator voted.").

[157] *Arizona*, 132 S. Ct. at 2505.

[158] Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 376–77; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 754 (2008).

[159] *Cf.* Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12 (1975).

[160] *See* Sharpe, *supra* note 18, at 167–69.

preemption even in the presence of an express preemption clause and indeed even in the presence of both an express preemption *and* a savings clause.[161] At the other end of the spectrum is the view that the courts should undertake implied conflict preemption only if Congress has included statutory text authorizing preemption analysis at such a high level of generality.[162]

Under either view, it is difficult to see *Whiting* and *Arizona* as consistent. *Whiting*, in effect, treated the text of the savings clause as restricting the range of state laws that could be obstacles to Congress's purpose; a licensing-sanction regime, regardless of its scope, severity, or novelty, could not be an obstacle. In other words, *Whiting* proceeded as though Congress had narrowed the delegation of preemption-based lawmaking power by means of the statutory text. This mode of interpretation, tying delegation closely to text, might be correct, but it seems sharply at odds with *Arizona*'s approach. IRCA's preemption clause speaks only of *employer* sanctions; the text thus does not indicate any delegation of power to the courts to preempt state *employee* sanctions. *Arizona* assumed that Congress had given the Court a much freer hand to assess its legislative purpose and to make policy judgments; that same approach in *Whiting* should have led the Court at least to consider whether some forms of licensing laws (even if fairly dubbed "licensing") might conflict with the policy IRCA embodies.

Again, the *Whiting-Arizona* combination does not pose real practical problems; lower courts will likely have no difficulty applying the cases to other state and local attempts to regulate unauthorized immigrant employment. And it is also at least possible that the Congress that enacted IRCA truly intended to create the legal landscape that now exists[163]: the presence of the savings clause indicates Congress intended states to retain *some* regulatory power over employers, and the statutory silence with respect to employees is not inconsistent with preemption. But even if the Court arrived at the "right" answers, it did so by methods of preemption analysis that are difficult to reconcile.

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[161] *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[162] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 304 (2000); Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1075–76 (2013). For an example of such a statute, see 49 U.S.C. § 5125(a)(2) (2006), which preempts any state law that is "an obstacle to accomplishing and carrying out this chapter [or related regulations]."

[163] The Court has repeatedly said that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *E.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted). *But see* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that this "touchstone" is in fact illusory).

D. The Prospects for Legislative Reform

One might think that the Court's divergent approaches in *Whiting* and *Arizona* increase the likelihood of a congressional response clarifying the distribution of federal and state authority. That is, if everyone agrees that the Court has erred in deciding at least some aspect of this federalism issue, the time might seem ripe for legislative action. But another way to look at the recent cases is to recognize that both sides in the debate over immigration federalism have gained something, and so the incentives to act and to compromise may have been diminished.

On one side of this debate are proponents of immigration federalism, who demand recognition that the burdens of illegal immigration are distributed unequally both among the states and between particular states and the federal government.[164] This unequal burden both justifies state action in this field and provides states with the incentive to develop effective enforcement mechanisms.[165] Moreover, immigration federalism, like federalism generally, harnesses the power of experimentation in developing effective enforcement strategies. State or local enforcement efforts can identify "more and less effective means of encouraging and discouraging migration," and if a local "experiment is too costly in social and economic terms, it will not be repeated more widely, and the harm will have been limited geographically."[166] In the wake of the Court's recent decisions, however, states arguably have little room to experiment with ways of discouraging unauthorized employment. The largest impediment is IRCA itself, which bars states from implementing a straightforward system of monetary fines on employers. Experimentation with other employer-targeted initiatives has been curtailed by decisions like *Edmondson* and *Alabama*, while employee sanctions have been ruled out by *Arizona*. But *Whiting*, at least, represents a victory. There the Court gave its imprimatur to state experimentation in two important — and previously contested — realms: E-Verify mandates and licensing sanctions.

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[164] *See, e.g.*, Schuck, *supra* note 52, at 79–80.

[165] *Id.* at 79 (arguing that states disproportionately burdened by the costs of illegal immigration "might have much stronger reasons to make employer sanctions effective than the federal immigration authorities do"). Professor Schuck argues that the "lassitude" of federal employer-sanctions enforcement is explicable in part by "the fiscal mismatch under which most tax revenues generated by immigrants, both legal and illegal, flow to Washington, and many other benefits of immigration (say, lower consumer prices) are also enjoyed nationally, while almost all of the costs . . . are borne locally." *Id.* at 80.

[166] Huntington, *supra* note 16, at 847; *see also* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628–39 (1997) (arguing that the possibility of state experimentation may forestall the enactment of harshly anti-immigrant laws at the federal level). *But see* Keith Cunningham-Parmeter, *Forced Federalism: States As Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011) (arguing that state experimentation with immigration law does not provide useful information).

Opposing the immigration federalists are those that might be called immigration nationalists: proponents of uniformity and federal primacy, who take comfort in the extent to which states' ability to experiment has been cabined. They point out at least three reasons to prefer uniformity in the laws affecting unauthorized immigrants. First, such laws indirectly but necessarily impact U.S. foreign relations through their treatment of foreign nationals.[167] Second, a patchwork of different unauthorized-immigrant-employment laws creates serious compliance burdens for businesses.[168] And finally, the danger is too great that states and localities will enforce such laws in a discriminatory fashion or even pass enforcement measures with discriminatory intent.[169] From this perspective, *Whiting* was a significant loss, allowing as it does the development of a fifty-state quilt of distinctive licensing-sanctions regimes and E-Verify requirements. Preliminary data suggest that while LAWA has reduced the number of unauthorized workers in Arizona, it has not improved employment outcomes for authorized workers and has likely driven many unauthorized workers into informal employment arrangements that lead to lower wages, lower tax revenues, and greater danger of exploitation.[170] *Arizona*, by contrast, was largely a victory for immigration nationalists. The Court there seemed tacitly to adopt a presumption *in favor of* preemption in the immigration context,[171] which might leave nationalists confident that *Whiting* was a one-off — a battle lost in a war being won.

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[167] *See, e.g.*, Brief of Service Employees International Union et al. as Amici Curiae Supporting Respondent at 27–30, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1139981, at *27–30 (arguing that section 5(C)'s criminal employee sanction intruded on the federal government's power over foreign affairs). The intertwining of immigration and foreign relations has served as a justification, though a contestable one, for the plenary power doctrine. *See supra* ch. I, pp. 1587, 1604–05.

[168] *See, e.g.*, Brief for the Petitioners at 14–15, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3483324, at *14–15. A cynical take on this argument is that it "is voiced most loudly by organizations that profit from continued violations of federal immigration laws." Kobach, *Reinforcing*, *supra* note 62, at 483.

[169] *See* Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 921 (2011); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 552–53 (2001) (criticizing state authority to enact alienage classifications in the context of welfare benefits). One danger posed by state and local enforcement of immigration law is that of more frequent Fourth Amendment violations. *See infra* ch. III, pp. 1643–49.

[170] *See* Sarah Bohn & Magnus Lofstrom, *Employment Effects of State Legislation Against the Hiring of Unauthorized Immigrant Workers* 21–23, 28–31 (Inst. for the Study of Labor (IZA), Discussion Paper No. 6598, 2012), *available at* http://ftp.iza.org/dp6598.pdf.

[171] Michael C. Dorf, *SCOTUS Adopts a Tacit Presumption in Favor of Preemption in Immigration Cases*, DORF ON LAW (June 25, 2012, 11:13 AM), http://www.dorfonlaw.org/2012/06/scotus-adopts-tacit-presumption-in.html.

The hypothesis that *Arizona* makes clarifying legislation less likely is admittedly somewhat abstract: it is simply to say that victory in *Arizona* has removed some of the urgency immigration nationalists would have felt to secure legislative reform had more of S.B. 1070 been upheld. But the effect of *Whiting* on immigration federalists is demonstrated by a more concrete example. In June 2011, just a month after the Court decided *Whiting*, Republican Representative Lamar Smith of Texas introduced a bill entitled "The Legal Workforce Act" that would require all U.S. employers to use E-Verify.[172] But it would also broaden the scope of IRCA's preemption clause to cover any state or local law, "including any criminal or civil fine or penalty structure . . . relat[ing] to the hiring, continued employment, or status verification for employment eligibility purposes, of unauthorized aliens."[173] A new savings clause would permit states to use licensing sanctions to punish only employers' failure to use E-Verify, not the actual employment of unauthorized workers.[174] As a result, the bill has faced criticism not only from those who think it is too onerous,[175] but also from immigration hardliners who oppose the expanded preemption clause.[176] Because those staunch opponents of illegal immigration no longer trust that the federal government will actually enforce federal standards, they are unlikely to support trading away the state and local enforcement authority (however incomplete) secured by *Whiting* for promises of a theoretically more stringent federal regime.[177]

But although Congress may be marginally less likely to address unauthorized immigrant employment as a stand-alone issue, the possibility of comprehensive reform has reemerged since the reelection of President Barack Obama (who received an overwhelming majority of the

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[172] Legal Workforce Act, H.R. 2164, 112th Cong. (2011). A substantively identical bill was reintroduced in September 2011. *See* Legal Workforce Act, H.R. 2885, 112th Cong. (2011).

[173] H.R. 2164, § 6.

[174] *Id.*

[175] *See, e.g.*, Todd McCracken, *Verification for Job Applicants Is Needed, But Mandating E-Verify Is Not the Answer*, WASH. POST ON SMALL BUSINESS BLOG (May 13, 2012, 3:35 PM), http://www.washingtonpost.com/blogs/on-small-business/post/verification-for-job-applicants-is-needed-but-mandating-e-verify-is-not-the-answer/2012/05/11/gIQAD3KwMU_blog.html.

[176] *See* Kris W. Kobach, Another *Amnesty?*, N.Y. POST (June 15, 2011, 10:43 PM), http://www.nypost.com/p/news/opinion/opedcolumnists/another_amnesty_LauPhaZnaURz3fUcpXAphK.

[177] *See id.* ("The federal government has been unwilling to aggressively enforce immigration laws in the workplace, and [the Legal Workforce Act] would be no exception."); Press Release, Representative Lou Barletta, E-Verify Bill Will Make Illegal Immigration Problem Worse (June 15, 2011), *available at* http://barletta.house.gov/index.cfm?sectionid=25&parentid=6§iontree=6,25&itemid=269 ("On paper, the Legal Workforce Act sounds good, but in reality it will be just another law the federal government doesn't enforce." (quoting Rep. Barletta) (internal quotation mark omitted)).

Latino vote).[178] In the context of a grand bargain addressing a path to legal status for undocumented immigrants, border security, visa allocations, and so forth, the issue of state authority to regulate unauthorized employment is relatively small. If truly comprehensive immigration reform becomes politically feasible, the employment holdings of *Whiting* and *Arizona* are unlikely to derail it. But one hopes legislators will bear in mind the recent decisions discussed in section B while crafting comprehensive reform legislation. The cases illustrate that states and localities are likely to experiment around the edges of federal immigration law. And if, as section C suggests, federal courts may not be consistent in their preemption analyses, there is an even greater need for a statutory regime that clearly delineates the distribution of authority between states and the federal government.

E. Conclusion

Given employment's centrality to the problem of illegal immigration, it has been a natural target for the many states that have sought to address illegal immigration on their own terms. The ensuing preemption litigation, culminating in a pair of Supreme Court cases that are methodologically difficult to reconcile, has reaffirmed that states do have some role — narrow in scope but possibly significant in impact — in regulating unauthorized immigrant employment. Few may be wholly satisfied with the status quo, but the recent decisions may actually make it harder for Congress to pass federal legislation clarifying the role of states in this domain. If truly comprehensive immigration reform does occur, it should address the enforcement role of states with sufficient clarity that future preemption litigation will be unnecessary.

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[178] *See, e.g.*, *Immigration Reform: This Time It's Different*, ECONOMIST, Nov. 24, 2012, at 30; Editorial, *New Hope on Immigration*, N.Y. TIMES, Nov. 18, 2012, at SR10. Congressional leaders and President Obama have begun discussions of comprehensive reform, though the details of any compromise are still unfolding. *See* Michael D. Shear & Julia Preston, *Obama's Plan Sets Long Line for Citizenship*, N.Y. TIMES, Feb. 18, 2013, at A1.

CHAPTER THREE

THE ROLE OF THE EXCLUSIONARY RULE IN REMOVAL HEARINGS

In July 2011, a New York City immigration court judge entered a notable order: she suppressed evidence that an alien had entered the United States illegally.[1] A review of the circumstances precipitating the alien's arrest, however, would make the grant of a suppression remedy seem unexceptional to any attorney versed in Fourth Amendment doctrine.

In 2007, the respondent alien awoke one morning at five o'clock to the sound of agents shouting "Police, police, open the door!"[2] Next, according to the respondent's unrefuted testimony, the air conditioner unit in the window next to his bed collapsed, the windowpane flew open, and an arm reached through the window to bludgeon the respondent in the head three times with a heavy flashlight.[3] The arm belonged to an agent of U.S. Immigration and Customs Enforcement (ICE).[4] Without consent, approximately ten agents soon entered the apartment through the front door; four agents then came into the respondent's bedroom, and one placed him in handcuffs.[5] Though the agents had an ICE-issued administrative warrant to arrest a different occupant of the household for unlawful presence, the agents did not have probable cause to believe that the respondent had no right to be in the country.[6] ICE then transported the respondent to a processing facility in Manhattan, where agents, speaking almost entirely in English, pressured respondent to sign a statement admitting he lived in the country without authorization.[7] After seven hours in custody, he signed.[8]

In a criminal trial, even the most ardent skeptic of the efficacy of the exclusionary rule would struggle to find doctrinal wiggle room to avoid suppressing evidence obtained through exploitation of this mis-

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[1] *[Redacted]*, Decision and Orders of the Immigration Judge at 11–12 (U.S. Dep't of Justice Executive Office for Immigration Review July 1, 2011), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NY-2011-07-01.pdf.

[2] *Id.* at 4.

[3] *Id.*

[4] *See id.* at 7.

[5] *Id.* at 5.

[6] *See id.* at 8.

[7] *Id.* at 5.

[8] *Id.* at 5, 9.

conduct.[9] But what distinguished this decision is that, in removal hearings, the availability of a suppression remedy is the exception, not the rule. Nearly thirty years ago, the Supreme Court held in *INS v. Lopez-Mendoza*[10] that the Fourth Amendment exclusionary rule is generally unavailable to immigrants ensnared by the country's immigration enforcement regime.[11] But at the end of her majority opinion in *Lopez-Mendoza*, Justice O'Connor expressly refrained from reaching the question of the exclusionary rule's availability for "egregious violations of [the] Fourth Amendment."[12] It was this implied egregiousness exception that the immigration judge in New York invoked to grant the respondent alien's request for suppression, and it is this exception that sustains a small body of civil immigration suppression jurisprudence.

Despite this limited opening for lodging suppression motions, courts rarely grant the remedy, and in practice almost entirely excuse the immigration-enforcement regime from Fourth Amendment strictures.

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[9] Though ICE agents committed at least three violations of the Fourth Amendment, the most blatant was their entry into the home without consent or a warrant. *See id.* at 7–9. Although the ICE officers had prepared an administrative arrest warrant for one of the residents, warrants for civil immigration arrests never permit agents to enter a home without consent (unlike in the criminal context, in which law enforcement officers may enter a home with an arrest warrant). Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 570 (2009). Had the agents possessed probable cause to believe that the respondent was unlawfully present, the exclusionary rule may not have countenanced the suppression of the respondent's subsequent statement. *See* New York v. Harris, 495 U.S. 14, 21 (1990) (concluding that the "fruit of the poisonous tree" doctrine did not apply to statements obtained in reliance upon a warrantless — and unconstitutional — entry into the home to conduct an arrest so long as agents had probable cause and thus could have obtained an arrest warrant).

[10] 468 U.S. 1032 (1984).

[11] *Id.* at 1050. However, the Board of Immigration Appeals (BIA) has sanctioned application of the Fifth Amendment exclusionary rule. *Garcia*, 17 I & N Dec. 319, 321 (B.I.A. 1980). The BIA has also permitted suppression for violations of ICE regulations, some of which serve Fourth Amendment interests. *See Garcia-Flores*, 17 I & N Dec. 325, 327–28 (B.I.A. 1980); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 562–66 (2011). The BIA grounded its rule in the *Accardi* doctrine, which establishes that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Montilla v. INS, 926 F.2d 162, 167 (2d Cir. 1991) (quoting Morton v. Ruiz, 415 U.S. 199, 235 (1974)) (internal quotation marks omitted). However, the Supreme Court has never ruled that the policies underlying the *Accardi* doctrine justify suppression in removal hearings. In *Accardi* itself, the Attorney General failed to comply with a procedural rule that could have been remedied at little cost by a remand to retry the case according to the proper procedure. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954). In the evidence-gathering context, however, authorities cannot similarly start over and rediscover the misbegotten evidence free of the taint from the previous violation. Thus, the costs of applying an exclusionary rule derived from *Accardi* are hardly negligible. Given the Supreme Court's demonstrated exclusionary rule skepticism, even in the Fourth Amendment context, in which the vindication of significant constitutional values has historically justified suppression in spite of its costs, it is difficult to imagine that the Supreme Court would endorse this extension of *Accardi*.

