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# PLENARY POWER IN THE MODERN ADMINISTRATIVE STATE*

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*For the past quarter century, the "plenary power" doctrine of immigration law—under which courts suspended ordinary standards of judicial review to defer to the political branches on questions relating to the exclusion, detention, and deportation of noncitizens—has been in decline. The conventional account attributes this development to the expansion of constitutionally-protected individual rights across public law cases. This Article assesses changes in immigration law from a different perspective, one having less to do with individual rights than with constitutional structure. It focuses on the role that delegation concerns have played, contextualizing the judiciary's willingness to review immigration decisions within a broader administrative law project to strengthen judicial checks on the growing authority of agency officials across the regulatory state.*

*This perspective helps explain one of the enduring puzzles of contemporary immigration law—why courts continue to defer to immigration decisions in some cases but not in others. Rather than rejecting the notion of a plenary power outright, courts have concluded that such power cannot be freely delegated to unelected agency officials. This insight carries important implications for the rights of noncitizens. A theory of judicial review premised on delegation concerns rather than individual rights offers little protection against actions by Congress and perhaps also the President. Moreover, where the relevant actor is an agency official, judicial scrutiny rooted in structural concerns may be as skeptical of administrative decisions favoring noncitizens as those harming them.*

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## INTRODUCTION

For much of the late nineteenth and twentieth centuries, federal courts categorically denied review over government decisions that would plainly violate constitutional rights outside of the immigration context, citing the government's "plenary power" to exclude, deport, and detain noncitizens. Pursuant to this doctrine, courts allowed the government to exclude noncitizens on the basis of race,[1] deport residents on the basis of their political opinions,[2] and indefinitely detain aliens without hearing.[3] Today, by contrast, courts routinely exercise robust review over immigration decisions, and not infrequently reverse government policies.[4] In doing so, they have largely retreated from plenary power principles, declining to exempt immigration law from generally applicable standards of judicial review.[5]

This doctrinal shift has not escaped scholarly notice, and commentators have been discussing the "demise" of plenary power for decades. The dominant scholarly explanation for this decline has attributed it to broader public law developments expanding the scope of constitutionally protected individual rights.[6] Pursuant to this view,

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1. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("If ... the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed .... [Such a] determination is conclusive upon the judiciary."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893) (sustaining legislation requiring the deportation of Chinese nationals who fail to prove lawful presence through the testimony of "at least one credible white witness").

2. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 595–96 (1952) (sustaining deportation of aliens based on prior membership in the Communist party).

3. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953) (rejecting due process challenge to indefinite detention without hearing for legal permanent resident seeking reentry).

4. *See, e.g.*, Mellouli v. Lynch, 135 S. Ct. 1980, 1983–84 (2015) (reversing decision to deport); Moncrieffe v. Holder, 133 S. Ct. 1678, 1683–84 (2013) (same); Judulang v. Holder, 565 U.S. 42, 51–52 (2011) (same); Negusie v. Holder, 555 U.S. 511, 514 (2009) (reversing denial of asylum); Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (rejecting indefinite detention of noncitizens without hearing); INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987) (reversing denial of asylum).

5. *See* Kevin R. Johnson, *Immigration and the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 111 (2015) (observing "mainstream[ing]" of immigration into ordinary domestic law and challenging practical import of plenary power doctrine); *cf.* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 588 (2017) (discussing normalization of immigration law).

6. Peter Schuck and Hiroshi Motomura were among the first to characterize the changes in immigration law in this manner. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*,

the emergence of fundamental rights recognized in cases like *Brown v. Board of Education*[7] and *Goldberg v. Kelly*[8] made it increasingly difficult to justify exempting an entire category of government decisions from judicial scrutiny; due process, equal protection, and free speech rights had finally penetrated immigration law.[9] This individual-rights explanation, however, provides at best an incomplete account of contemporary immigration law. While modern courts have rejected plenary power principles in many cases, they continue to invoke the doctrine in others. As a descriptive matter, the conventional account fails to explain the plenary power doctrine's continued, albeit circumscribed, persistence.

This Article examines the vast changes in immigration jurisprudence from a different perspective, one having less to do with individual rights than with constitutional structure. It focuses on the role that delegation concerns have played in the judiciary's growing willingness to review immigration decisions.[10]

Across the modern regulatory state, national policy decisions increasingly are made by agency officials, notwithstanding the constitutional mandate vesting legislative authority exclusively with Congress. Article I not only requires that federal laws be enacted by

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100 YALE L.J. 545, 564, 577, 595 (1990) (pointing to "gravitational pull" of equality and due process norms in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4 (1984) (tracing changes to emerging recognition of "universal rights based upon individuals' essential and equal humanity"). Since then, a near consensus has emerged, attributing modern developments in immigration law to a growing judicial solicitude toward the rights and interests of aliens. *See, e.g.*, T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (describing a "radical shift" in immigration law to extend due process protections to aliens); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 57–58 (1998) (contending that due process and equal protection norms trump plenary power in recent immigration cases); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 882 (2015) (contending that courts have integrated due process doctrine into immigration law in a manner that enhances individual rights); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 297–99 (1984) (identifying departures from plenary power principles rooted in equality and due process norms); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (arguing that recent developments afford "more robust judicial protection of the rights of immigrants").