[12] *Lopez-Mendoza*, 468 U.S. at 1050–51.

One avenue, then, for channeling disquiet about an unwieldy and unsupervised immigration-enforcement apparatus vested with authority to levy increasingly harsh punishments upon the nation's undocumented immigrant population[13] would be to reconsider *Lopez-Mendoza* and make the exclusionary rule generally available in removal hearings.

This Chapter begins in section A by introducing *Lopez-Mendoza* and situating its holding within modern exclusionary rule doctrine. Section B then critically examines two features of the status quo: first, the lower courts' troubled experience attempting to make sense of the *Lopez-Mendoza* "egregiousness" exception, and second, an emerging lower-court interpretation that unwisely exempts state and local officials from even the limited judicial scrutiny of the *Lopez-Mendoza* regime. One reason for revisiting *Lopez-Mendoza*, then, is simply to provide helpful clarity for lower courts in construing the egregiousness exception. Section C, however, goes on to make the more aggressive case for revisiting the core holding of *Lopez-Mendoza* entirely. That section illustrates why assumptions crucial to *Lopez-Mendoza*'s calculus have not withstood changes to immigration enforcement or, in the wake of Supreme Court's recent judgment in *Arizona v. United States*,[14] changes to the way the Supreme Court thinks about immigration enforcement.

A. The Exclusionary Rule and Lopez-Mendoza

1. The Fourth Amendment Exclusionary Rule. — The exclusionary rule provides the primary remedy for violations of Fourth Amendment rights.[15] Backers of the rule have traditionally proffered two policy rationales for the remedy.[16] First, suppression deters future Fourth Amendment violations.[17] Second, countenancing the introduction of illegally procured evidence may compromise the integrity of the judicial system.[18]

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[13] *See, e.g.*, *infra* ch. IV, pp. 1660–63 (describing the increasing reliance of the enforcement regime on lengthy detention of immigrants awaiting removal processing).

[14] 132 S. Ct. 2492 (2012).

[15] *See generally* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997).

[16] It is now well established that the Fourth Amendment itself does not command application of the exclusionary rule. *See* Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

[17] Project, *Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988*, 77 GEO. L.J. 489, 667 (1989).

[18] *Id.* Drawing upon the doctrine of unclean hands traditionally employed by courts of equity, Justice Brandeis defended suppression as a means by which courts can avoid aiding and abetting the government's unconstitutional misconduct by granting it judicial imprimatur. *See* Olmstead v. United States, 277 U.S. 438, 483–84 (1928) (Brandeis, J., dissenting).

Since the peak of the Supreme Court's enthusiasm for the rule when, in *Mapp v. Ohio*,[19] it extended the remedy to state criminal trials, the Court has undertaken an unmistakable campaign to temper lower-court inclinations to grant suppression motions.[20] In one manifestation of that retreat, the Court has ditched the judicial-integrity rationale entirely and, in adopting deterrence as the exclusive justification, has molded deterrence theory into a force deployed to cut back on the rule, rather than defend its broad application.[21] Snubbing an expansive conception of deterrence,[22] majorities on the Court have balanced the "deterrence benefits" of the rule's invocation against its "social costs,"[23] like time-intensive litigation, even though the social costs themselves might deter misconduct.

2. Lopez-Mendoza*.* — On first reading, *Lopez-Mendoza* may appear simply to proceed mechanistically through a litany of factors relevant to immigration agents' susceptibility to deterrence, and indeed, prior critiques of the decision have focused on refuting these claims point by point.[24] However, the primary thrust of the decision is the majority's hunch that the social cost of the exclusionary rule's application is actually higher in the realm of deportations than in the criminal law enforcement context. Though Justice O'Connor seemed to regard unlawful presence as criminal in nature,[25] the opinion distinguished immigration offenses because following the grant of a suppression remedy, immigration judges may have to let undocumented immigrants walk out of the courtroom, free to continue ignoring the nation's immigration laws.[26] From her perspective, it was inherently less costly to sanction suppression in criminal cases because acquitted defendants do not necessarily continue to commit the offense in question.

Starting from this position that the exclusionary rule is inherently more costly in the removal context than in the realm of criminal law

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[19] 367 U.S. 643 (1961).

[20] *See* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1207 (2012).

[21] Sharon L. Davies, *The Penalty of Exclusion — A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1299–1302 (2000).

[22] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 268–69, 272–74 (1988).

[23] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006).

[24] *See, e.g.*, Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1140–54; Matthew S. Mulqueen, Note, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157, 1181–1200 (2008) (addressing Justice O'Connor's "social cost" distinction briefly but focusing on deterrence factors).

[25] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("[R]emaining unlawfully in this country is itself a crime.").

[26] *See id.* at 1047.

enforcement, the majority could not identify sufficiently countervailing deterrent effects to justify the rule's availability. Specifically, the opinion focused on four factors. First, Justice O'Connor cryptically assumed that evidence of identity would not be suppressible regardless of the exclusionary rule's broader availability in deportation proceedings[27] and further, that other evidence of alienage would be easy for the government to procure as a substitute.[28]

Second, voluntary departure rates for detained undocumented immigrants were astoundingly high at the time. Voluntary departure is, in a sense, a get-out-of-the-country-free card: detained aliens, if eligible, may agree to leave the country voluntarily, and in exchange, the federal government does not attach a formal order of removal to their records.[29] In 1984, when the Supreme Court heard arguments in *Lopez-Mendoza*, over 97.5% of all unlawfully present aliens arrested chose to accept voluntary departure.[30] Justice O'Connor reasoned that if so many arrested immigrants bypassed immigration courts entirely, presumably without regard to contestable Fourth Amendment issues in their cases, the provision of suppression hearings in the remaining cases would provide, at best, an extremely weak deterrent to unconstitutional misconduct by the Immigration and Naturalization Service (INS).[31]

Third, the INS provided its agents with training in Fourth Amendment law and imposed a set of disciplinary regulations to punish Fourth Amendment violations by officers.[32] Fourth, Justice O'Connor pointed out that alternative remedies, like civil suits, remain available for immigrant victims.[33]

One factor on the deterrence side of the equation did, however, point weakly in the opposite direction of the Court's judgment: the inability of suppression in trials for criminal immigration offenses to

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[27] Because Justice O'Connor seemed to conflate the traditional rule prohibiting defendants from suppressing their very presence at a hearing to defeat the court's personal jurisdiction with a novel limit on suppressing "identity evidence," this portion of the opinion has led to "amaranthine confusion" in the lower courts. United States v. Ortiz-Hernandez, 441 F.3d 1061, 1063 (9th Cir. 2006) (Paez, J., dissenting from denial of rehearing en banc).

[28] *See Lopez-Mendoza*, 468 U.S. at 1043–44. The government's burden in a removal case is to reveal a person's identity and prove that the individual is an alien; thereafter, the burden shifts to the alien to prove that he or she has entered and remains in the country lawfully. *Id.* at 1039.

[29] *See* Chelsea Walsh, Note, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 FORDHAM L. REV. 2857, 2868 (2005).

[30] *Lopez-Mendoza*, 468 U.S. at 1044.

[31] *Id.*

[32] *Id.* at 1044–45. The opinion, however, did not distinguish INS training and disciplinary review from the instruction and internal correctional procedures of ordinary law enforcement agencies, the presence of which has never acted to bar availability of the exclusionary rule in criminal trials.

[33] *Id.* at 1045.

substitute adequately for suppression in removal hearings. In other words, suppression in criminal trials had deterrence potential that could have made extension of the rule to removal hearings redundant.[34] But as Justice O'Connor conceded, the ratio of criminal immigration trials to civil deportation proceedings was very small, ostensibly too small to make suppression motions in these trials an effective substitute for suppression in deportation cases.[35]

Finally, Justice O'Connor appended a coda to the decision, which carried only four votes.[36] This closing disclaimed any intent of reaching "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[37] The lower federal courts have relied on this statement to develop a removal-hearing exclusionary rule doctrine.[38]

B. Lopez-Mendoza *in the Lower Courts*

Lower federal appellate courts as well as the Board of Immigration Appeals (BIA) have encountered two major difficulties in construing *Lopez-Mendoza*. First, in facing their most manifest challenge, lower courts have formulated several ways to give meaning to the egregiousness exception. They have, however, proven unable to do so in a way that is simultaneously (a) true to the text of the *Lopez-Mendoza* coda as well as the opinion as a whole, (b) consistent with contemporary trends in exclusionary rule jurisprudence, and (c) capable of preserving a nonredundant role for Fourth Amendment analysis. Second, in a line of cases still in its infancy, lower courts have confronted the question of how to apply the *Lopez-Mendoza* standard to state and local officers who conduct the initial arrest of an alien later charged in immigration court. With a purely federal enforcement focus, *Lopez-Mendoza* is silent on this issue.

1. Egregiousness Diversely Defined. — Justice O'Connor's egregiousness afterthought has generated doctrine in the lower federal appellate courts that has opened the door to suppression, even if immi-

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[34] *Id.* at 1042–43.

[35] *Id.*

[36] Chief Justice Burger did not sign onto the coda. *Id.* at 1034.

[37] *Id.* at 1050–51 (plurality opinion). The *Lopez-Mendoza* majority apparently assumed that the Fourth Amendment protected undocumented aliens, but did not expressly resolve the question. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990). Although the *Verdugo-Urquidez* decision implies that unauthorized immigrants possess Fourth Amendment rights and most lower courts have agreed, a Fifth Circuit panel recently expressed strong doubt about the matter. *See* United States v. Portillo-Munoz, 643 F.3d 437, 440–41 (5th Cir. 2011).

[38] For further review of this case law, see Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 70–73 (2010).

gration judges still rarely grant it.[39] Although only three other Justices joined Justice O'Connor's statement about "egregious violations," four dissenters would have applied the exclusionary rule in all removal proceedings, meaning that "there were eight votes on the *Lopez-Mendoza* Court for at least leaving open the possibility that the exclusionary rule might apply to egregious violations."[40] Accordingly, all circuits but the Fifth[41] (and the D.C. Circuit, which has not considered the issue at all) have recognized that *Lopez-Mendoza* at least left "a glimmer of hope"[42] for *potential* application of the exclusionary rule in deportation hearings and have periodically assumed without deciding that the exception exists.[43] Only the Second, Eighth, and Ninth Circuits, however, have gone as far as expressly affirming that *Lopez-Mendoza* permits suppression motions in cases of egregious unconstitutional misconduct.[44]

The meaning of the *Lopez-Mendoza* coda is far from pellucid. First of all, the plain terms of the text suggested that a qualifying constitutional violation must both be egregious "*and* undermine the probative value of the evidence obtained."[45] But because Fourth Amendment violations hardly ever compromise evidentiary probity, the conjunctive standard Justice O'Connor's language seemed to favor would render the entire exception virtually meaningless. For this reason, the three federal appellate courts to consider the issue head-on have opted to replace the opinion's "and" with an "or" to create a disjunctive standard.[46]

Beyond that initial source of difficulty, the coda is still opaque but nonetheless offers several crucial interpretive clues. First, Justice O'Connor's language qualified both the category of "egregious" Fourth Amendment violations and the group of "egregious" violations of "other liberties" with the requirement that cognizable violations must

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[39] Stephanie Francis Ward, *Illegal Aliens on I.C.E.*, A.B.A. J. (June 1, 2008, 7:10 AM), http://www.abajournal.com/magazine/article/illegal_aliens_on_ice.

[40] Orhorhaghe v. INS, 38 F.3d 488, 493 n.2 (9th Cir. 1994); *accord* Puc-Ruiz v. Holder, 629 F.3d 771, 778 n.2 (8th Cir. 2010).

[41] *See* Escobar v. Holder, 398 F. App'x 50, 53 (5th Cir. 2010) (declining to decide whether, but expressing doubt that, the *Lopez-Mendoza* rule contains an egregiousness exception); Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994).

[42] Navarro-Chalan v. Ashcroft, 359 F.3d 19, 22 (1st Cir. 2004).

[43] Luevano v. Holder, 660 F.3d 1207, 1212 (10th Cir. 2011); Ghysels-Reals v. U.S. Att'y Gen., 418 F. App'x 894, 895–96 (11th Cir. 2011); Gutierrez-Berdin v. Holder, 618 F.3d 647, 652–53 (7th Cir. 2010); Martins v. Att'y Gen. of U.S., 306 F. App'x 802, 804 (3rd Cir. 2009); Miguel v. INS, 359 F.3d 408, 411 (6th Cir. 2004); Mineo v. INS, No. 93-1631, 1994 WL 65051, at *2 (4th Cir. Feb. 24, 1994).

[44] *See, e.g.*, *Puc-Ruiz*, 629 F.3d at 778; Almeida-Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006); *Orhorhaghe*, 38 F.3d at 493.

[45] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (emphasis added).

[46] *See Almeida-Amaral*, 461 F.3d at 234 ("The Court, seemingly inadvertently, used the conjunctive 'and' instead of the disjunctive 'or' to link these two possible grounds for deeming a violation egregious"); *Orhorhaghe*, 38 F.3d at 502; Gonzalez-Rivera v. INS, 22 F.3d 1441, 1451–52 (9th Cir. 1994); *see also Puc-Ruiz*, 629 F.3d at 778–79.

"transgress notions of fundamental fairness."[47] In other words, to find a qualifying violation under the exception, courts should look to some benchmark autonomous of Fourth Amendment doctrine to judge whether the violation transgresses notions of fundamental fairness.

Second, the coda's "cf." citation[48] to *Rochin v. California*[49] suggested *Rochin* should serve as a guide in developing that autonomous benchmark without going so far as to require courts to suppress evidence only when the violation is equivalent in severity to the *Rochin* fact pattern.[50] *Rochin* suppressed evidence, not under the Fourth Amendment, but under a due process standard requiring police to "respect certain decencies of civilized conduct."[51] Thus, reading the *Lopez-Mendoza* exception as satisfied only when misconduct rises to the level of a *Rochin* due process violation would render consideration of the Fourth Amendment entirely redundant, as the *Rochin* doctrine would independently require suppression.

Nonetheless, the BIA, in cases arising from immigration courts in circuits that have not adopted a governing interpretation of the egregiousness exception, has narrowly interpreted the exception in a manner that would indeed make Fourth Amendment analysis redundant. *Lopez-Mendoza*, the Board has claimed, merely "acknowledged a narrow exception . . . that would permit the suppression of evidence, on Fifth Amendment due process grounds, if that evidence were obtained through an 'egregious' violation of the Fourth Amendment."[52]

The Second and Eighth Circuits have adopted a more moderate approach. In *Almeida-Amaral v. Gonzales*,[53] a Second Circuit panel ultimately rejected an alien's effort to suppress evidence but, in advisory dicta, recognized two types of misconduct that would constitute egregious behavior: first, baseless searches or seizures that are "sufficiently severe," and second, regardless of severity, "grossly improper" motivations for unconstitutional misconduct, including racial bias.[54] The Eighth Circuit, also in dicta, has substantially agreed with the Second Circuit's focus on these two considerations.[55] This effort at un-

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[47] *Lopez-Mendoza*, 468 U.S. at 1051. Otherwise, the opinion would have read "egregious violation of *the* Fourth Amendment or other liberties that might transgress . . . ," rather than the text actually employed, which leaves out the crucial article "the": "egregious violations of Fourth Amendment or other liberties that might transgress . . . ."

[48] *Id.*

[49] 342 U.S. 165 (1952).

[50] In *Rochin*, Justice Frankfurter applied the exclusionary rule to suppress evidence of a drug offense obtained when the police pumped the victim's stomach to discover ingestion of illegal pills. *Id.* at 172.

[51] *Id.* at 173.

[52] Maria Cecilia Camarena-Cerrillo, A088 748 263, 2011 WL 7071014 (B.I.A. Dec. 29, 2011).

[53] 461 F.3d 231 (2d Cir. 2006).

[54] *Id.* at 235.

[55] *See* Puc-Ruiz v. Holder, 629 F.3d 771, 778–79 (8th Cir. 2010).

packing the egregiousness exception has some merit. In primarily looking to the manner and characteristics of law enforcement actions, it appropriately draws upon *Rochin* as a benchmark without going so far that it makes the inquiry redundant with *Rochin* due process doctrine.