7. 347 U.S. 483 (1955).

8. 397 U.S. 254 (1970).

9. *See, e.g.*, Motomura, *supra* note 6, at 566–67.

10. In an essay published ten years ago discussing Judge Posner's immigration jurisprudence, Adam Cox called for scholarly exploration of the role that non-delegation concerns play in modern immigration law. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1687 (2007). This Article responds to that call.

the democratically elected members of Congress;[11] it also provides that such laws must undergo a carefully calibrated set of procedural requirements prior to enactment.[12] These measures are designed to ensure that federal laws be subject to public accountability, are carefully deliberated, and enjoy a sufficiently broad range of support to mitigate the risks of factionalism, tyranny, and arbitrariness.[13] Yet Congress today routinely delegates the power to promulgate wide-ranging policy decisions to administrative agencies, including our nation's immigration agencies.[14] While the Supreme Court has been notably unwilling to enforce non-delegation requirements directly, it has developed a series of doctrines to promote non-delegation norms *indirectly*—largely through the sub-constitutional field of ordinary

11. U.S. CONST. art. I, §§ 1–3 (vesting legislative power in Congress and specifying electoral process for composition of House and Senate); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others, the essential legislative function with which it is . . . vested.").

12. U.S. CONST. art. I, § 7 (setting forth procedural requirements of bicameralism and presentment).

13. John Manning describes the constitutional goals served by the lawmaking procedure as follows:

> [I]t makes it more difficult for factions . . . to capture the legislative process for private advantage, it promotes caution and restrains momentary passions, it gives special protection to the residents of small states through the states' equal representation in the Senate, and it generally creates a bias in favor of filtering out bad laws by raising the decision costs of passing any law.

John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 239–40 (2001) (footnotes omitted); *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (describing how federal lawmaking procedures protect separation of powers norms); Jonathan R. Macey, *How Separation of Powers Protects Individual Liberties*, 41 RUTGERS L. REV. 813, 819–20 (1989) (describing normative goals of constitutional lawmaking requirements).

14. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 12–13 (2014) (criticizing modern delegations of administrative power for violating constitutional structural requirements); Gary Lawson, *The Rise and Rise of the Modern Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994) (same); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996) (identifying divergence between modern administrative state and separation-of-powers principles); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 (1987) (describing modern administrative state's failure to incorporate sufficient checks and balances to constrain agency discretion).

This Article focuses on the non-delegation problems implicated by administrative agencies' exercise of *policymaking* authority. Doctrinal efforts to constrain agencies' exercise of *adjudicative* authority are beyond the scope of this Article. *See generally* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854–56 (1986) (analyzing congressional delegation of adjudication power to agencies). For a discussion of the structural constitutional problems raised by agency adjudications, see Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1571–72 (2013).

administrative law—to cabin the delegated discretion of agency officials.[15] As in other regulatory fields, courts have begun to apply these doctrines to closely scrutinize agency decisions in the immigration context.[16]

This perspective contextualizes contemporary immigration law as part and parcel of a larger administrative law project to strengthen judicial checks on the growing authority of agency officials across the regulatory state. On this understanding, courts have not necessarily rejected the notion of plenary power outright but have concluded that such power cannot freely be delegated to unelected agency officials.[17] This insight carries important implications for the rights of noncitizens. First, an exercise of judicial review motivated primarily

15. *See* Manning, *supra* note 13, at 223 (discussing influence of non-delegation norms on evolution of doctrines of administrative deference); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491 (2010) (arguing that non-delegation concerns animate much of contemporary administrative law); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015) (characterizing emergence of administrative law as "an act of constitutional restoration, anchoring administrative governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law"); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958 (2007) (discussing non-delegation norms promoted by administrative law doctrine announced in *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943)); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000) (identifying canons of statutory construction that substitute for under-enforcement of non-delegation doctrine).

16. Scholars in other regulatory fields traditionally viewed as "exceptional"—including tax law, patent law, foreign affairs, and national security—have observed a similar integration of generally applicable administrative law principles. *See* Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2144–45 (2016); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222–23 (2014); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1903 (2015) (describing normalization of foreign affairs law); Christopher J. Walker, Chevron *Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 149–50 (2016) (arguing that courts integrate ordinary principles of administrative law into patent law).

17. While concepts of citizenship are closely tied to those related to immigration, courts have not extended plenary power principles in cases involving the former. *See* Maslenjak v. United States, 137 S. Ct. 1918, 1923–24 (2017) (applying ordinary methods of statutory interpretation to conclude that naturalization may be revoked on the basis of false statements made during the course of naturalization proceedings only if such statements bear a causal relationship to the naturalization decision); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (applying ordinary equal protection standards to reject statute employing sex-based classification in conferral of citizenship to child born out of wedlock to U.S. citizen parent); Nyugen v. INS, 533 U.S. 53, 71 (2001) (purporting to apply ordinary equal protection standards to *sustain* statute employing sex-based classification in conferral of citizenship to child born out of wedlock); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (applying Fourteenth Amendment to confer birthright citizenship on children of Chinese immigrants).

by delegation concerns rather than individual-rights concerns is less likely to protect noncitizens from actions by Congress and perhaps also the President. Second, where the relevant actor is an agency official, judicial scrutiny rooted in structural concerns may be as skeptical of administrative decisions *benefiting* noncitizens as those harming them.

This Article proceeds in three Parts. Part I describes the prevailing scholarly account of the doctrinal retreat from plenary power principles—which emphasizes the emergence of universal equality and due process norms—and identifies the theoretical and practical shortcoming of this account. Part II introduces a new perspective from which to examine shifts in immigration jurisprudence, contending that many of the doctrinal developments in immigration law can be traced to the same delegation concerns animating administrative law more generally. It then shows how this understanding helps explain why courts continue to apply plenary power principles in some immigration cases but not in others. Part III explores the normative implications of a retreat from plenary power principles rooted in delegation concerns rather than individual rights.

## I. THE CONVENTIONAL ACCOUNT OF PLENARY POWER

This Part briefly describes the rise and fall of the plenary power doctrine before setting forth the prevailing scholarly explanations for these developments, which emphasize the role of emerging equality and due process norms. It then identifies the theoretical and practical limitations of this narrative, which fails to provide a satisfactory account for the doctrine's continued, albeit circumscribed, persistence.

### *A. The Shift in Immigration Jurisprudence*

The Supreme Court's contemporary immigration jurisprudence bears little resemblance to its historical precedent. During what scholars refer to as the "classical" era of immigration law, roughly dating from the late nineteenth century through the Cold War,[18] the Supreme Court routinely sustained government decisions that would plainly violate constitutional rights had they occurred outside of the immigration context, reasoning that the political branches possess "plenary power" to exclude, deport, and detain noncitizens without judicial restraint. Today, by contrast, the Court routinely exercises

18. *See* Motomura, *supra* note 6, at 550–54 (defining the "classical" period of immigration law); Schuck, *supra* note 6, at 3 (same).

close scrutiny over immigration decisions, typically without even mentioning plenary power principles.

### 1. The Classical Era

The Court first announced what came to be known as the plenary power doctrine in *Chae Chan Ping v. United States*,[19] a case challenging the exclusion of Chinese nationals from the United States.[20] In 1882, Congress enacted the first of a series of Chinese Exclusion Acts, which prohibited the entry of noncitizens of Chinese ancestry, but allowed such individuals to depart and re-enter if they had already established residence in the United States and obtained a government certificate of reentry prior to their departure.[21] Chae was a longtime legal resident of the United States who had left the country for a temporary trip to China in 1887 after securing the requisite reentry certificate.[22] While he was abroad, however, Congress enacted a new statute barring the entry of all Chinese noncitizens, including returning legal residents who had a valid certificate for reentry.[23] When Chae was denied reentry, he challenged his race-based exclusion and further claimed that the refusal to honor his certificate of reentry violated his due process rights.[24] Rejecting these claims, a unanimous Supreme Court concluded:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed .... [I]ts determination is *conclusive* upon the judiciary.[25]

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19. 130 U.S. 581 (1889).

20. *Id.* at 589.

21. The Chinese Exclusion Acts barred all noncitizens of Chinese ancestry, regardless of the individual's actual nationality. *See* Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power, in* IMMIGRATION STORIES 7, 8 (David A. Martin & Peter H. Schuck eds., 2005). Moreover, individuals of Chinese ancestry at the time were precluded from citizenship by naturalization. *Id.*

22. *Chae Chan Ping*, 130 U.S. at 582.

23. *Id.*

24. *Id.* at 584; *see also* Chin, *supra* note 21, at 7–13 (describing factual background in *Chae Chan Ping*).