Nonetheless, this approach seems to bear little connection to the deterrence rationale at the core of contemporary exclusionary rule doctrine. Neither the Second nor the Eighth Circuit has made an effort to reconcile the egregiousness exception or its understanding of the exception with the doctrine's contemporary deterrence focus, and it is indeed difficult to contend that violent or race-driven police behavior is inherently more deterrable than ordinary Fourth Amendment misconduct. Instead, as the Ninth Circuit has pointed out, the exception appears to be a manifestation of the judicial integrity rationale: that is, it shields the judiciary from association with the types of police misconduct like racism and brutality that are most likely to elicit the public's disapprobation.[56] Perhaps Justice O'Connor had judicial integrity in mind when drafting the curt *Lopez-Mendoza* egregiousness qualification, but if so, the exception lacks a solid footing measured against the single-minded focus on deterrence in today's exclusionary rule doctrine.

The Ninth Circuit has embraced a more capacious understanding of the exception. Egregiousness in the Ninth Circuit means "bad faith," a standard that turns on the reasonableness of the Fourth Amendment violation.[57] Of course, a Fourth Amendment violation is, by definition, an unreasonable search or seizure. But the Ninth Circuit standard asks whether such an unreasonable search or seizure deviates so clearly from governing law that a reasonable officer could not have understood his or her conduct as constitutionally permissible.[58] In effect, the Ninth Circuit applies the same standard that governs qualified immunity, making the exclusionary rule available in removal hearings only when immigration officers would, in a separate civil suit, face damages liability.[59]

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[56] *See* Adamson v. Comm'r, 745 F.2d 541, 545–46 (9th Cir. 1984).

[57] Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994).

[58] *See id.* ("[A] bad faith constitutional violation occurs when 'evidence is obtained by deliberate violations of the fourth amendment, or by conduct a *reasonable officer should have known* is in violation of the Constitution.'" (quoting *Adamson*, 745 F.2d at 545)).

[59] *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (reciting the rule that officers are liable only for "clearly established" constitutional violations of which they could have reasonably been apprised (internal quotation marks omitted)). Only the Eighth Circuit has explicitly rejected the Ninth Circuit's "bad faith" standard, but it did so in dicta that confused the reasonableness standard for identifying Fourth Amendment violations in the first instance with the Ninth Circuit's second-order reasonableness inquiry. *See* Garcia-Torres v. Holder, 660 F.3d 333, 336–37 & n.4 (8th Cir. 2011). If this Eighth Circuit panel's criticism were valid, the qualified immunity standard applied in every federal court in the nation would be inexplicable.

The Ninth Circuit's standard, however, is largely untethered from the text of the *Lopez-Mendoza* coda. True, conduct so inconsistent with well-established Fourth Amendment doctrine that any reasonable law enforcement officer would recognize it as unconstitutional may plausibly be called "egregious." But the focus on Fourth Amendment doctrine alone appears to be inconsistent with Justice O'Connor's *Rochin* citation and the question of whether conduct "transgress[es] notions of fundamental fairness." A further problem is that the Ninth Circuit has explicitly defended its standard under the banner of protecting judicial integrity, a rationale with dubious force in the contemporary doctrinal context.[60]

Yet the Ninth Circuit's approach does enjoy the comparative advantage of finding validation in the rest of the *Lopez-Mendoza* decision. Read as a whole, *Lopez-Mendoza* ostensibly objected to licensing a forum in every removal hearing for the iterative manufacture of a Fourth Amendment doctrine specific to immigration enforcement, a doctrine that could uniquely or unpredictably hamper immigration officers in the field. Although *Lopez-Mendoza* did not draw directly upon plenary power doctrine — that is, it did not examine the constitutionality of congressional legislation regulating immigration[61] — the decision undoubtedly evoked a similarly deferential mood, steering clear of potential judicial interference with the political branches' execution of immigration policy.[62]

Several applied examples of this concern surface in the decision. Justice O'Connor specifically referenced anxiety about both frustrating enforcement efforts by compelling INS agents to preserve records of workplace raids or to testify at suppression hearings[63] and interfering with immigration courts' efficient adjudication by asking judges to wrestle with complex questions in applying Fourth Amendment doctrine to immigration-specific scenarios.[64]

The Ninth Circuit's understanding of egregiousness is alone among the lower-court interpretations in directly responding to these anxieties. As a practical matter, evidence in removal proceedings may be suppressed only when immigration agents commit violations that unmistakably fall outside the Fourth Amendment's zone of approval (that is, when they commit violations that are well established in the Fourth

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[60] *Adamson*, 745 F.2d at 545–46.

[61] *See supra* ch. I, pp. 1584–86 (narrating the history of the plenary power's development).

[62] *See* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 439 (1997) ("Although the *Lopez-Mendoza* Court based its cost-benefit analysis of the exclusionary rule without reference to the plenary power doctrine, its conclusion is entirely consistent with the plenary power doctrine.").

[63] INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984).

[64] *Id.* at 1048.

Amendment doctrine constructed outside the immigration context).[65] Therefore, any paucity of immigration-court expertise or fear of immigration enforcement–specific standards loses much of its force as objections to suppression under the Ninth Circuit's egregiousness exception. The extent to which this estimable feature of the Ninth Circuit approach counterbalances its tenuous nexus to the *Lopez-Mendoza* text is a difficult matter to evaluate. Regardless, it is clear that the Supreme Court would do well to clean up the murky egregiousness exception doctrine by offering further guidance on its contours. Better yet, it could revisit the holding entirely and recognize that, as section C explores, the core concerns of *Lopez-Mendoza* have not aged well.

2. Intersovereign Dilution Effect. — *Lopez-Mendoza*'s deterrence analysis focused solely upon the federal immigration enforcement regime. But since the mid-1980s, state and local officials have begun to play a more pronounced role in executing the nation's immigration laws, both directly through partnerships with ICE and indirectly by sharing information on arrests with ICE.[66] Thus, the chances that an alien ultimately finding himself in a federal deportation hearing will have initially been arrested by state or local police have substantially increased. This trend highlights the hazard posed by one approach to applying *Lopez-Mendoza* in the state and local contexts.

Lower courts have followed one of two approaches in weighing suppression motions filed in removal hearings alleging Fourth Amendment violations by state and local officials. The more straightforward of the two assumes that the *Lopez-Mendoza* egregiousness standard applies just as it does when federal officers commit constitutional violations.[67] For example, in a recent Eleventh Circuit case, the respondent alien's path to deportation began with a routine traffic stop by local police after which the authorities shared his information with the Department of Homeland Security (DHS).[68] At his removal hear-

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[65] The Supreme Court has given the federal appellate courts a green light to issue advisory dicta that, in turn, bind officers prospectively. *See* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). But at least a substantial minority of courts decline to exercise this authority, stopping short of promulgating advisory statements and, instead, simply resolving cases on qualified immunity grounds. *See* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011). And there is reason to believe this hesitance would be particularly strong in immigration cases subject to a quasi–qualified immunity standard, given the anxiety courts have exhibited about wading into immigration matters in the *Bivens* context. *See infra* note 147.

[66] *See The Supreme Court, 2011 Term — Leading Cases,* 126 HARV. L. REV. 327, 333–34 (2012). *See generally* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012).

[67] *See, e.g.*, Ghysels-Reals v. U.S. Att'y Gen., 418 F. App'x 894, 895 (11th Cir. 2011); Puc-Ruiz v. Holder, 629 F.3d 771, 778 (8th Cir. 2010); Martinez-Medina v. Holder, 616 F.3d 1011, 1015 (9th Cir. 2010); Martins v. U.S. Att'y Gen., 306 F. App'x 802, 804 (3d Cir. 2009); Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994).

[68] *Ghysels-Reals*, 418 F. App'x at 895.

ing, the respondent argued that the stop violated his Fourth Amendment rights, but every court to consider the motion determined that the alleged violation was not egregious.[69]

However, several federal appellate courts as well as the BIA (where most appeals from removal orders end[70]) have suggested the possibility of taking a radically different tack: barring access to the exclusionary rule in removal hearings *entirely* when state or local officers commit the alleged Fourth Amendment violations.[71] This approach relies upon an overbroad Supreme Court pronouncement in *United States v. Janis*[72] that "the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[73]

In fact, *Janis* involved relatively sui generis circumstances. Los Angeles police had arrested an individual under local gambling laws, and on the basis of the evidence obtained by local authorities, the Internal Revenue Service (IRS) computed the individual's unpaid tax liability and seized cash found at the scene to cover the tab.[74] After the same evidence was suppressed in the state criminal trial, the individual filed a civil suit in federal court against the IRS for return of the seized cash; the IRS responded by pointing to evidence of unpaid taxes on the plaintiff's illegal gambling, and the plaintiff again moved to suppress the evidence.[75] It was in this nonpunitive, plaintiff-initiated civil proceeding that the Supreme Court denied recourse to the exclusionary rule. The case not once mentions immigration charges or other types of government-initiated quasi-punitive civil cases,[76] and subsequently, the Court has understood *Janis* as demanding a case-specific balancing of social costs and benefits, not as imposing a categorical rule against suppressing state-procured evidence in any type of federal civil proceeding.[77]

Nonetheless, even if *Janis* does not ipso facto reach civil immigration cases, its reasoning might. The Court in *Janis* relied upon a hypothesis that may be dubbed the "intersovereign dilution effect" — the

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[69] *Id.*

[70] Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL'Y 1, 18 (2012) (finding that at the peak of a surge in appeals from the BIA, between 39% and 50% of cases were appealed).

[71] *See* Lopez-Gabriel v. Holder, 653 F.3d 683, 686 (8th Cir. 2011); Oliverio Bonilla-Ramos, No. A076 773 878, 2012 WL 691467, at *2 (B.I.A. Feb. 22, 2012).

[72] 428 U.S. 433 (1976).

[73] *Id.* at 459–60.

[74] *Id.* at 436–37.

[75] *Id.* at 437–39.

[76] The traditional civil-criminal distinction does not hold up well, at least as a stark line of meaningful demarcation, in the immigration context. *See infra* ch. IV, pp. 1665-72.

[77] *See INS v. Lopez-Mendoza, 468 U.S. 1032, 1040–42 (1984).*

notion that the local law enforcement official necessarily cares less about, and is thus less deterred by, the prospect of suppression thwarting a federal case because he "is already 'punished' by the exclusion of the evidence in the state criminal trial."[78] Because the deterrence benefit of suppression is the gravamen of modern exclusionary rule doctrine, less deterrence means suppression is correspondingly less justifiable.

Although this theory is empirically questionable in general given the increasingly intertwined nature of federal and state law enforcement,[79] it is undoubtedly dubious as applied to state and local interest in deportation. During the George W. Bush Administration, the Office of Legal Counsel (OLC) opened the door to new state and local enforcement efforts by reversing the longstanding executive position that federal immigration laws preempt any authorization for subfederal law enforcement officers to make civil immigration arrests.[80] Several states — most notoriously, Arizona — embraced this decision and made it official state policy to contribute to the deportation of undocumented immigrants.[81] In another sign of state and local interest in immigration enforcement, as of 2011, seven state law enforcement agencies and local authorities in fourteen additional states had signed memoranda with DHS under the 287(g) program, deputizing state and local officers to make civil immigration arrests.[82] Meanwhile, although many leaders of state and local police agencies remained wary of playing too intimate a role in immigration enforcement, a national survey indicated that a significant number either hoped to heighten their offices' roles in immigration enforcement or felt local political pressure to do so.[83]

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[78] *Janis*, 428 U.S. at 448.

[79] *See* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 244–45 (2005).

[80] *See* MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R41423, AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW 22–24 (2012); Memorandum from Jay S. Bybee, Assistant Att'y Gen., to the Att'y Gen. 8 (Apr. 3, 2002), *available at* http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf.

[81] *See* 2010 Ariz. Sess. Laws ch. 113 ("[T]he intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens . . . ."); *see also* Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of* Chamber of Commerce v. Whiting *for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 87–89 (2012) (collecting illustrative examples).

[82] *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa (last visited Mar. 3, 2013).

[83] ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 12–13, 169, 172, 174, 176 (2009), *available at* http://www.policefoundation.org/strikingabalance/strikingabalance.html.

Finally, at the level of individual officers, reports relying on anecdotal information as well as state- and nationwide studies have concluded that Latinos are often victimized by racial profiling. This trend has been particularly pronounced in areas such as the American Midwest that have not traditionally been home to large Latino communities.[84] The willingness to engage in racial profiling likely correlates with the desire to play a more substantial role in immigration enforcement.[85] In telling figures, about 25% of local law enforcement chiefs in a recent survey agreed that personnel in their departments "believe that it is relatively easy to determine who is in this country without authorization," and nearly one in three thought "victimization of immigrants" was a significant problem in their respective departments.[86]

Several recent developments, by giving state and local officers more power to influence the ultimate decision to deport immigrants, likewise increase the temptation of some of these officials to violate the Fourth Amendment as a means to identify undocumented immigrants for federal authorities. Perhaps making this temptation stronger, the Supreme Court's recent decision in *Arizona v. United States*, by preempting several state attempts to enforce federal immigration laws,[87] filches a direct and legitimized role from state and local officers chafing to participate in federal enforcement efforts. The decision certainly nullified OLC's legal blessing of local police arrests of civil immigration violators and even suggested that federal law might preempt authority for state and local police to make arrests for violations of federal *criminal* immigration laws.[88] This latter authority had received a green light from the Justice Department even prior to the 2002 Bush OLC memo.[89] The Supremacy Clause, therefore, has largely thwarted any independent efforts of states and localities to play a direct role in arresting undocumented aliens for violations of federal immigration law.

But to the extent that concerned state and local officials remain able to contribute to the rate of deportation indirectly, they may nonetheless be tempted to engage in Fourth Amendment violations to target immigrants and uncover evidence of unlawful presence. ICE data

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[84] *See* Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 10–16 (2005).

[85] *See, e.g.*, Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119–21 (2007) (describing an operation wherein local police stopped "Mexican-looking" drivers to inquire about immigration status, not to enforce local laws like traffic regulations (internal quotation marks omitted)).

[86] KHASHU, *supra* note 83, at 173–74.

[87] 132 S. Ct. 2492, 2505 (2012).

[88] GARCIA & MANUEL, *supra* note 80, at 13, 21, 24.

[89] *Id.* at 22.

exhibits the enormous influence state and local officers possess: over just three years, the number of immigrants held in local jails that ICE has sought to detain increased threefold from 68,558 aliens in fiscal year 2007 to 201,778 in fiscal year 2010.[90] To put these figures in perspective, in 2010 ICE placed detainers[91] on nearly four times the number of aliens arrested initially by state and local police than ICE arrested itself.[92]

One development indirectly delegating more power to state and local officials to influence an alien's deportation risk is the Secure Communities program. Secure Communities has forced state and local authorities to share information on individuals booked into their jails with DHS.[93] Unlike 287(g) or ad hoc participation arrangements between local and federal authorities, Secure Communities is mandatory[94] and national in scope.[95] Prior to the program, state and local authorities shared information on arrestees, such as names and

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[90] These statistics come from data obtained through a Freedom of Information Act (FOIA) request to ICE. *How Have ICE Immigration Detainers Affected Your Community?*, NAT'L IMMIGRANT JUST. CENTER, http://www.immigrantjustice.org/ICEdetainerdata (last visited Mar. 3, 2013).

[91] When ICE receives an alert that a state or local jail has booked an undocumented immigrant, the agency often issues a detainer instructing local authorities to hold the individual in preparation for transfer to ICE's custody. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES 8 (2012).

[92] ICE made 53,610 arrests in 2010. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS, at 93 tbl.35 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf.

[93] The Bush Administration launched Secure Communities in 2008 in response to a congressional directive "to develop 'an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies . . . that is relevant to determine . . . the inadmissibility or deportability of an alien . . . .'" *See* CHUCK WEXLER ET AL., HOMELAND SEC. ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES 5 (2011) (alterations in original) (quoting 8 U.S.C. § 1722(a)(2) (2006)), *available at* http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf.

[94] *See* RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE'S FAILED "SECURE COMMUNITIES" PROGRAM 25–28 (2011) [hereinafter RESTORING COMMUNITY], *available at* http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf. DHS defended states' and localities' inability to prevent the FBI from sharing jail-booking data with DHS in a 2010 memorandum long sought and finally procured by immigration-reform advocates through a FOIA request. For the DHS memo, see Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to Beth N. Gibson, Assistant Deputy Director, U.S. Immigration & Customs Enforcement (Oct. 2, 2010) [hereinafter Ramlogan Memo], *available at* http://epic.org/privacy/secure_communities/ice-secure-communities-memo.pdf. For discussion of the FOIA battle and analysis of the memo, see CTR. FOR CONSTITUTIONAL RIGHTS, A BRIEFING GUIDE TO THE SECURE COMMUNITIES OCTOBER 2, 2010 "MANDATORY MEMO" 1 (2012), *available at* http://uncoverthetruth.org/wp-content/uploads/2012/01/1-9-12-Briefing-Guide-Oct-2-Mandatory-Memo.pdf.