25. *Chae Chan Ping*, 130 U.S. at 606 (emphasis added). The justifications for this radical departure from ordinary standards of judicial review were somewhat oblique. The constitutional text does not explicitly vest either Congress or the President with the power to regulate immigration, much less the *unreviewable* power to do so. While it delegates to the political branches somewhat related powers, such as the power to regulate

*Chae Chan Ping* now stands for the proposition that decisions to exclude noncitizens at the border are not subject to judicial review and are instead vested exclusively in the political branches.[26]

The Court affirmed these plenary power principles four years later in *Fong Yue Ting v. United States*,[27] challenging another iteration of the Chinese Exclusion Act, this one mandating the arrest and deportation of all Chinese immigrants within the country who failed to produce at least one "credible white witness" to testify to their lawful presence.[28] Fong Yue Ting was ordered deported pursuant to this provision, even though the testimony of his non-white witnesses was sufficient to persuade the reviewing judge that Fong was, in fact, present in the United States lawfully.[29] These restrictions—the racial qualifications for testimonial witnesses and imposition of the burden on the accused to effectively prove her innocence in order to avoid detention and exile—clearly would not survive constitutional scrutiny had they been imposed on citizens. Yet the Court relied on its reasoning in *Chae Chan Ping* to sustain these restrictions in Fong's case, finding that the political branches' power to detain and remove noncitizens within the nation's borders is as plenary and unreviewable as the power to exclude noncitizens from its territorial soil: "The right of a nation to expel or deport foreigners, who have not been naturalized . . . , rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[30] In doing so, the Court denied noncitizens any constitutionally cognizable interest not only in returning to, but also in remaining in, the United States.

Importantly, even before either *Chae Chan Ping* or *Fong Yue Ting* was decided, the Court made clear in *Yick Wo v. Hopkins*[31] that the Constitution's guarantee of equal protection applied to aliens and citizens alike.[32] Invalidating a San Francisco ordinance that had been

naturalization and foreign commerce and to act in foreign affairs, the Constitution makes no provision for the immigration and deportation of noncitizens. *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 857 (1987) (criticizing the judicial conclusion that the federal government's power to regulate immigration, although unenumerated in the Constitution, is inherent in sovereignty).

26. Henkin, *supra* note 25, at 854.
27. 149 U.S. 698 (1893).
28. *Id.* at 727.
29. *Id.* at 704.
30. *Id.* at 707.
31. 118 U.S. 356 (1886).
32. *Id.* at 368.

used to discriminatorily deny licenses to Chinese laundry operators, *Yick Wo* unequivocally held:

> The rights of the petitioners ... are not less because they are aliens .... The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.... [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.[33]

The Supreme Court, however, distinguished cases involving the entry and removal of noncitizens from ordinary domestic regulation such as that at issue in *Yick Wo*.[34] While the latter remained subject to ordinary standards of review, the Court made clear in *Fong Yue Ting* that the former was categorically immunized from judicial scrutiny:

> Chinese laborers ... like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution .... But they continue to be aliens ... and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.[35]

After *Fong Yue Ting*, noncitizens within the United States would be entitled to the full protection of the Constitution on domestic regulatory matters but denied any legal protection with respect to their removal from the United States under the plenary power doctrine.[36]

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33. *Id.* at 368–69.

34. *Fong Yue Ting*, 149 U.S. at 724–25.

35. *Id.* at 724; *see also id.* at 731 ("The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject.").

36. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 382–83 (1971) (holding that state denial of welfare benefits to noncitizens would violate equal protection); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948) (rejecting denial of fishing licenses on basis of alienage on Equal Protection grounds); Truax v. Raich, 239 U.S. 33, 43 (1915) (invalidating restrictions on alien employment as violation of equal protection); *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869–70 (1989) (discussing doctrinal distinction between alienage laws and immigration laws). For a discussion of the contested nature of the boundary between immigration law on the one hand and alienage law on the other, see Linda Bosniak,

During the Cold War, the Court extended plenary power principles further. In *United States ex rel. Knauff v. Shaughnessy*,[37] the Court held that noncitizens have no constitutional right to challenge, or even learn the reasons for, their exclusion, stating "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[38] In doing so, it held that noncitizens not only have no substantive right to enter the United States, but also lack any procedural rights to challenge a denial of entry.[39]

Then, in *Shaughnessy v. United States ex rel. Mezei*,[40] it went so far as to deny review over an exclusion decision that resulted in the prolonged and potentially permanent detention of the noncitizen.[41] In that case, the government, on the basis of secret evidence and without hearing, denied reentry to Mezei, a longtime legal permanent resident who sought to return to his U.S. citizen family after a trip overseas.[42] Because no other country was willing to repatriate him, Mezei was placed in detention, where he remained for years, with little prospect for release.[43] Rejecting his constitutional claims, the Court reasoned that Mezei's detention was a mere byproduct of the exclusion decision and thus immunized from judicial intervention: "Whatever our individual estimate of [the government's] policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."[44] By the 1950s, then, the plenary power principles extended so far as to sustain even the prolonged and potentially permanent detention of noncitizens without hearing.[45]

### 2. The Contemporary Era

Contemporary immigration jurisprudence today bears little resemblance to the early plenary power cases. Today, federal courts routinely exercise close scrutiny over immigration decisions, often

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*Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056 (1994) (conceptualizing immigration law as allocation of rights and benefits to noncitizens).