[95] DHS estimates that by the end of 2013, all fifty states will participate in Secure Communities. *Secure Communities: The Basics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., http://www.ice.gov/secure_communities (last visited Mar. 3, 2013).

fingerprints, with the FBI.[96] Though states are not necessarily required to participate in the FBI data-sharing program, all do so voluntarily to gain access to the national database, which may assist in identifying criminals and solving local crimes.[97] Secure Communities is the product of a memorandum of agreement between DHS and the FBI, which agreed to submit data it receives from all jurisdictions to DHS.[98] In transmitting that information to DHS, Secure Communities effectively requires local authorities to participate in immigration enforcement; upon receiving the information, DHS crosschecks it with ninety-one million fingerprint records, including those of any immigrants previously deported or who have applied to enter the country lawfully.[99]

Because ICE often responds to matches by issuing detainers for undocumented immigrants, local police officers know they have, in effect, a direct line to federal immigration enforcers. For example, an officer could unconstitutionally stop a driver he suspects of being in the country unlawfully, arrest him on trumped-up charges or for a genuine violation of the law discovered after the illegal stop, such as driving without a license, then wait for ICE to bring him before an immigration court, where *Lopez-Mendoza* will likely keep the unconstitutional nature of the stop from coming to light. This is not a mere thought experiment: through 2012, 59% of all aliens arrested under Secure Communities were convicted either of misdemeanors, like traffic violations, or no crimes at all.[100]

A second development that has indirectly delegated authority over immigration to state and local officials is the State Criminal Alien Assistance Program (SCAAP). Since 1994, SCAAP has provided federal funding to reimburse states for the cost of incarcerating undocumented immigrants that commit state or local crimes.[101] This program encourages authorities to inquire about an arrestee's place of birth and immigration status in order to take advantage of the federal reimbursement.[102] Though the program requires only that participating jurisdictions submit the information to DHS for verification of immigration status, many participants report the discovery of unlawful

[96] AARTI KOHILI ET AL., SECURE COMMUNITIES BY THE NUMBERS 1–2 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

[97] *See* Ramlogan Memo, *supra* note 94, at 5 n.6.

[98] *Id.* at 3.

[99] KOHILI ET AL., *supra* note 96, at 5.

[100] RESTORING COMMUNITY, *supra* note 94, at 5.

[101] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 1–2 (2007), *available at* www.justice.gov/oig/reports/OJP/a0707/final.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-187, CRIMINAL ALIEN STATISTICS 5–6 (2011).

[102] *See* OFFICE OF THE INSPECTOR GEN., *supra* note 101, at 11–12.

presence to ICE or maintain records that they allow ICE to inspect.[103] By increasing, if only marginally, the probability that a state or local arrest will lead to ultimate deportation, SCAAP contributes to state- and local-officer incentives that the exclusionary rule could temper.

Because state and local law enforcement played a far smaller part in immigration enforcement several decades ago, the *Lopez-Mendoza* majority understandably saw little need to advise lower courts of the decision's interplay with the *Janis* intersovereign dilution assumption. But left to the devices of rudderless lower courts, that gap has become increasingly worrisome.

C. Lopez-Mendoza *at (Almost) Thirty*

The previous section identified several points of confusion in the lower courts generated by either the ambiguity or limited reach of *Lopez-Mendoza*. One appropriate role for the Court, then, would be simply to weigh in on these matters of dispute to outfit the lower courts with a clearer compass.

Yet more drastic action is warranted. Changes to immigration enforcement have largely undermined support for *Lopez-Mendoza*'s general rule barring access to the exclusionary rule in removal hearings. Given this erosion, if the case were revisited today, the deterrence considerations would merit extending the suppression remedy to removal proceedings. Still, any argument for revisiting the decision must contend not just with the factors appearing in *Lopez-Mendoza* itself but also with the inhospitable mood that prevails in the Court's contemporary approach to the exclusionary rule. Even measured against this baseline suppression skepticism, *Lopez-Mendoza* stands out as uniquely sweeping in the de facto exemption from Fourth Amendment scrutiny it provides the immigration enforcement bureaucracy.

1. Revisiting Lopez-Mendoza. — Perhaps the most crucial recent shift has not been in immigration enforcement itself, but rather in the way the Supreme Court thinks about immigration enforcement. In the 2011 Term's blockbuster ruling in *Arizona v. United States*, the Court did more than reach a decision, quite far-reaching in itself, on the difficulty states face in shielding their immigration policies from the force of federal preemption. The Court definitively laid to rest *Lopez-Mendoza*'s conceptualization of civil immigration violations as criminal in nature[104] as well as the decision's deep-seated unease about the appearance of judicially sanctioning ongoing violations of the law. These recognitions undercut the core assumption of *Lopez-Mendoza*

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[103] *See id.* at 13–14.
[104] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

that heretofore had at least plausibly sustained its flimsy deterrence analysis.

In her *Lopez-Mendoza* decision, Justice O'Connor contended that the "social cost" of the exclusionary rule in removal proceedings would be higher than in criminal trials because it would release lawbreakers to continue in their misconduct. The opinion compared the release of undocumented immigrants to a leaking hazardous dump — if evidence of an environmental regulatory crime were suppressed in a criminal trial, courts would nonetheless refuse to allow the leak to continue.[105] Yet Justice O'Connor proffered no reasons why the ongoing nature of a civil immigration offense was so inherently troubling, certainly none to justify the analogy to the public-safety emergency of leaking toxins. Thus, her concern must have rested heavily upon her suggestion that unlawful presence is criminal in nature.[106] Therefore, because immigration offenses do not inherently jeopardize public safety, this supposition was relevant to the social costs of letting undocumented immigrants go free only insofar as something labeled "criminal" represents a per se threat to public safety.

In *Arizona*, by contrast, Justice Kennedy declared that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[107] And independent of his debunking of *Lopez-Mendoza*'s loose invocation of the term "criminal," Justice Kennedy rejected any theory that continuing unlawful presence inherently imperils public safety or racks up an intolerable social cost. He did so by emphasizing the Court's recognition that prosecutorial discretion — and the high number of unlawfully present aliens that will remain in the country as a consequence of such discretion — represents a fundamental aspect of the American immigration system.[108] Revisiting the deterrence inquiry post–*Arizona*, then, the Court could no longer begin from a perspective that treats the exclusionary rule's application with a priori greater skepticism than in the criminal context.

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[105] *Id.* at 1046–47.

[106] This attitude toward civil immigration violations engendered confusion in lower courts for decades; as recently as 2010, for example, a Ninth Circuit panel held that even though unlawful presence was not a crime, it was not unreasonable for a police officer, in reliance upon *Lopez-Mendoza*'s clumsy language, to think that it was and to arrest an alien with probable cause of the "crime" of status as an illegally present alien. *See* Martinez-Medina v. Holder, 616 F.3d 1011, 1017 (9th Cir. 2010).

[107] Arizona v. United States, 132 S. Ct. 2492, 2505 (2012). Ironically, Justice Kennedy cited to *Lopez-Mendoza* as support for this statement. *Id.* (citing the portion of Justice O'Connor's opinion stating that "remaining unlawfully in this country *is* itself a crime," *Lopez-Mendoza*, 468 U.S. at 1038 (emphasis added)).

[108] *See id.* at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime."); *id.* ("A principal feature of the removal system is the broad discretion exercised by immigration officials.").

One response to this application of Justice Kennedy's treatment of prosecutorial discretion might be to question whether there is a difference between the cost of continuing unlawful presence in general and the cost of continuing unlawful presence by those individuals that the immigration enforcement bureaucracy has singled out for deportation. DHS has indeed established a prioritization scheme to determine the types of immigrants that should or should not benefit from myriad forms of discretionary relief from prosecution.[109] Does the Department haling an alien into court for removal from the country signal an executive determination that this person's continued presence would impose a greater cost on the country than the cost of the average undocumented immigrant's presence such that paving the way for the exclusionary rule to release that alien would be intolerable?

In short, no. There is much lost in the imperfect translation from the priority factors listed in ICE memoranda — such as criminal past, family ties, and contributions to American society[110] — to the makeup of the population actually deported.[111] But even if the United States deported exactly the group of aliens it sought to remove, release of some of these individuals at the hands of the exclusionary rule would impose no greater social costs than releasing criminals. A criminal past, after all, is one of the most important factors for deportation prioritization.[112] There is simply nothing inherent about unlawful presence, inside or out of an immigration courtroom, that makes release of an alien more costly than release of a criminal.

Against this shift in attitude toward unlawful presence, the *Lopez-Mendoza* deterrence analysis appears all the more strained. First, the voluntary departure rate has fallen dramatically from the 97% figure Justice O'Connor examined in 1984 to just over 55% in 2010.[113] The reliance on the voluntary departure rate was always questionable: in 1984, 84% of all federal criminal cases ended in plea bargains, and that figure has continued to rise.[114] But the fact that the vast majority of criminal cases never create a forum for the exclusionary rule has

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[109] *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to all ICE Employees (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[110] *See id.* at 4.

[111] *See* FAIR IMMIGRATION REFORM MOVEMENT, RESTORE THE PROMISE OF PROSECUTORIAL DISCRETION 12–14 (2012), *available at* http://fairimmigration.files.wordpress.com/2012/06/restore-the-promise-full-report.pdf.

[112] *See U.S. Department of Homeland Security Appropriations for 2012: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 112th Cong. 16 (2012) (statement of John Morton, Assistant Sec'y, U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec.).

[113] *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 92, at tbl.36.

[114] GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 223 (2004).

never provided cause to purge criminal adjudication of all suppression motions. Additionally, the vast majority of immigrants who accept voluntary departure are aliens who have just crossed the border and agree to leave after discovery by border patrol agents.[115] Border patrol agents may, of course, commit Fourth Amendment violations, but given the Court's willingness to dilute Fourth Amendment protection in border areas to grant authorities a freer hand in border control,[116] the likelihood of their doing so is far smaller than the risk of Fourth Amendment violations by ICE agents or state and local officials trying to identify undocumented immigrants in homes, workplaces, or even vehicles. Thus, the group of aliens offered voluntary departure is not nearly so likely to overlap with those aliens victimized by Fourth Amendment violations as Justice O'Connor insinuated.

One change in immigration enforcement, however, may appear at first to lend some credence to Justice O'Connor's conclusion. Between 2007 and 2010, ICE arrested an average of 65,570 aliens per year,[117] and over the same period, ICE arrests for criminal immigration charges averaged about 15,000 per year.[118] At least for ICE agents, then, the marked increase in criminal immigration prosecutions over the past decade[119] may have made suppression in ensuing criminal trials a more legitimate substitute for suppression in removal hearings.

Yet several factors diminish the deterrent potential on ICE officers of the exclusionary rule's availability in criminal immigration cases. First, ICE officers often have no way of knowing prior to arresting an alien whether he or she had previously faced deportation;[120] thus, the risk of suppression at a subsequent criminal trial is unlikely to shape an officer's conduct ex ante. Second, even in criminal cases that lead

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[115] *See, e.g.*, MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 4, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf (explaining that over 99% of voluntary departures in 2005 "involved aliens who were apprehended by the Border Patrol and returned quickly").

[116] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 566 n.19 (1976).

[117] *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 92, at 93 tbl.35.

[118] *See* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL JUSTICE SYSTEM, 2010, at 13 (2012).

[119] *Id.* at 7. Since the time *Lopez-Mendoza* came down, the number of criminal immigration cases has multiplied by a factor of ten. *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 2000, at 5 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/iofcjs00.pdf (finding that prosecutors brought criminal immigration charges against 7239 offenders in 1985), *with* SYRACUSE UNIV., TRANSACTIONAL ACCESS RECORDS CLEARINGHOUSE (TRAC), DECLINE IN FEDERAL CRIMINAL IMMIGRATION PROSECUTIONS (2012), *available at* http://trac.syr.edu/immigration/reports/283/ (reporting over 72,000 criminal prosecutions in 2010).

[120] That is, ICE agents are often suspicious of an immigrant's lawful status only to find later that the alien was previously deported and thus likely guilty of criminal reentry. *See, e.g.*, United States v. Lara-Garcia, 478 F.3d 1231, 1232–33 (10th Cir. 2007).

to successful suppression motions, the aliens remain eligible for deportation where the *Lopez-Mendoza* restriction applies.[121] Because removal is ultimately the primary goal of immigration enforcement,[122] the outcome of subsequent criminal proceedings is, to a large extent, irrelevant to ICE agent incentives in the field.

Justice O'Connor was not blind to the possibility that time could prove her favored rule intolerably deleterious to immigrant rights: in closing, she cautioned that "[o]ur conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[123] One recent study may fit the bill. A review of ICE raids in New York and New Jersey documented evidence of recurring Fourth Amendment violations.[124] In fact, one immigration court, on its way to granting an alien's suppression motion, relied on the study to censure ICE for "widespread" violations of the Fourth Amendment in the court's jurisdiction.[125] Additional studies in this mold, covering other regions of the country, may draw further attention to the realities of contemporary enforcement that undermine *Lopez-Mendoza*'s foundations.

2. The ICE Exception to the Fourth Amendment. — Several students and scholars have called upon the Court to revisit *Lopez-Mendoza* in light of developments in immigration policy.[126] Their analyses, however, have focused on the decision itself without situating *Lopez-Mendoza* within the broader context of a Supreme Court unmistakably skeptical of expanding access to the exclusionary rule.[127] In a narrow sense, the Court's retreat has been marked by aversion to any rationales for the rule other than deterrence. In that respect, casting doubt solely upon *Lopez-Mendoza*'s deterrence analysis would not require any departure from the dominant deterrence-focused trend.

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[121] In fact, other than drug charges, the most likely predicate criminal offense for deportation is an immigration-related crime, such as illegal reentry. *See* U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 4 (2011).

[122] ICE press releases and reports repeatedly invoke the mantra that ICE "prioritizes *removal* of criminal aliens." *E.g.*, *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (emphasis added) (last visited Mar. 3, 2013).

[123] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

[124] *See* BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 9–10 (2009), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

[125] Treadwell, *supra* note 11, at 559 (quoting *In re* R-C- and J-C-, slip op. at 16–17 (N.Y.C. Immigration Ct. May 12, 2010)).

[126] *See* sources cited *supra* note 24; *see also* Jonathan L. Hafetz, *The Rule of Egregiousness:* INS v. Lopez-Mendoza *Reconsidered*, 19 WHITTIER L. REV. 843, 845–46 (1998).

[127] For one exception briefly pointing out that *Lopez-Mendoza*'s holding cannot be justified by the dominant categories of deterrence-based exceptions to the exclusionary rule's availability, see Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 393–95 (2003).

However, it would be naïve to conclude that deterrence theory alone explains the Court's retreat; as Justice Ginsburg recently put it, some members of the Court once held "a more majestic conception of . . . the exclusionary rule,"[128] and it is the patent abandonment of this mood that may elicit skeptical reactions to calls to reexamine *Lopez-Mendoza*.

But one need not regard the exclusionary rule with "majestic" esteem to cast aspersions on *Lopez-Mendoza*'s ramifications, which distinguish the decision from the Court's exclusionary rule retreat. Moreover, recent trends have aggravated these effects.

As the sole exclusionary rule decision that comes close to exempting an entire law enforcement bureaucracy from Fourth Amendment judicial scrutiny, *Lopez-Mendoza* carries significant potential for rampant and unchecked invasions of protected privacy interests. One of the core justifications for the regulatory trappings of modern Fourth Amendment jurisprudence — that is, a general rule favoring warrants, the probable cause requirement, and of course, the exclusionary rule — was the rise of bureaucratized police forces set apart from the community at large.[129] This trend led to the development of a "police culture" prone to abuse because the drive to prevent and investigate crime had the tendency to become a single-minded effort blind to the significance of competing societal values.[130]

Though the immigration-enforcement regime has long been subject to a similar risk of overreach,[131] that risk has become particularly striking following the organizational response to the attacks of Sep-

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[128] Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)) (internal quotation marks omitted).

[129] *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 833–38, 844, 847 (1994).

[130] *See id.* at 853–54. *But see* Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1712–15 (2009) (describing how reforms have curbed some abusive police proclivities even though others remain).