37. 338 U.S. 537 (1950).
38. *Id.* at 544.
39. *Id.*
40. 345 U.S. 206 (1953).
41. *Id.* at 216.
42. *Id.* at 207–09.
43. *Id.*
44. *Id.* at 216.
45. For a contemporaneous criticism of the *Knauff* and *Mezei* decisions, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391–95 (1953).

without mentioning plenary power at all. Over the past quarter century in particular, the Supreme Court in case after case has applied generally applicable standards of judicial review to vacate decisions to exclude, detain, and deport noncitizens. In one of the clearest departures from prior doctrine, the Court in *Zadvydas v. Davis*[46] discarded plenary power principles to curtail the government's power to detain noncitizens.[47] Zadvydas was a longtime legal permanent resident who had been ordered deported on the basis of a criminal offense.[48] He was placed in detention pending his removal, but, like the noncitizen in *Mezei*, faced the prospect of prolonged detention because no other country was willing to repatriate him.[49] Yet the Supreme Court held in *Zadvydas* that the indefinite detention of noncitizens posed a sufficiently grave threat to constitutional rights to necessitate the imposition of a judicial time limit on the length of statutorily authorized detention.[50]

In the modern era, the Supreme Court has exercised review over decisions to exclude, detain, and deport noncitizens with striking regularity. It has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year.[51] And in the vast majority of these

46. 533 U.S. 678 (2001).

47. *See id.* at 702.

48. *Id.* at 684.

49. The Court purported to distinguish the case from *Mezei* on the ground that Zadvydas was detained after he was ordered *deported*, while Mezei was detained after being denied *reentry*. *Id.* at 693–94. The distinction, however, is not entirely persuasive. After all, Zadvydas had already been ordered deported and thus, like Mezei, possessed no legal right to be in the country. *See id.* at 684. If anything, Mezei, who had been detained for nearly two years and was not provided notice of the charges against him, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208–09 (1953), had a stronger claim of procedural violations than Zadvydas, who had been detained for a shorter period and only after a full hearing to adjudicate his removability, *see Zadvydas*, 533 U.S. at 684–85; *see also* N. Alejandra Arroyave, Comment, *Preserving the Essence of* Zadvydas v. Davis *in the Midst of a National Tragedy*, 57 U. MIAMI L. REV. 235, 251 (2002) (discussing Justice Scalia's criticism of majority's attempt to distinguish *Mezei*).

50. *Zadvydas*, 533 U.S. at 701.

51. *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017) (reversing order to deport noncitizen on basis of criminal record); Mellouli v. Lynch, 135 S. Ct. 1980, 1991 (2015) (same); Moncrieffe v. Holder, 133 S. Ct. 1678, 1693–94 (2013) (same); Judulang v. Holder, 565 U.S. 42, 64 (2011) (same); Negusie v. Holder, 555 U.S. 511, 514 (2009) (vacating exclusion of alien seeking asylum); *see also* Johnson *supra* note 5, at 117–18 (summarizing immigration cases from 2009–2013 terms); Kevin R. Johnson, *Big Immigration Cases in the 2016 Term*, IMMIGRATIONPROF BLOG (June 29, 2016), http://lawprofessors.typepad.com/immigration/2016/06/big-immigration-cases-in-the-2016-term.html [http://perma.cc/SSK2-KZ2D] (summarizing immigration cases in the 2016 term); Kevin R. Johnson, *Immigration in the Supreme Court in the 2015 Term*, IMMIGRATIONPROF BLOG (Oct. 9, 2015), http://lawprofessors.typepad.com/immigration

cases, the Court has applied ordinary standards of judicial review rather than granting plenary deference to the government.[52]

### *B. Prevailing Theoretical Explanation*

The doctrinal retreat from plenary power principles has not escaped scholarly notice.[53] The prevailing theoretical explanation for this doctrinal shift has characterized it as a belated integration of public law norms, asserting the universal application of a robust set of Equal Protection and Due Process rights into the immigration context. While this explanation undoubtedly possesses normative appeal, the Court's decisions do not consistently conform to it, significantly compromising its predictive value.

Scholars have been discussing the "demise" of plenary power for decades. With few exceptions, they have attributed it to broader public law developments expanding the scope of constitutionally protected individual rights.[54] Peter Schuck was among the first to observe a "fundamental transformation" of immigration law.[55] Writing in 1984, he characterized this shift as signaling judicial acceptance of "communitarian" public law norms rooted in "universal rights based upon individuals' essential and equal humanity."[56] Hiroshi Motomura similarly conceptualized the "gradual demise" of the plenary power doctrine as a response to the "gravitational pull" of norms "develop[ed] elsewhere in the constitutional law of individual rights and liberties," creating new "phantom norms" in the realm in immigration law.[57] These views have developed into a near consensus

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/2015/10/immigration-in-the-supreme-court-in-the-2015-term.html [http://perma.cc/8LCR-ER4B] (summarizing immigration cases in the 2015 term); Kevin R. Johnson, *Supreme Court Immigration Rulings in the 2014 Term*, IMMIGRATIONPROF BLOG (June 15, 2015), http://lawprofessors.typepad.com/immigration/2015/06/suprme-court-immigration-rulings-in-the-2014-term.html [http://perma.cc/CA8H-W4HN] (summarizing immigration cases in the 2014 term).

52. *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1567; *Mellouli*, 135 S. Ct. at 1991; *Moncrieffe*, 133 S. Ct. at 1693–94; *Judulang*, 565 U.S. at 64; *Negusie*, 555 U.S. at 514.

53. *See, e.g.*, Motomura, *supra* note 6, at 549 (describing retreat of plenary power doctrine); Schuck, *supra* note 6, at 58 (same); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002) (same).

54. For exceptions, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015) (arguing that plenary power doctrine should be understood to resolve allocation of immigration authority between federal government and States, rather than claim that sovereignty trumps individual rights), Spiro, *supra* note 54, at 340–41 (attributing retreat of plenary power doctrine to changed global order in which United States is no longer hegemonic).

55. Schuck, *supra* note 6, at 4.

56. *Id.* at 3–4.

57. Motomura, *supra* note 6, at 549, 566, 577.

tracing the evolution of immigration law to the expansion of equal protection and due process rights recognized in cases like *Brown v. Board of Education* and *Goldberg v. Kelly*.[58]

This explanation no doubt presents normative appeal. The plenary power doctrine has always been difficult to reconcile with the principle announced in *Yick Wo*, extending constitutional protections to citizens and aliens alike.[59] As the Court has stated, the denial of constitutional protections to a category of individuals creates "an underclass present[ing] most difficult problems for a Nation that prides itself on adherence to principles of equality under the law."[60] If Equal Protection and Due Process rights are fundamental and universal, it is difficult to see why they should not apply in the immigration context.

As a descriptive matter, however, the individual-rights account provides at best an incomplete explanation for the shifts in immigration jurisprudence.[61] It is true that modern courts frequently reverse immigration decisions, often failing to even mention the plenary power doctrine.[62] Yet courts continue to invoke plenary power principles to deny noncitizens' claims from time to time. As late as 1977, the Supreme Court in *Fiallo v. Bell*[63] refused to apply ordinary standards of equal protection scrutiny over the government's "double-barreled" discrimination granting preferential immigration status on the basis of sex and illegitimacy, concluding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[64] And as recently as 2015, Justice Kennedy's concurrence in *Kerry v. Din*[65] invoked the plenary power doctrine to reject a due process challenge to the denial of an immigration visa.[66]

Scholars have proposed more limited versions of the individual-rights account to explain why courts are willing to protect noncitizens' rights in some contexts but not others. Some offer a substantive-

58. *See supra* note 6 and accompanying text.

59. *See* Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886).

60. Plyler v. Doe, 457 U.S. 202, 219 (1982).

61. Proponents of the individual-rights theory acknowledge this limitation. *See* Motomura, *supra* note 6, at 549 (identifying "conflicts and contradictions among the cases" that "have frustrated the efforts of courts and commentators to be more precise" about the plenary power doctrine's ongoing relevance); Schuck, *supra* note 6, at 75 ("[T]he transformation of immigration law has significantly increased its indeterminacy . . . .").

62. *See supra* Section I.A.2.

63. 430 U.S. 787 (1977).

64. *Id.* at 792, 794.

65. 135 S. Ct. 2128 (2015).

66. *Id.* at 2139–40 (Kennedy, J., concurring).

procedural distinction in the courts' willingness to recognize individual rights in the immigration context, while others propose an insider-outsider distinction to explain the courts' decisions. Neither of these distinctions, however, provides an entirely satisfactory explanation for the courts' modern immigration jurisprudence.