[131] *See* Josiah McC. Heyman, *Putting Power in the Anthropology of Bureaucracy: The Immigration and Naturalization Service at the Mexico–United States Border*, 36 CURRENT ANTHROPOLOGY 261, 267–69 (1995) (describing immigration officers' training in and devotion to the immigration enforcement mission, their idealized, narrow conceptualization of American citizenship, and their sometime reliance upon military analogies to describe enforcement). In the immigration context, fidelity to mission can also trigger abuse out of frustration when officers perceive the "futility of enforcing U.S. immigration laws" and seek to impose informal punishments that they believe unauthorized immigrants deserve. HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED 2 (1992); Heyman, *supra*, at 271. In fact, immigration enforcement authorities may be more prone to abuse their authority than are local police. *See* David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 212–13 (2012) (arguing that unlike nonimmigration law enforcement agencies, which are more decentralized and thus held accountable locally, the centralized federal immigration bureaucracy has traditionally been more insulated from effective checks).

tember 11, 2001.[132] Before 9/11, the INS, which included a division responsible for investigations of unlawful presence and subsequent deportations, was an office within the Department of Justice.[133] Following the attacks, in an effort to centralize any government actors with duties even remotely relevant to detecting and frustrating terrorist attacks, Congress created DHS.[134] The reorganization splintered the former INS into three new semiautonomous agencies subsumed within the new homeland security smorgasbord,[135] in effect segregating efforts to punish immigration-law offenders from the humanitarian refugee-related and lawful-migration processing responsibilities previously handled within the same office.[136] This bureaucratic divorce had elicited near-consensus backing from advocates of INS reform,[137] in large part because the absence of clear lines of division between enforcement responsibilities and processing services was thought to have frustrated effective accountability.[138] But this division may have had the collateral effect of aggravating the enforcement regime's propensity for overreach by limiting enforcement officers' interaction[139] with professionals whose duties would have led them to understand and learn about immigration enforcement through a humanitarian lens.[140]

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[132] *See* MICHELLE MITTELSTADT ET AL., MIGRATION POLICY INST., THROUGH THE PRISM OF NATIONAL SECURITY: MAJOR IMMIGRATION POLICY AND PROGRAM CHANGES IN THE DECADE SINCE 9/11, at 1–2 (2011), *available at* http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf (describing the post–9/11 reorganization).

[133] Marian L. Smith, *Overview of INS History to 1998*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 27, 2009), http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b7294b0738f70110VgnVCM1000000ecd190aRCRD&vgnextchannel=bc9cc9b1b49ea110VgnVCM1000004718190aRCRD.

[134] *See* Charles Perrow, *The Disaster after 9/11: The Department of Homeland Security and the Intelligence Reorganization*, 2 HOMELAND SEC. AFF. 9–10 (2006); *see also id.* at 12 (criticizing the decision to "merge[] agencies that, along with their security roles, had responsibilities for such activities unrelated to terrorism as fisheries, river floods, animal diseases, energy reliability, computer crime, citizenship training, tariffs on imports, drug smuggling, and the reliability of telephone networks").

[135] MITTELSTADT ET AL., *supra* note 132, at 2.

[136] These refugee-related duties are now managed by the U.S. Citizenship and Immigration Services (USCIS). *See About Us*, U.S. CITIZENSHIP & IMMR. SERVICES (Sept. 12, 2009), http://www.uscis.gov/aboutus.

[137] LISA M. SEGHETTI, CONG. RESEARCH SERV., RL31388, IMMIGRATION AND NATURALIZATION SERVICE: RESTRUCTURING PROPOSALS IN THE 107TH CONGRESS 1 (2002).

[138] *See id.* at 15–16.

[139] By some reports, the USCIS and ICE have encountered difficulties in their post-reorganization working relationship. ALISON SISKIN ET AL., CONG. RESEARCH SERV., RL33351, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 70 (2006).

[140] For a description of the humanitarian goals embedded in the Refugee Act, enforced by the INS and now by the USCIS, see Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 923–24 (1990), which describes the humanitarian bent to the Act's definition of "refugee" but criticizes implementation for giving short shrift to humanitarian interests. Requiring agencies with distinct missions and bureaucratic cultures to work together, even at an in-

Undoubtedly, the creation of DHS facilitated the development of an immigration enforcement network that defines itself by and operates on the basis of a terrorist-fighting mission, a mission exposed to the same risk of law enforcement abuse that inspires Fourth Amendment regulation. In fact, the gravity of the terrorist threat makes this dynamic even more pronounced than the tendency for tunnel vision among police forces generally.[141] ICE leaders and officers adhere to antiterrorism norms, justifying policies and practices on the basis of an asserted connection to terrorism[142] even though only a tiny fraction of deportation cases or immigration detentions have a plausible nexus to terrorist activity.[143] More broadly, by its very nature as an agency designed to enforce an antiterrorism "precautionary principle," DHS is biased toward stringency in enforcement[144] and, therefore, may not be the most fitting home for the implementation of an immigration policy sensitive to humanitarian norms.[145] This stringency bias helps to explain the breakdown in translation of humanitarian-minded White House immigration initiatives into policies implemented by resistant ICE employees.[146]

Aliens possess few alternative remedies that are even remotely effective in attaining a court's review of Fourth Amendment viola-

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formal level, helps to dissipate closed-mindedness and facilitates reasoned decisionmaking. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184 (2012). Of course, this phenomenon is not a one-way street; thus, if the enforcement-officer mentality became dominant and fixed within the broader INS culture by coloring the perspectives of even workers with a nonenforcement portfolio, the ultimate effect of the DHS reorganization on the probability of enforcement abuse may have been negligible. *See* DEMETRIOS PAPADEMETRIOU ET AL., REORGANIZING THE IMMIGRATION FUNCTION (1998), *available at* http://www.carnegieendowment.org/files/Reorganizing_Full1.pdf ("[One] criticism posits that the culture of the agency has bred an 'enforcement mentality' that 'infects' INS personnel undertaking other tasks.").

[141] *See* Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 114–16 (2005).

[142] *See* AMNESTY INT'L, JAILED WITHOUT JUSTICE 4 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

[143] *See Immigration Enforcement: The Rhetoric, The Reality*, TRAC IMMIGR. (May 28, 2007), http://trac.syr.edu/immigration/reports/178/.

[144] *See* JOHN MUELLER & MARK G. STEWART, TERROR, SECURITY, AND MONEY 6, 14–17 (2011); *see also* M. Isabel Medina, *Immigrants and the Government's War on Terrorism*, 6 CR: THE NEW CENTENNIAL REV. 225, 230 (2006) ("[T]he reorganization's symbolic message to American society and the world at large was that immigration was inextricably intertwined with terrorism.").

[145] *See* Rachel E. Barkow, *Prosecutorial Administration* 33–37 (NYU Sch. of Law, Pub. Law Research Paper Series, Working Paper No. 12-41, 2012) (explaining how, in multimission agencies, one mission often becomes dominant and trumps competing concerns).

[146] *See* Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 57 (2012); Stephen Lee, *Workplace Enforcement Workarounds*, 21 WM. & MARY BILL RTS. J. 549, 573 (2012).

tions.[147] And as section C.1 explains, the limited deterrence provided by the exclusionary rule's availability in criminal immigration cases is a poor substitute for a removal-hearing suppression remedy. Thus, when one ICE officer reportedly told an immigrant during a raid that "we don't need a warrant; we're ICE,"[148] he was not far off the mark, at least from a Holmesian "bad man" perspective.[149]

D. Conclusion

The status quo is failing. Lower courts have attempted but largely failed to transform *Lopez-Mendoza*'s vague notion of egregiousness into a workable standard consistent with contemporary exclusionary rule doctrine. And due to the growing reliance of ICE on local and state detention regimes to identify unauthorized immigrants, *Lopez-Mendoza*'s silence on the issue persists as the facilitator of a dangerous gap in the doctrine. Most importantly, changes to immigration enforcement and the Court's attitude toward enforcement have undermined the decision's analysis and amplified its distinguishing flaws, in particular its de facto exemption of ICE from meaningful Fourth Amendment scrutiny. In short, the case for starting over has never been stronger.

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[147] *See, e.g.*, Peter Margulies, *Noncitizens' Remedies Lost?: Accountability for Overreaching in Immigration Enforcement*, 6 FLA. INT'L U. L. REV. 319, 321–22 (2011) (explaining that courts often dismiss *Bivens* suits by undocumented immigrants after finding "special factors [that] counsel[] hesitation") (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (second alteration in original) (internal quotation marks omitted)). Furthermore, as Justice White pointed out in *Lopez-Mendoza* itself, aliens, once deported, have no realistic means to file civil suits from outside the country. INS v. Lopez-Mendoza, 468 U.S. 1032, 1055 (1984) (White, J., dissenting).

[148] Lindsay Kee, *"We Don't Need a Warrant, We're ICE,"* ACLU (Oct. 21, 2011, 5:46 PM), http://www.aclu.org/blog/content/we-dont-need-warrant-were-ice.

[149] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

CHAPTER FOUR

REPRESENTATION IN REMOVAL PROCEEDINGS

A. Introduction

There are few, if any, civil contexts in which the presence of competent counsel is as critical as it is in removal proceedings.[1] The stakes are enormous; the field of law, exceedingly complex; and the barriers — such as noncitizens' language difficulties and lack of familiarity with the legal system — considerable. Indeed, the conclusion of several recent studies that representation by counsel is among the most important factors affecting the outcome of immigration proceedings is significant, but unsurprising.[2] And yet, available figures paint a dire picture of both the availability and quality of immigrant representation in removal proceedings. Of the approximately 300,000 immigration proceedings completed each year, only about half involve noncitizens with representation.[3] And when noncitizens do retain counsel, that counsel can be of dubious quality: a 2008 survey, for example, reported federal and state judges' belief that immigration is the area of civil practice "in which the quality of representation [is] lowest."[4] "Crisis" is not too strong a word to describe the current state of representation in removal proceedings.

This Chapter traces recent developments affecting legal representation in removal hearings, proceeding in three sections. The first sec-

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[1] Until 1996, immigration proceedings were bifurcated into deportation and exclusion proceedings. In deportation proceedings, the government sought to remove someone it had already admitted to the country; in exclusion proceedings, it sought to bar someone from entering the country altogether. *See* Judulang v. Holder, 132 S. Ct. 476, 479 (2011). In 1996, legislation consolidated deportation and exclusion proceedings into the "unified procedure" of a removal proceeding. *Id.* at 479–80.

[2] *See, e.g.*, N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 3 (2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf [hereinafter ACCESSING JUSTICE]. For a study examining the impact of representation in asylum proceedings, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) ("[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.").

[3] *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK, at G1 (2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf ("The percentage of represented aliens for [fiscal year] 2007 to [fiscal year] 2011 ranged from 45 percent to 51 percent.").

[4] Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011). Fifty-seven percent of federal appellate judges reported that immigration is the field of law in which they perceive the most significant disparities in legal representation. *Id.* at 331.

tion identifies and examines two developments — the proliferation of immigrant detention and the exacerbation of legal complexity — that have undercut the quality of, and access to, legal representation. The second section turns to two recent Supreme Court decisions, *Padilla v. Kentucky*[5] and *Turner v. Rogers*.[6] These cases have given new life to the argument for a right to counsel in removal proceedings, most importantly by undermining one of the key conceptual barriers to that right — namely, that deportation is a civil sanction rather than a criminal punishment. Finally, the third section assesses how the law has evolved and *should* evolve in response to the above developments. Specifically, this section proposes a right to appointed counsel for three classes of noncitizens — lawful permanent residents, the mentally ill, and juveniles — and suggests other means of strengthening representation in removal proceedings.

B. Representation: Crucial, yet Stymied

Removal proceedings have long been treated as falling under the civil paradigm.[7] The Sixth Amendment attaches only to criminal proceedings; thus, noncitizens in removal proceedings possess no right to appointed counsel.[8] Still, removal hearings are subject to constitutional and statutory requirements that bear on a right to counsel. Under the Immigration and Nationality Act[9] (INA), noncitizens are entitled to "the privilege of being represented" by counsel, but "at no expense to the Government."[10] Moreover, longstanding Supreme Court doctrine entitles noncitizens to Fifth Amendment due process protections in deportation proceedings[11] (though not in exclusion hearings[12]). Some federal appeals courts have interpreted the Fifth Amendment as also affording noncitizens who are able to obtain counsel a right to *ef-*

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[5] 130 S. Ct. 1473 (2010).

[6] 131 S. Ct. 2507 (2011).

[7] *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1308–12 (2011).

[8] *See id.* at 1302.

[9] 8 U.S.C. §§ 1101–1537 (2006 & Supp. V 2011).

[10] *Id.* § 1362 (2006).

[11] Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903); *see also* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[12] Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 634 (2006) (citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950)) (noting that, under existing doctrine, Fifth Amendment protections do not attach in exclusion proceedings). Though the Supreme Court held in *Landon v. Plasencia*, 459 U.S. 21 (1982), that a permanent resident alien returning from a visit abroad was entitled to procedural due process in her exclusion hearing, the Court carefully limited that finding to "the circumstances of [that] case." *Id.* at 32.

fective assistance of counsel,[13] but the Supreme Court has not yet addressed whether that right exists.

This section discusses two developments that have detracted from quality representation and rendered the presence of competent counsel ever more important: the expansion of immigrant detention and the increasing complexity of immigration law.

1. Immigrant Detention. — Immigrant detention is by no means a recent development; its tremendous growth, however, is. Courts and commentators alike have observed the adverse impact of detention on the right to counsel, and recent empirical work has helped substantiate this connection.

It is no overstatement to say that the use of immigrant detention has exploded over the last two decades.[14] In 1994, the government held approximately 6000 noncitizens in detention on any given day and detained about 81,000 over the course of the whole year; by 2008, those figures had swelled to around 33,000 and 380,000, respectively.[15] Nearly half of noncitizens now subject to removal proceedings are detainees.[16] The sharp increase is attributable largely to mandatory detention laws. These policies "subject ever-larger categories of individuals to removal charges and custody,"[17] including noncitizens allegedly removable on criminal grounds, who are detained after release from criminal custody; returning permanent residents and asylum-seekers who have been deemed inadmissible and are therefore subject to detention by Immigration and Customs Enforcement (ICE); and individuals with "final administrative removal orders" who are detained while judicial review is pending or ICE is attempting removal.[18] Immigrant detention has grown increasingly lengthy as well: each year, some 19,000 individuals are held for over four months, while 2100 are detained for over a year.[19] To be sure, the length of an immigrant's de-

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[13] *See, e.g.*, Iavorski v. INS, 232 F.3d 124, 128–29 (2d Cir. 2000); Lozada v. INS, 857 F.2d 10, 13 (5th Cir. 1988). However, a growing number of courts have expressed skepticism about the existence of such a right or flatly stated that none exists. *See, e.g.*, Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).

[14] *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–45 (2010).

[15] *Id.* (citing DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POLICY INST., IMMIGRANT DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6–7 (2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf).

[16] *Id.* at 45 (citing EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at O1 fig.23 (2009), *available at* http://www.justice.gov/eoir/statspub/fy08syb.pdf).

[17] *Id.*

[18] *Id.* at 45–46.

[19] *Id.* at 49.

tention is subject to constitutional constraints,[20] but in *Demore v. Kim*,[21] the Supreme Court upheld the constitutionality of mandatory detention of noncitizens pending immigration proceedings.[22]

As immigrant detention has expanded, so have ICE transfers and other detention-related practices. Expensive and increasingly scarce detention space in California and the Northeast has required ICE to transfer detainees to facilities in "far-flung" locations with surplus beds[23] — often in "rural, geographically isolated" areas.[24] The rate of these transfers, like the frequency of detention, has increased dramatically in recent years. In 1999, 74,329 immigrants were transferred between detention facilities; by 2007, that figure had risen to 261,941.[25] An additional problematic practice is the issuance of "immigration detainers," ICE documents that advise federal, state, and local enforcement agencies holding a noncitizen that ICE is seeking to obtain custody and deport him or her.[26] While the use of detainers is not new, they have been increasingly issued for individuals "at earlier stages in criminal proceedings" under the recently adopted Secure Communities program.[27] The enforcement of detainers not only prolongs a noncitizen's detention in the custody of enforcement agencies — pursuant to detainers, individuals can be held for up to forty-eight hours (excluding weekends and holidays), and are often held for longer[28] — it also potentially brings about one's detention by ICE, since individuals who would not otherwise be detained are taken into custody by ICE.

Among the host of issues that detention and transfer policies raise is the profound impact of these practices on noncitizens' ability to access counsel. A major impediment is financial: detention prevents immigrants from maintaining employment, and absent a source of in-

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[20] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (finding that indefinite and potentially permanent detention of an immigrant violates due process).

[21] 538 U.S. 510 (2003).

[22] *Id.* at 531. For an alternative view, see *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 223 (3d Cir. 2011), and *Diouf v. Napolitano*, 634 F.3d 1081, 1084 (9th Cir. 2011), discussed *infra* p. 1679.

[23] Kalhan, *supra* note 14, at 48 (citing DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6–9 (2009)).

[24] César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 20 (2011).

[25] *Id.* at 19–20 (citing HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 29 tbl.1 (2009)).

[26] KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 1 (2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf. Detainers are requests, not legal orders. *Id.*

[27] *Id.*

[28] *See id.* at 2 n.11.

come many detainees simply cannot afford to retain counsel.[29] This and other constraints — the distant and often isolated locations of detention facilities, ICE transfers, detainees' limited access to outside communication, and the psychological impact of detention — frustrate detainees' ability both to retain counsel and to consult with a lawyer to meaningfully prepare a case.[30] That immigrant detainees are especially ill-equipped for pro se representation — they have a far more limited ability to engage in factfinding or conduct research than nondetained noncitizens do[31] — makes the presence of counsel in this context all the more crucial.

Both courts and commentators have noted the myriad means by which detention and transfer policies impede an immigrant detainee's access to counsel.[32] More recent, however, is the emergence of empirical work studying the difficulty of surmounting these obstacles. The New York Immigrant Representation Study (NYIRS), a study of immigrant representation in New York published in December 2011, revealed that detention is one of the two most important variables affecting a proceeding's outcome (the other being the presence of counsel).[33] The NYIRS found that 60% of detained immigrants do not have counsel by the time their cases are completed, in contrast to 27% for nondetained individuals.[34] Transfer policies exacerbate this gap: individuals who are transferred from New York to detention centers in remote areas — most often Louisiana, Pennsylvania, and Texas — go unrepresented 79% of the time.[35] What's more, whether an individual is detained acutely affects the likelihood of relief: 74% of immigrants who have representation and are released or never detained have "successful outcomes,"[36] compared to 18% for represented and detained immigrants.[37] Even accounting for selection effects — that is, the possibility that lawyers select cases with clients who are already likely to

[29] Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 126 (2008).

[30] *Id.* at 127.

[31] *Id.* at 116.

[32] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., concurring in part and dissenting in part) (noting the INS's power to "detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence"); HUMAN RIGHTS WATCH, *supra* note 25, at 4 ("Almost invariably, there are fewer prospects for finding an attorney in the remote locations to which [detained immigrants] are transferred.").

[33] ACCESSING JUSTICE, *supra* note 2, at 3.

[34] *Id.*

[35] *Id.*

[36] *Id.* The authors of the study define "successful outcome" as a grant of relief or a termination of a proceeding, both of which entitle a person to remain in the United States. *Id.*

[37] *Id.* The corresponding numbers for unrepresented immigrants were 13% and 3%. *Id.*

prevail — these figures are troubling.[38] Immigrant detention therefore raises concerns not merely for its own sake, but also because of its stifling impact on noncitizens' access to counsel and capacity to prevail in removal proceedings.

2. Legal Complexity. — It has not escaped the Supreme Court's notice that "the complexity of immigration procedures" is part of what "make[s] legal representation in deportation proceedings especially important."[39] To be sure, the complexity of immigration law is no new phenomenon, and it has even softened in some respects in recent years. However, it has also intensified in significant ways, especially with respect to the law that applies in removal hearings. This complexity has rendered the presence of competent counsel even more important for safeguarding immigrant interests and promoting fairness in immigration proceedings.

By way of brief background, major changes to immigration law were introduced in 1996 through the enactment of the Antiterrorism and Effective Death Penalty Act of 1996[40] (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[41] (IIRIRA). Among other things,[42] the new legislation — specifically, IIRIRA — amended the procedures for obtaining relief from removal in immigration proceedings. Prior to IIRIRA, lawful permanent residents could obtain waivers from deportation under section 212(c) of the INA[43] if they had accrued seven years of "unrelinquished domicile" and were otherwise eligible under statute.[44] In IIRIRA, however, Congress replaced 212(c) waivers with "Cancellation of Removal," codified at section 240A of the INA, for permanent residents in removal proceedings on or after April 1, 1997.[45] Relief under section 240A(a) requires "seven years of 'continuous residence,' and five years of law-

[38] The authors consider, but reject, the possibility that selection effects account for the discrepancy in the success rates. *See id.* at 22 ("[T]he power of the representation variable makes it unlikely that [the strength of the relief claim] is the only causal factor." (second alteration in original) (quoting Ramji-Nogales et al., *supra* note 2, at 340) (internal quotation marks omitted)).

[39] Ardestani v. INS, 502 U.S. 129, 138 (1991).

[40] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

[41] Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

[42] For a comprehensive analysis of the changes effected by AEDPA and IIRIRA on immigration law, see generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

[43] 8 U.S.C. § 1182(c) (1994) (repealed 1996).

[44] Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief? — The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(a) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 1–2 (2000) (quoting 8 C.F.R. § 212.3 (1995)).

[45] *Id.* at 2.

ful permanent residence."[46] Moreover, section 440(d) of AEDPA amended the INA by prohibiting section 212(c) relief to noncitizens deportable for committing an aggravated felony, a controlled-substances offense, a firearms offense, or a crime involving moral turpitude.[47] The changes were not only harsh, but also complex.

The Supreme Court's 2001 decision in *INS v. St. Cyr*[48] and the accompanying jurisprudence is illustrative. In *St. Cyr*, the Court held that the relevant provisions of IIRIRA did not apply retroactively to noncitizens who pled guilty to applicable offenses prior to April 24, 1996, and for whom section 212(c) would have otherwise been available.[49] If the holding of *St. Cyr* was complex, the jurisprudence that has emerged in its wake is even more so. For example, a lawful permanent resident is not eligible for section 212(c) relief if she entered a plea between April 24, 1996, and April 1, 1997, for a conviction of an aggravated felony, a controlled-substances offense, a firearms offense, a listed miscellaneous crime, or multiple crimes involving moral turpitude.[50] Moreover, several circuits have found that a noncitizen with convictions that both pre- and postdate IIRIRA is eligible for section 212(c) relief if the immigration proceeding commenced prior to implementation of IIRIRA.[51] Some, but not all, circuits also require the noncitizen to show reliance on the continued availability of the section 212(c) provision in order to be eligible for relief.[52]

Another relevant example is the "stop-time" rule,[53] a measure introduced in IIRIRA to respond to "dilatory tactics" by some noncitizens seeking to acquire the minimum residence period required for eligibility for removal relief.[54] Prior to IIRIRA, time accrued during immigration proceedings counted toward this period of minimum residence; under the new rule, however, the accrual of continuous residence stops after a service of a Notice to Appear in a removal proceed-

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[46] *Id.* (quoting INA § 240A(a), 8 U.S.C. § 1229b(a) (2006 & Supp. V 2011)) (internal quotation marks omitted).

[47] *See* AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996) (codified as amended in scattered sections of 8 U.S.C.).

[48] 533 U.S. 289 (2001).

[49] *Id.* at 326.

[50] *See* 8 C.F.R. § 1212.3(h)(2) (2012); *see also* AEDPA § 440(d). As is well known, the phrase "moral turpitude" is anything but straightforward. *See, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) ("The meaning of ['moral turpitude'] falls well short of clarity. Indeed, as has been noted before, 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase.").

[51] *See, e.g.*, Pascua v. Holder, 641 F.3d 316, 321 (9th Cir. 2011); Enriquez-Gutierrez v. Holder, 612 F.3d 400, 412 (5th Cir. 2010); Garcia-Padron v. Holder, 558 F.3d 196, 204 (2d Cir. 2009).

[52] *See* Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir. 2007); Wilson v. Gonzales, 471 F.3d 111, 113 (2d Cir. 2006).

[53] Hunker, *supra* note 44, at 2 (internal quotation marks omitted).

[54] *Id.*

ing or at the moment a noncitizen commits an offense that renders her inadmissible under section 212(c) of the INA.[55] The stop-time rule may appear straightforward enough, but in reality it is fraught with complexities. For example, as noted above, to be eligible for relief from removal a lawful permanent resident must meet two residence requirements: continuous residence in the United States for seven years after lawful admission, and five years in the country as a lawful permanent resident.[56] The stop-time rule, however, only applies to the former residence requirement; it does not prevent the lawful permanent resident from accruing the five-year residence requirement during immigration proceedings.[57] Another subtle wrinkle arises from the difference between grounds for deportability and inadmissibility. Specifically, a noncitizen convicted of an offense that constitutes a ground for deportability but not inadmissibility (for example, unlawful possession of a firearm) will not be subject to the stop-time rule.[58] Likewise, a noncitizen convicted of a single crime involving moral turpitude is able to elude the stop-time rule where the offense qualifies under the INA's petty offense exception,[59] even if the offense would render the noncitizen deportable under the INA.[60]

These patchwork rules, along with other complex and nebulous aspects of relief from removal doctrine,[61] have rendered the presence of competent counsel more critical for noncitizens in removal proceedings. Indeed, it is worth emphasizing that relief from removal rules — in contrast to, for example, laws setting out the grounds for deportability — place the burden squarely on the noncitizen to raise the defense and advocate for its application. Considered in light of many noncitizens' lack of knowledge about the fundamentals of the legal system, this feature of the doctrine heightens the need for counsel.

C. *Taking Deportation Seriously and Moving Away from Categorical, Label-Driven Due Process Doctrine:* Padilla *and* Turner

At the same time that changes in law and policy have detracted from the level of and access to immigrant representation, the Supreme Court has evinced a greater sensitivity to the severity of deportation and has moved further away from a civil-criminal dichotomy with re-

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[55] *See id.*

[56] *Id.*

[57] 8 U.S.C. § 1229b(d)(1) (2006 & Supp. V 2011).

[58] *See, e.g.*, *In re* Campos-Torres, 22 I. & N. Dec. 1289, 1295 (B.I.A. 2000).

[59] 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

[60] *Id.* § 1227(a)(2).

[61] The new standard of "exceptional and extremely unusual" hardship for nonpermanent residents seeking cancellation of removal is one example. *See generally, e.g.*, *In re* Andazola-Rivas, 23 I. & N. Dec. 319 (B.I.A. 2002); *In re* Monreal-Aguinaga, 23 I. & N. Dec. 56 (B.I.A. 2001).

spect to the right to appointed counsel. In *Padilla v. Kentucky*, the Court found that an attorney who failed to advise his client of the deportation consequences of a guilty plea provided ineffective assistance under the Sixth Amendment.[62] And in *Turner v. Rogers*, the Court applied a due process analysis in deciding whether an indigent defendant confined in a civil contempt case is automatically entitled to appointed counsel, ultimately answering in the negative.[63] Though *Padilla* and *Turner* appear at first glance to cut in different directions, the Court's reasoning in both cases weighs in favor of a right to counsel in removal proceedings.

1. Padilla v. Kentucky. — In 2002, Jose Padilla, a lawful permanent resident of the United States for over four decades and veteran of the Vietnam War, pled guilty to drug charges in Kentucky; he claimed he did so on his lawyer's erroneous advice that he would not be deported.[64] Facing mandatory deportation as a result of his plea, Padilla subsequently sought postconviction relief on Sixth Amendment ineffective assistance of counsel grounds, but the Supreme Court of Kentucky denied his claim.[65]

The Supreme Court reversed and remanded.[66] Writing for a five-member majority, Justice Stevens began with an observation about the remarkable expansion of deportable criminal offenses in the last ninety years.[67] "The 'drastic measure' of deportation,"[68] Justice Stevens noted, had once applied to only a narrow set of offenses; now, it is "virtually inevitable" for a large number of individuals.[69] What's more, a greater number of offenses today result in automatic deportations; while judges once possessed discretion to remedy unjust outcomes in individual cases, that discretion has almost been completely eliminated.[70] These changes, Justice Stevens continued, "have dramatically raised the stakes" of criminal conviction and rendered deportation an "integral part" — "sometimes the most important part" — of the penalty imposed on noncitizens.[71]

Turning to Padilla's claim, the Court rejected the rule, applied by the Kentucky Supreme Court, that a conviction's collateral conse-

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[62] 130 S. Ct. 1473, 1486 (2010).

[63] 130 S. Ct. 2507, 2520 (2011).

[64] *Padilla*, 130 S. Ct. at 1477–78. Padilla claimed his counsel told him that he "did not have to worry about immigration status since he had been in the country so long." *Id.* at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)) (internal quotation marks omitted).

[65] *Id.*

[66] *Id.* at 1487.

[67] *See id.* at 1478.

[68] *Id.* (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

[69] *Id.*

[70] *See id.* at 1478–80.

[71] *Id.* at 1480.

quences are always outside the scope of the Sixth Amendment.[72] The Court found it unnecessary to definitively resolve the issue, however, because of deportation's "unique nature."[73] While noting that deportation "is not, in a strict sense, a criminal sanction" and that "removal proceedings are civil in nature,"[74] the Court granted that deportation is an especially "severe 'penalty,'"[75] is "intimately related to the criminal process,"[76] and is "uniquely difficult to classify" as a direct or collateral consequence of the conviction.[77] The Court concluded that the direct-collateral distinction is thus poorly suited for this context, and held that the Sixth Amendment is applicable.[78] The Court then found that the conduct of Padilla's counsel was constitutionally deficient and remanded on the issue of prejudice.[79] Justice Alito, joined by Chief Justice Roberts, filed an opinion concurring in the judgment,[80] and Justice Scalia, joined by Justice Thomas, filed a dissent.[81]

2. Turner v. Rogers. — Because immigration proceedings are classified as "civil," arguments for a right to appointed counsel for noncitizens must contend with the Court's long history of denying a right to counsel in most, although not all, civil proceedings. *Turner* is the latest episode in that history and must first be contextualized within it.

In the watershed decision of *Gideon v. Wainwright*,[82] the Supreme Court held that indigent state criminal defendants are constitutionally entitled to appointed counsel.[83] The Court's decision applied only to criminal proceedings,[84] but in two subsequent cases the Court laid the foundation for an extension of *Gideon* to civil proceedings.[85] First, in

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[72] *See id.* at 1481.

[73] *Id.*

[74] *Id.* (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)).

[75] *Id.* (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).

[76] *Id.*

[77] *Id.* at 1482.

[78] *Id.* The reach of *Padilla* has been limited by *Chaidez v. United States*, No. 11-820, 2013 WL 610201 (U.S. Feb. 20, 2013), which held that under the principles of *Teague v. Lane*, 489 U.S. 288 (1989), the rule in *Padilla* does not apply retroactively. *Chaidez*, 2013 WL 610201, at *3. The *Chaidez* Court, however, reaffirmed *Padilla*'s pronouncement that deportation is "unique." *Id.* at *6 (quoting *Padilla*, 130 S. Ct. at 1481) (internal quotation marks omitted).

[79] *Padilla*, 130 S. Ct. at 1486–87.

[80] *Id.* at 1487 (Alito, J., concurring in the judgment). Justice Alito and Chief Justice Roberts would have limited the Sixth Amendment's reach to only those cases in which an attorney affirmatively misleads — instead of merely failing to advise — a client about the removal consequences of a conviction. *Id.*

[81] *Id.* at 1494 (Scalia, J., dissenting). Justices Scalia and Thomas dissented on the grounds that deportation is merely a collateral consequence of a criminal conviction, to which Sixth Amendment protections do not attach. *Id.* at 1494–95.

[82] 372 U.S. 335 (1963).

[83] *Id.* at 339–42.

[84] *Id.* at 344.

[85] *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 979 (2012).

In re Gault,[86] the Court held that a right to counsel extends to juveniles in delinquency proceedings.[87] Though such proceedings had been characterized as civil rather than criminal to avoid application of the Sixth Amendment,[88] the Court reasoned that due process warrants a categorical rule to protect juveniles' liberty interests.[89] Then, in *Argersinger v. Hamlin*,[90] the Court found that the protections of the Sixth Amendment applied not just to felonies, but also to any criminal prosecution resulting in incarceration, however limited the sentence.[91] *Argersinger* thus "set a low bar for liberty interests" compared to the relatively "serious deprivations" involved in some civil cases, including removal proceedings.[92]

However, the Court subsequently struck a major blow to the civil application of *Gideon* in *Lassiter v. Department of Social Services*.[93] There, the Court found that indigent parents are not entitled to counsel in proceedings to terminate their parental rights.[94] While applying the case-by-case approach it had formulated in prior cases[95] — one that bases the due process analysis on whether proceedings comport with "fundamental fairness"[96] in any given case — the Court stated that a right to appointed counsel is presumed only where an indigent defendant "may lose his personal freedom."[97]

For decades following *Lassiter*, the Supreme Court did not revisit the right to counsel in civil cases, but it reentered the fray in 2011 in *Turner*. The issue there was whether an indigent defendant who could be incarcerated following a civil contempt proceeding is automatically entitled to appointed counsel.[98] The Court answered in the negative.[99] Justice Breyer, writing for the majority,[100] clarified that cases concerning a right to counsel in civil matters have found a presumption of that right "'*only*' in cases involving incarceration," without stating that the

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[86] 387 U.S. 1 (1967).