### 1. Substantive Versus Procedural Rights

One version of the individual-rights thesis suggests that the retreat from plenary power principles has been limited to a judicial willingness to recognize noncitizens' procedural, but not substantive, rights. Under this view, courts have preserved plenary power principles to insulate the government's *substantive* decisions as to which aliens to exclude, detain, or deport; but they have retreated from these principles to impose *procedural* restrictions on how such decisions are made.[67]

This explanation, however, does not map neatly onto the case law. The Court continues to apply plenary power principles even in cases raising only procedural rather than substantive claims. In *Sale v. Haitian Centers Council*,[68] involving the repatriation of migrant Haitians intercepted on the high seas, the plaintiffs asserted no substantive right to be admitted into the United States or resist repatriation to Haiti; they claimed a right only to some sort of procedure to determine whether they fell within the congressionally defined category of individuals who could be admitted or at least not repatriated.[69] Likewise, in *Demore v. Kim*,[70] involving a challenge to the mandatory detention of aliens pending removal proceedings, the plaintiff did not claim that he was substantively entitled to release; he sought only a procedural right to a bond hearing to determine whether release was warranted.[71] Yet in both cases, the Court did not

67. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631–32 (1992) (discussing recognition of "procedural due process" rights in immigration law, which "tries to fill the vacuum in substantive constitutional rights that the plenary power doctrine has created"); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 969–72 (1993) (examining the plenary power doctrine in the face of changing international norms and changing conceptions of sovereignty, including traditional procedural due process conceptions). *See generally* Motomura, *supra* note 6 (analyzing traditional reliance on procedural due process rights in immigration case law).

68. 509 U.S. 155 (1993).

69. *Id.* at 166–67.

70. 538 U.S. 510 (2003).

71. *See id.* at 522–23.

hesitate to apply the plenary power doctrine to deny these limited procedural claims.[72]

At the same time, the Court routinely applies ordinary standards of judicial review in immigration cases asserting substantive claims, thus retreating from plenary power principles. In a string of cases beginning with *Judulang v. Holder*,[73] none of which involved allegations of procedural unfairness, the Court applied ordinary standards of judicial review to reject the government's substantive grounds for deporting the noncitizen.[74] These cases suggest that the procedural versus substantive nature of a noncitizen's claim is an unreliable predictor for whether a court will apply plenary power principles in a given case.

### 2. Insiders Versus Outsiders

Another version of the individual-rights thesis distinguishes between "insiders" and "outsiders" to explain the doctrinal retreat from plenary power principles. Pursuant to this view, the Court has been willing to depart from plenary power principles to recognize the individual rights of noncitizens deemed to fall within an "insider" category. Plenary power continues to apply with full force, however, to deny any individual rights to those deemed "outsiders."[75]

Even within this narrative, the line between insiders and outsiders is subject to debate. Some have interpreted the case law to extend individual-rights protections to "insiders" as defined by their *physical* presence in the United States, while denying such protections to "outsiders" remaining outside our nation's borders; others suggest that the case law defines insider status based on *lawful* presence and that plenary power continues to deny any individual rights not only to aliens outside of our borders but also to undocumented noncitizens within.[76]

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72. *See id.* at 513; *Sale*, 509 U.S. at 187.

73. 565 U.S. 42 (2011).

74. *See id.* at 52–53 (employing ordinary modes of statutory construction to reject removal of alien on basis of criminal conviction); *see also* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017) (same); Mellouli v. Lynch, 135 S. Ct. 1980, 1984 (2015) (same); Moncrieffe v. Holder, 133 S. Ct. 1678, 1693–94 (2013) (same).

75. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 51–53 (2006); Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 378–97 (2013) (discussing the varying approaches taken to cases involving insiders vs. "putative outsiders"); Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 50–52 (2013) (examining the inside/outside distinction).

76. *See* BOSNIAK, *supra* note 75, at 125–26.

Again, however, modern cases do not adhere to such distinctions. In *Demore v. Kim*, the mandatory detention case described above, the claimant would have qualified as an "insider" under any definition of the term, as he was a legal permanent resident who had not yet been adjudicated deportable.[77] Such physical and even lawful presence in the United States imposed no obstacle to the applicability of plenary power principles to deny him the individual rights claimed.[78]

* * *

Contemporary immigration law does not consistently conform to an individual-rights explanation for the decline of plenary power. While the Court discards plenary power principles in favor of noncitizens' interests in some cases, it continues to apply the doctrine in others. Neither a distinction between substantive and procedural rights nor one based on an alien's insider versus outsider status provides a satisfactory explanation for why courts continue to defer to the political branches' immigration decisions in some cases, while exercising robust judicial review in others.