[87] *Id.* at 41.

[88] *Id.* at 59 (Black, J., concurring).

[89] *Id.* at 36–42 (majority opinion).

[90] 407 U.S. 25 (1972).

[91] *Id.* at 37.

[92] Barton & Bibas, *supra* note 85, at 979.

[93] 452 U.S. 18 (1981).

[94] *Id.* at 33.

[95] *See* Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973).

[96] *Lassiter*, 452 U.S. at 26 (internal quotation marks omitted).

[97] *Id.* at 27.

[98] Turner v. Rogers, 131 S. Ct. 2507, 2512 (2011). As the Court explained: "Civil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." *Id.* (alteration in original) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)).

[99] *Id.*

[100] Justice Thomas dissented, joined by Justice Scalia and joined in part by Chief Justice Roberts and Justice Alito.

right "exists in *all* such cases."[101] Applying the due process analysis established in *Mathews v. Eldridge*,[102] the Court rested its holding on three considerations: that the issues in these proceedings are often "straightforward,"[103] that providing counsel to only one party in these cases would create "an asymmetry of representation,"[104] and that there was a set of "substitute procedural safeguards" adequate to protect against an erroneous denial of liberty.[105] The Court also emphasized the narrowness of its holding; it stressed that due process "does not *automatically* require" the presence of counsel in civil contempt proceedings and that its holding did not apply to contexts where the legal issues are complex or the proceedings are initiated by the government.[106]

3. A Context-Sensitive Approach to Due Process. — Together, *Padilla* and *Turner* undermine the rationale for the persisting civil-criminal distinction that applies to the right to counsel. These judicial opinions are not the first to question the civil-criminal dichotomy in the immigration context,[107] but the fact that *Padilla* and *Turner* are Supreme Court opinions gives them special force.

To be sure, *Padilla* is a Sixth Amendment case, and its holding directly bears on only *criminal* prosecutions. Nonetheless, as others have noted,[108] its reasoning and language have wider implications, including for the right to counsel in removal proceedings. The *Padilla* Court stopped short of designating deportation as criminal punishment, but its recognition that the sanction precludes simple categorization is itself noteworthy. Supreme Court Justices have acknowledged the harshness of deportation for over a century,[109] but in *Padilla* the Court went further by stressing the "unique" character of deportation[110] and by giving teeth to its previously hollow observations in the

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[101] *Turner*, 131 S. Ct. at 2517.

[102] 424 U.S. 319 (1976).

[103] *Turner*, 131 S. Ct. at 2518–19.

[104] *Id.* at 2519.

[105] *Id.* (quoting *Mathews*, 424 U.S. at 335) (internal quotation marks omitted).

[106] *Id.* at 2520.

[107] *See, e.g.*, Stroe v. INS, 256 F.3d 498, 505 (7th Cir. 2001) (Wood, J., concurring) (noting that the "criminal" and "civil" labels are imprecise, and that immigration proceedings may be a context in which the distinction between the two becomes blurred).

[108] *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1464 (2011); *see also* Stephen H. Legomsky, *Transporting* Padilla *to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43, 46 (2011) (arguing that the logic of *Padilla* offers support for the right to effective assistance of counsel in deportation proceedings).

[109] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

[110] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010). As commentators have recognized, there is a strong link between whether a sanction is collateral and whether it is civil; the Court's recognition that deportation defies simple categorization as either a direct or collateral consequence is thus immensely important. *See* Markowitz, *supra* note 7, at 1337.

form of tangible constitutional protections. Indeed, much of the Court's opinion was devoted to recounting changes that have expanded the frequency and mandatory nature of deportation — considerations that strongly support greater protections for noncitizens in removal proceedings. Moreover, in recognizing that deportation is "sometimes the most important part" of the penalty imposed on noncitizens in criminal proceedings,[111] the Court acknowledged — if impliedly — the illogic in continuing to treat deportation as civil sanction rather than criminal punishment. Even if the Court is not yet willing to recognize deportation as criminal punishment, neither is it satisfied with the law's current civil-criminal labels. Of course, *Padilla*'s implications should not be overstated; the Court reaffirmed that removal hearings are civil proceedings outside the scope of the Sixth Amendment,[112] and the Court gave no indication that it is now more likely to establish a *categorical* right to counsel in that context.[113] Nonetheless, *Padilla* conveys the view of five Supreme Court Justices that, put simply, deportation is different.

Turner, a due process case involving a civil proceeding, also evinces the Court's dissatisfaction with a rigid civil-criminal distinction. In taking a context-sensitive approach that leaves open the possibility of requiring appointed counsel in certain circumstances, the majority rejected the dissent's formalistic view that the appointment of counsel is necessary only in cases in which the Sixth Amendment requires it.[114] To be sure, the application of *Turner* to removal proceedings is not straightforward, not least because the Court's jurisprudence maintains a distinction between incarceration, where appointed counsel may be required, and other sanctions (including deportation), where it is not. Nonetheless, *Turner*'s reasoning, like *Padilla*'s, calls into question prevailing jurisprudential distinctions that are both rigid and unwarranted.

Beyond the civil-criminal dichotomy, *Padilla* and *Turner* have other implications for the right to counsel in removal proceedings. For its part, *Padilla* increases the incoherence of current jurisprudence by widening the gulf between an immigrant's rights in the criminal system and her rights in removal proceedings. Under current doctrine, an immigrant charged with an offense as light as subway-turnstile jumping has a constitutional right to counsel — including, under *Padilla*,

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[111] *Padilla*, 130 S. Ct. at 1480.

[112] *Id.* at 1481.

[113] *But see, e.g.*, Duncan Fulton, Comment, *Emergence of a Deportation* Gideon*?: The Impact of* Padilla v. Kentucky *on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219, 220–21 (2011).

[114] *See* Turner v. Rogers, 131 S. Ct. 2507, 2522 (2011) (Thomas, J., dissenting). The dissent also rested its conclusions on an originalist reading of the Due Process Clause and the Sixth Amendment, but only Justice Scalia joined this portion of Justice Thomas's dissent. *See id.* at 2521–22.

the right to be advised that a conviction may result in removal — even though she is unlikely to serve more than a day in jail.[115] However, the same individual would have no right to counsel in a subsequent removal proceeding. She may be "forced to navigate the labyrinthine world of immigration law on her own,"[116] even though lengthy detention and potentially permanent exile from her family and home would be at stake and even though, as the *Padilla* Court acknowledged, she is part of "a class of clients least able to represent themselves."[117] *Padilla* did not create this discrepancy, but the decision expands it and renders it increasingly difficult to justify.

As for *Turner*, although many proponents of a civil *Gideon* treated the decision as a loss,[118] the Court's reasoning actually supports at least a limited right to counsel in removal proceedings. As noted above, the Court's holding rested on three factors: simplicity, symmetry, and substitutable safeguards. All three factors weigh in favor of appointing counsel in removal proceedings. First, these hearings often present issues that are anything but straightforward. As discussed in detail above, immigration law is notoriously complex,[119] and in removal proceedings — where the question is often not whether a noncitizen can be removed (a relatively clear issue), but whether she can file a successful application for relief from removal (a far less clear one)[120] — the outcome often depends on vigorous advocacy and a thorough knowledge of the law. Second, because the government is always represented by lawyers at removal hearings, the presence of counsel for an indigent immigrant in a proceeding would cure, rather than cause, an asymmetry of representation. Indeed, other courts have suggested that more than normal process is due in civil contexts where the government acts like a prosecutor.[121] Finally, and partly because of immigration law's complexity,[122] safeguards short of appointed counsel may not be adequate to prevent unnecessary deportation. One could argue that the right to effective assistance[123] is precisely such a safeguard, but that right provides no protection to pro se immigrants.

[115] ACCESSING JUSTICE, *supra* note 2, at 1.

[116] *Id.*

[117] *Padilla*, 130 S. Ct. at 1484.

[118] *See* Barton & Bibas, *supra* note 85, at 970.

[119] *See, e.g.*, Escobar-Grijalva v. INS, 206 F.3d 1331, 1335 (9th Cir. 2000) (describing immigration law as a "labyrinth almost as impenetrable as the Internal Revenue Code").

[120] THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP 750 (7th ed. 2012).

[121] *See* Stroe v. INS, 256 F.3d 498, 501 (7th Cir. 2001) (noting a prior case's suggestion that "it might be arguable that more process and protection are due when the INS acts as a 'prosecutor' in deportation cases" (citing DeSilva v. DiLeonardi, 181 F.3d 865, 869 (7th Cir. 1999))).

[122] *See supra* pp. 1663–65.

[123] *See supra* p. 1660.

Thus, even if the Court is unlikely to recognize a right to counsel in removal proceedings soon, doing so would be supported by its reasoning in *Turner*.

D. Legal Reform

This section considers the ways in which the law should respond to the crisis of representation in removal proceedings. Specifically, this section examines movements toward a right to appointed counsel for limited classes of immigrants, measures addressed at curbing detention, and other policies.

1. Appointed Counsel for Certain Classes of Immigrants. — The Supreme Court has not considered whether the Due Process Clause affords a right to counsel in removal proceedings, but lower courts have addressed the issue. The first to do so was the Sixth Circuit[124] in *Aguilera-Enriquez v. INS*.[125] Reiterating the Supreme Court's case-by-case "fundamental fairness" test for due process,[126] the court stated: "Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the government's expense."[127] However, the court found that in the case before it, the petitioner had been afforded the opportunity to present his case adequately and that due process therefore was not violated.[128] The dissent argued that a case-by-case approach was inadequate and that "only a per se rule requiring appointment of counsel will assure a resident alien due process of law."[129] While many cases since *Aguilera-Enriquez* have reiterated the fundamental fairness test, no published opinion has applied the standard to require appointed counsel in a removal proceeding.[130]

In light of both the dubiousness of the civil-criminal dichotomy and the evidence substantiating the strong correlation between the presence of counsel and the probability of a successful outcome,[131] this section proposes a right to counsel for limited classes of immigrants. A class-specific right to counsel has at least four virtues over a categorical right to counsel in removal hearings. First, if a broad categorical right to counsel were recognized, it would likely siphon away much-needed funds from criminal defense or other tightly constrained areas.[132] The

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[124] Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1549 (2007).
[125] 516 F.2d 565 (6th Cir. 1975).
[126] *See supra* p. 1668.
[127] *Aguilera-Enriquez*, 516 F.2d at 569 n.3.
[128] *Id.* at 569.
[129] *Id.* at 573 (DeMascio, J., dissenting).
[130] ALEINIKOFF ET AL., *supra* note 120, at 1155.
[131] *See supra* p. 1662.
[132] *See* Barton & Bibas, *supra* note 85, at 980.

effect would likely be an expansion in quantity, but a diminution in quality, of legal representation for those most in need of it. Second, while neither a limited nor a categorical right to counsel appears easily achievable, the latter is likely to be substantially less feasible. Put otherwise, the possibility of persuading lawmakers or courts to embrace a right to counsel is likely higher where that right is tightly limited to certain groups. Third, and relatedly, the class-specific right to counsel is consistent with a common law approach in judicial decisionmaking, in that it counsels incremental — though not necessarily insignificant — changes in the law.[133] The common law approach allows courts to test the wisdom of a right to counsel by initially extending it to limited groups without foreclosing the possibility of broadening the right in the future. Fourth, a class-specific right to counsel recognizes that there are particular classes of noncitizens who have a better claim than others to appointed counsel, either because they may be more vulnerable or because they may have a stronger entitlement to the right. To be sure, this is not to say that these are the only groups that deserve a right to counsel, nor even that they will always need the right more than other noncitizens do. Rather, a limited right to counsel merely recognizes that, on balance, there are some classes of noncitizens with a more powerful claim to, or heightened need for, a right to counsel.

This section considers three potential beneficiaries of a right to appointed counsel: lawful permanent residents, mentally incompetent individuals, and juveniles. Were a right to counsel recognized for these groups, it would likely flow from the Due Process Clause of the Fifth Amendment or from statute.[134] As noted above, the Court has held that the Fifth Amendment applies to deportation hearings (though not to exclusion proceedings),[135] and a right to appointed counsel could be part of the package of rights afforded to noncitizens in that context. Congress could also rewrite the INA — which currently provides for a right to counsel "at no expense to the Government"[136] — to make appointed counsel available for these groups.

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[133] *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–94 (1996).

[134] *Cf. supra* ch. III, pp. 1639–41 (considering the relationship between Fourth Amendment rights and due process rights for suppression of evidence in the immigration context).

[135] *See supra* p. 1659. For a court to make out a Fifth Amendment right to counsel in *exclusion* proceedings, it would first have to find that those proceedings are in fact subject to procedural due process requirements. Of course, there would be no such problem were the right to be provided by statute.

[136] 8 U.S.C. § 1362 (2006).

Alternatively, it could be argued that a right to appointed counsel in removal hearings should emanate from the *Sixth* Amendment.[137] Proponents of this view contend that, in light of *Padilla v. Kentucky*, removal proceedings should be properly regarded as belonging to the criminal paradigm — triggering Sixth Amendment protections. However, *Padilla* itself presents an obstacle to this line of reasoning, since it expressly affirmed that removal hearings are *civil* in nature.[138] The application of the Sixth Amendment hinges on acceptance of the proposition that deportation is criminal punishment, and this premise remains contentious. More fundamentally, this argument would result in selective incorporation of Sixth Amendment rights into removal proceedings. Though a Sixth Amendment right to counsel could in theory be imported into removal hearings, other Sixth Amendment rights — such as the right to trial by jury — could not be applied without destroying the whole edifice of immigration adjudication. But selective incorporation of Sixth Amendment rights raises a major difficulty: if deportation is indeed criminal punishment, it becomes difficult to maintain that some, but not all, Sixth Amendment rights should apply. Because of the conceptual challenges involved in applying the Sixth Amendment to removal proceedings, the more likely vehicle for a right to appointed counsel will be a federal statute or the Fifth Amendment.

(a) Lawful Permanent Residents (LPRs). — LPRs, individuals like Jose Padilla who are authorized to live and work in the United States permanently, are in a strong position to assert a right to appointed counsel. There are at least two rationales for a right to counsel for this class of individuals. The first is doctrinal. There is support in current law for the proposition that LPRs are entitled to special treatment under the Constitution. In *Landon v. Plasencia*,[139] for example, the Court held that a noncitizen who has established legal resident status does not lose that status merely by traveling overseas.[140] The Court emphasized that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[141] No other class of immigrants is afforded this particular constitutional protection.[142] And indeed, the law distinguishes LPRs from other noncitizens, often granting privi-

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[137] *See generally* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011).

[138] *See supra* p. 1667.

[139] 459 U.S. 21 (1982).

[140] *See id.* at 33–34.

[141] *Id.* at 32.

[142] García Hernández, *supra* note 24, at 29.

leges to the former that it denies to the latter.[143] A cursory consideration of the modern test for procedural due process, laid out in *Mathews v. Eldridge*, also suggests greater protection for LPRs. The *Mathews* test gives weight to three factors: the private interest, the government interest, and the risk of erroneous deprivation.[144] Though analysis of these last two factors is likely the same for LPRs and other noncitizens, there is arguably a greater private interest at stake for LPRs given their already strong ties to the United States.

The second, related rationale is philosophical. LPRs are a distinctive class of individuals who have a stronger claim than other noncitizens to certain rights, including greater procedural due process protections in removal proceedings. Under the "immigration-as-affiliation" model, "the treatment of lawful immigrants and other noncitizens should depend on the ties that they have formed in this country."[145] Immigration as affiliation rejects an all-or-nothing distinction between citizens and noncitizens; instead, it produces a spectrum that categorizes individuals by how much they resemble or differ from citizens.[146] The model reflects the intuition that the attachment between an individual and a host country takes shape gradually over time, instead of forming at one decisive moment.[147] Hints of this philosophy are found not just in immigration law, but also in some areas of constitutional law.[148] According LPRs a right to appointed counsel fits with the immigration-as-affiliation model: LPRs have been present in the United States longer than most immigrants and will typically have developed stronger ties to individuals, communities, and the country generally. This special interest in, and entitlement to, remaining in the United States arguably should translate into greater protections against removal, including a right to counsel in removal hearings.

(b) Mentally Incompetent Noncitizens. — Another group with a strong claim to a right of appointed counsel is the class of mentally ill noncitizens. There are no reliable or comprehensive statistics on immigrant mental health, but the available figures suggest that mental

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[143] One example is cancellation of removal, discussed *supra* pp. 1663–64. Relative to other noncitizens, LPRs need to meet fewer and less stringent requirements to be eligible for relief from removal. *Compare* 8 U.S.C. § 1229b(a) (2006 & Supp. V 2011) (cancellation of removal for permanent residents), *with id.* § 1229b(b) (cancellation for other noncitizens).

[144] 424 U.S. 319, 335 (1976).

[145] HIROSHI MOTOMURA, AMERICANS IN WAITING 11 (2006).

[146] *Id.* at 89.

[147] *Id.*

[148] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (noting that "the people" protected by the Fourth Amendment and other constitutional provisions "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). *See generally* Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078 (2013) (discussing the various meanings of "the people" in several provisions of the Constitution).

illnesses among immigrants subject to removal are far from rare. ICE estimates from 2008 indicate that between 7571 and 18,929 immigrants in detention suffered from a "serious mental illness," and that somewhere between 38,000 and 60,000 detainees had contact with the immigrant mental health system.[149] Human Rights Watch estimates that in 2010 some 57,000 immigrant detainees had a mental disability.[150]

The chorus of commentators arguing for a right to appointed counsel for mentally ill immigrants has grown in recent years,[151] and developments portend that courts could move in that direction. First, in *Franco-Gonzales v. Holder*,[152] a California district court held that noncitizens with severe mental illnesses detained pending immigration proceedings had stated a prima facie violation of the Rehabilitation Act[153] and were entitled to representation by a "[q]ualified [r]epresentative" during removal and custody hearings.[154] The outcome was an enormous achievement for the plaintiffs — *Franco-Gonzales* is "the first published opinion ever" to require the government to furnish legal representation to a noncitizen in an immigration proceeding[155] — but because the court grounded its decision in statute, it is unclear how far-reaching the case's impact will be.

Several months after *Franco-Gonzales*, the Board of Immigration Appeals (BIA) issued the precedent decision *In re M-A-M-*,[156] in which

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[149] Helen Eisner, Comment, *Disabled, Defenseless, and Still Deportable: Why Deportation Without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511, 515 (2011) (internal quotation marks omitted).

[150] *Id.*

[151] *See generally, e.g.*, *id.*; Christopher Klepps, Note, *What Kind of "Process" Is This?: Solutions to the Case-by-Case Approach in Deportation Proceedings for Mentally Incompetent Non-Citizens*, 30 QUINNIPIAC L. REV. 545 (2012).

[152] 767 F. Supp. 2d 1034 (C.D. Cal. 2010).

[153] 29 U.S.C. § 794 (2006). Under section 504 of the Rehabilitation Act, no "qualified individual with a disability" may "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." *Id.* § 794(a). Under federal regulations, "[a]n organization that receives federal funds violates Section 504 if it denies a qualified individual with a disability a reasonable accommodation that the individual needs in order to enjoy meaningful access to the benefits of public services." *Franco-Gonzales,* 767 F. Supp. 2d at 1051 (citing 28 C.F.R. § 35.130(b)(7) (2012)).

[154] *Franco-Gonzales*, 767 F. Supp. 2d at 1058. A "[q]ualified [r]epresentative" must: "(1) be obligated to provide zealous representation; (2) be subject to sanction by the [Executive Office for Immigration Review] for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials; and (5) maintain confidentiality of information." *Id.* (quoting Parties' Joint Report at 3, *Franco-Gonzales*, 767 F. Supp. 2d 1034 (No. 2:10-CV-02211)) (internal quotation marks omitted).

[155] Franco v. Holder, AM. CIV. LIBERTIES UNION S. CAL. (Dec. 27, 2010), http://www.aclu-sc.org/franco.

[156] 25 I. & N. Dec. 474 (B.I.A. 2011). Precedent decisions are so designated by the BIA and legally bind "the [Department of Homeland Security] components responsible for enforcing immigration laws in all proceedings involving the same issue or issues." *Precedent Decisions*, U.S.

it promulgated standards for Immigration Judges (IJs) presiding over proceedings with mentally incompetent individuals. *M-A-M-* requires that IJs inquire into the competency to proceed of a noncitizen who exhibits "indicia of incompetency."[157] If she is not competent, the IJ must provide "appropriate safeguards," such as "refusal to accept an admission of removability . . . ; docketing or managing the case to facilitate the [noncitizen]'s ability to obtain legal representation and/or medical treatment in an effort to restore competency; [and] actively aiding in the development of the record [and questioning of] witnesses."[158] The necessary safeguards will depend on "the facts and circumstances" of each case.[159]

M-A-M- is a welcome, if overdue, decision; up until its publication, the regulations and procedures for immigration cases involving mental incompetency were unclear. However, the decision did not fully address the challenges associated with removal hearings for the mentally incompetent. While *M-A-M-* laudably directs IJs to implement safeguards where there are any indicia of incompetency, it fails to account for judges' relative lack of adeptness at detecting or evaluating mental illness. For example, although IJs are required to assess mental competency throughout a proceeding to determine whether an individual's condition has improved or deteriorated, there are likely to be times where changes in an individual's condition would not be obvious to an IJ. Moreover, *M-A-M-* affords IJs wide discretion in prescribing safeguards in cases of mental incompetence — and these safeguards may be as minimal as closing a hearing to the public or refusing to accept an admission of removability. There will almost certainly be instances in which, even though mental incompetency has been established, IJs will prescribe fewer safeguards than necessary, whether due to an underestimation of a specific problem or a more general skepticism of mental illness. It may be asserted that safeguards short of appointed counsel suffice in these cases, but considering the high bar for mental incompetence — an individual must "lack[] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense"[160] — and other barriers

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CITIZENSHIP & IMMIGRATION SERVS. (Oct. 20, 2010), http://www.uscis.gov/portal/site/uscis/menuItem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoId=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=f2c29c7755cb9010VgnVCM10000045f3d6a1RCRD.

[157] *M-A-M-*, 25 I. & N. Dec. at 480.

[158] *Id.* at 483.

[159] *Id.*

[160] *Id.* at 478 (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)) (internal quotation mark omitted). This standard for mental incompetence is drawn from the criminal context; though the BIA acknowledged that removal hearings are civil proceedings, it noted that "the law regarding mental competency issues in criminal proceedings is well developed" and "consider[ed] it instructive." *Id.*

in immigration proceedings (for example, legal complexity), there is a powerful argument that appointed counsel is necessary.

(c) Juveniles. — The group with the strongest claim to a right to appointed counsel based on Supreme Court precedent is juvenile noncitizens. In *Gault*, the Court recognized a right to counsel (among other due process rights) for juveniles in delinquency proceedings.[161] It emphasized a juvenile's special need for counsel "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[162] Moreover, the Court's recent juvenile criminal cases — *Roper v. Simmons*,[163] *Graham v. Florida*,[164] and *Miller v. Alabama*[165] — have established that, for purposes of sentencing and punishment, "juveniles have diminished culpability and greater prospects for reform" and are therefore to be accorded unique treatment.[166]

While the cases above do not bear directly on the Sixth Amendment right to counsel or even on the Fifth Amendment, their reasoning is relevant for our purposes. These decisions evince the Court's sensitivity to psychological differences between juveniles and adults; some of these differences translate into a stronger need for counsel for juveniles. One difference pertains to decisionmaking capacity: juveniles have limited foresight, capricious emotions, difficulty calculating risk, and greater vulnerability to pressure, all of which may lead them to make different decisions than adults would in the same circumstances.[167] Juveniles thus have a special need for counsel to provide advice and assistance in making tactical and other decisions in the context of removal proceedings. They may also be more susceptible to coercion and more deferential to adults,[168] making the presence of counsel — who can offer the vigorous advocacy required in an adversarial proceeding — highly valuable, if not essential. Considering these characteristics in conjunction with most juveniles' lack of even basic knowledge about the legal system,[169] the case

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[161] *See supra* notes 86–89 and accompanying text.

[162] *In re* Gault, 387 U.S. 1, 36 (1967) (footnote omitted).

[163] 543 U.S. 551 (2005).

[164] 130 S. Ct. 2011 (2010).

[165] 132 S. Ct. 2455 (2012).

[166] *Id.* at 2464; *see also* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (describing children's heightened susceptibility to pressure and poor decisionmaking).

[167] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 436.

[168] *See id.*

[169] *See, e.g.*, Perez-Funez v. INS, 619 F. Supp. 656, 661 (C.D. Cal. 1985) ("[M]inors generally do not understand the concept of legal rights without explanation.").

for a right to appointed counsel for juveniles in removal proceedings becomes compelling.

2. Other Measures. — There are at least four other potential measures that could partially or completely remedy the current crisis in representation in removal proceedings. First, immigrant detention should be curbed. As detailed above, developments in the law have tended to expand immigrant detention rather than curb it — but that trend has not been without exception. For example, in *Diop v. ICE/Homeland Security*,[170] the Third Circuit vacated a district court decision that found that the detention of an individual for nearly three years pending removal did not violate due process.[171] The Third Circuit held that federal statutory provisions prescribing mandatory detention authorize such detention only "for a reasonable period of time"; when detention exceeds that period, the government must "establish that continued detention is necessary to further the purposes of the detention statute."[172] The Ninth Circuit reached a similar conclusion, holding that a noncitizen in prolonged detention is constitutionally entitled to a bond hearing and must be released "unless the government establishes that he is a flight risk or a danger to the community."[173]

On their face, both decisions are modest — they require that the government merely justify its continued detention of noncitizens under the applicable statute — but there are likely to be cases where the government cannot meet even the low bar required by statute. Moreover, the courts' decisions increase — albeit modestly — the cost of detention by forcing the government to continue to offer justifications for it. This cost itself may deter some prolonged and wrongful detention.

In response to growing concerns about detention and a Department of Homeland Security (DHS) report acknowledging systematic and unnecessary detention of immigrants, the Obama Administration proposed reforms to create a "truly civil detention system."[174] As commentators have noted, however, the reforms fall short of a "fundamental reconsideration of immigration control"[175] by failing to promulgate substantive binding standards on detention conditions or transfers between detention facilities.[176] Legal representation in removal proceedings could, along with strict limits on mandatory detention and a

[170] 656 F.3d 221 (3d Cir. 2011).
[171] *Id.* at 223.
[172] *Id.*
[173] Diouf v. Napolitano, 634 F.3d 1081, 1082 (9th Cir. 2011).
[174] Kalhan, *supra* note 14, at 44 (quoting Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A1) (internal quotation marks omitted).
[175] *Id.* at 58.
[176] *Id.* at 51–53 .

greater use of alternatives to detention, be part of a more thoughtful detention system.

Second, alternative schemes of representation should be considered. The Study Group on Immigrant Representation, author of the NYIRS,[177] recently proposed one such scheme. Following its first report, which compiled information and statistics on immigrant representation in New York,[178] the Study Group released a second report containing a proposed remedy for the representation crisis: the New York Deportation Defense Project.[179] The Project aims to achieve universal representation for immigrant detainees potentially subject to removal,[180] relying on a group of "institutional immigration legal service providers" — nonprofit organizations as well as law firms — that would be "overseen by a coordinating organization."[181] The proposed scheme would also include basic legal support services — such as language and mental health services — for noncitizens and would be funded primarily by a "reliable public funding stream."[182]

The Project is thoughtful, comprehensive, ambitious, and, above all, realistic. It recognizes the value of universal representation, but reasonably limits itself to targeting those who have borne the brunt of the representation crisis: immigrant detainees. Moreover, the Project provides far more than token representation. It ensures that representation is both holistic, by proposing to provide several legal support services to detainees, and competent, by limiting the potential providers of legal representation to reliable and qualified organizations.[183] The biggest hurdle to the program is obviously its price tag, estimated at six million dollars a year[184] — but if that hurdle can be surmounted and the Project is administered, it could become a model for curing the crisis in immigrant representation across the country.

Third, Congress should fully or partially reinstate funding for the representation of noncitizens through the Legal Services Corporation (LSC). The "single largest funder of civil legal aid for low-income Americans in the nation," LSC funds major nonprofit legal services

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[177] *See supra* pp. 1662–63.

[178] *See* ACCESSING JUSTICE, *supra* note 2.

[179] *See* N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 18 (2012), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

[180] *Id.* at 18–20.

[181] *Id.* at 18.

[182] *Id.*

[183] *See id.*

[184] Kirk Semple, *Plan Aims to Add Help to Contest Deportation*, N.Y. TIMES, Nov. 28, 2012, at A28, *available at* http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html?ref=nyregion.

providers across the country.[185] In 1980, however, Congress prohibited the use of LSC funds to assist many noncitizens.[186] The 1980 legislation continued to allow LSC-funded lawyers to use external funding to represent noncitizens, but in 1996 a congressional appropriations act barred these lawyers from using *any* funds — LSC or otherwise — to represent what amounted to large swaths of the immigration population.[187] Greater Boston Legal Services, for example, was required to relinquish $1.4 million in LSC funding because it was unwilling to accept the required restrictions on its immigration work.[188] Moreover, while the statute provides some exceptions to the bar on funding,[189] many legal services organizations simply stopped taking on any deportation defense cases as a result of the 1996 restrictions.[190]

Reinstating LSC funding would be no adequate substitute for appointed counsel in removal proceedings, but it would certainly expand the availability of counsel for particularly vulnerable groups. Other than the federal government, the key sources of funding for immigration work are state and local governments, which have been disinclined to fund deportation defense work because they view it as a federal issue, and foundations, which often choose to invest their limited funding in less political and time-intensive work. Removing just the 1996 restrictions from future congressional appropriations would be a major step.

Fourth, the Legal Orientation Program (LOP), funded by the Executive Office for Immigration Review (EOIR), should be expanded. Established in 2003, LOP provides funding for pre-hearing legal orientation presentations by private nonprofit agencies for detainees in certain facilities.[191] Like LSC funding, LOP funding is no substitute for ap-

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[185] *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., http://www.lsc.gov/about/what-is-lsc (last visited Mar. 3, 2013).

[186] *Fact Sheet: The Restriction Barring LSC-Funded Lawyers from Assisting Certain Immigrant Groups*, BRENNAN CTR. FOR JUSTICE (Sept. 26, 2003), http://www.brennancenter.org/content/resource/lsc_restriction_fact_sheet_4_the_restriction_barring_legal_services_co.

[187] *Id.*

[188] *Significant Events in GBLS' History*, GREATER BOS. LEGAL SERVS., http://www.gbls.org/about/history (last visited Mar. 3, 2013).

[189] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 1321-53 to -55 (1996) (recognizing exceptions for aliens who are present in the United States and who (1) are legal permanent residents, (2) are close relatives of a citizen and have an application pending for status as a lawful permanent resident, (3) have been granted asylum or admission as a refugee, including conditional entry as a refugee prior to April 1, 1980, (4) have had an order of deportation withheld by the Attorney General, or (5) belong to a narrow category of lawfully admitted agricultural workers).

[190] Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 550 n.42 (2009).

[191] AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION

pointed counsel; however, analysis shows that LOP and other legal orientation programs are educative and efficient, reducing the length of removal proceedings and saving resources for both the immigration courts and the detention system.[192] As of 2010, LOP was serving some 60,000 detainees annually in twenty-seven detention centers around the country.[193] However, studies have also noted that the rising number of detainees "has outpaced the expansion of funding for LOP," and the number of individuals receiving assistance from the program "represents a shrinking percentage of the overall detained population."[194] Federal funding through LOP — a means of bringing funds to the immigrant population that is less politically charged than funding through LSC — should be increased to reach all noncitizens in detention, particularly the vulnerable (such as minors or those with mental illnesses) and those placed into expedited removal.[195]

E. Conclusion

The presence of competent legal representation is crucial in removal proceedings. While recent developments have impaired both the quality of and access to such representation, recent Supreme Court cases have undermined one of the key rationales for the current jurisprudence and government policy — namely, that removal proceedings and the sanction of deportation itself belong to the civil, not criminal, paradigm. Doctrinally, these decisions have opened the door for reforms, such as a limited right to appointed counsel, that could have an important remedial effect on the current crisis in representation. The moment is ripe for change, but it is unclear whether either the courts or Congress will take up the mantle.

OF REMOVAL CASES 5-6 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

[192] *See* Markowitz, *supra* note 190, at 572.

[193] *Recent Initiatives for EOIR's Legal Orientation and Pro Bono Program*, U.S. DEP'T OF JUSTICE (Oct. 4, 2010) http://www.justice.gov/eoir/press/2010/RecentInitiativesforLOP10042010.htm.

[194] AM. BAR ASS'N, *supra* note 191, at 5-12.

[195] *Id.* at 5-13.