## II. IMMIGRATION LAW THROUGH A NON-DELEGATION LENS

This Part examines immigration jurisprudence from a slightly different perspective, one focused less on individual rights than on constitutional structure. It contextualizes changes in immigration law within a broader trend common across the modern administrative state, in which courts have grown increasingly skeptical toward the scope of discretionary authority exercised by unelected agency officials. The first Section examines the classical era of immigration law from this perspective, showing that courts during this period equated the scope of agencies' immigration power with that of Congress. The second Section analyzes the subsequent expansion of administrative discretion and the threat these developments posed to constitutional non-delegation norms. The third Section recounts how immigration law responded to these developments by subjecting immigration officials to a series of administrative law doctrines

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

78. At the same time, the Supreme Court has retreated from plenary power principles to confer individual legal rights to noncitizens who are "outsiders," at least as defined by lawful rather than physical presence. For example, the claimant in *Negusie v. Holder*, 555 U.S. 511 (2009), was an "outsider" in that he was seeking formal admission into the United States as an asylee, yet the Court applied ordinary standards of judicial review to vacate the government's denial of his application. *See id.* at 514–16. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court applied even closer scrutiny than required under ordinary equal protection analysis to reject the denial of education to the "outsider" group of undocumented aliens. *See id.* at 230.

designed to mitigate delegation concerns. The final Section contends that this account, in which shifts to immigration jurisprudence are largely animated by delegation concerns, helps explain one of the central puzzles in contemporary immigration law—why courts continue to defer to government immigration decisions in some cases but not others.

### A. *The Classical Period: Conflating the Immigration Power of Congress and Agencies*

During the classical era of immigration law, the Supreme Court not only vested *Congress* with the unreviewable power to render immigration decisions, but also extended such power to *administrative* officials as well. When the plenary power doctrine was first announced in *Chae Chan Ping*, it was identified as a power belonging to Congress.[79] Only three years later, however, the Court in *Nishimura Ekiu v. United States*[80] suggested that the delegated immigration authority of administrative officials was as plenary and unreviewable as that of Congress itself.[81] In that case, a noncitizen brought a due process challenge to her exclusion on the ground that she was likely to become a public charge.[82] Importantly, Nishimura did not challenge the *legislative* authority to exclude such noncitizens; rather, her challenge was limited to the *agency's* conclusion that she in fact fell within the legislative category to be excluded.[83] Rejecting that claim, the Supreme Court extended the plenary power doctrine to immunize the administrative finding that a particular individual fell within the legislative category: "As to [foreigners seeking permission to enter the United States], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[84]

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79. The Supreme Court stated:

> If, therefore, the government of the United States, *through its legislative department*, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed .... [I]ts determination is conclusive upon the judiciary.

Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (emphasis added).

80. 142 U.S. 651 (1892).

81. *Id.* at 660.

82. *See id.* at 656.

83. *Id.* at 658.

84. *Id.* at 660.

Significantly, immigration officials during this period enjoyed only limited statutory authority to engage in discretionary decisionmaking.[85] Statutes promulgated during that era circumscribed the power of agency officials, delegating relatively narrow fact-finding authority and specifying a small class of officials authorized to make exclusion decisions.[86] For example, the first statute imposing substantive restrictions on non-citizens' entry into the United States delegated to state customs officials authority to determine whether an arriving alien would be excluded because he or she was a "convict, lunatic, idiot," or likely to become a public charge.[87] Those statutes were consistent with what scholars refer to as the "transmission belt" model of administrative governance that prevailed in the earlier days of our republic.[88] Pursuant to this model, Congress was understood to make all substantive rules, delegating to agencies only limited authority to decide whether a given rule applied to a particular case.[89] During this era, when agency discretion was already strictly circumscribed by statute, the Court was unwilling to impose additional constraints on it.

### *B. Emerging Delegation Concerns in the Modern Administrative State*

As regulatory needs became increasingly complex and technical, however, Congress proved incapable of anticipating, much less resolving, the multitude of issues confronting modern government. Recognizing its limitations, Congress began to delegate increasingly open-ended grants of authority to administrative agencies,[90] "leaving to the relevant agency's discretion major questions of public policy."[91] This Section shows the particularly expansive breadth of policymaking authority vested in our nation's immigration agencies and then analyzes the constitutional harms threatened by such administrative power.

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85. As Gerald Neuman has documented, Congress did not meaningfully restrict immigration into the country until the 1880s. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1834–35 (1993).

86. *See, e.g.*, Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214.

87. *Id.*

88. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001).

89. As then-Professor Elena Kagan noted, "[t]he first generation of the nation's regulatory statutes ... largely followed this model ..., containing detailed and limited grants of authority to administrative bodies." *Id.* at 2255.

90. *See generally* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES (3d ed. 2016) (describing the emergence of the modern regulatory state).

91. Kagan, *supra* note 88, at 2255.

### 1. Discretionary Authority of Immigration Agencies

Nowhere is the administrative exercise of policymaking authority more evident than in the immigration context.[92] As the Supreme Court recently acknowledged, the "broad discretion exercised by immigration officials" constitutes "[a] principal feature" of our immigration system.[93] The Immigration and Nationality Act ("INA") delegates exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy—spread across multiple agencies including the immigration courts and the Board of Immigration Appeals ("BIA") within the Department of Justice, the Bureau of Consular Affairs and Office of Visa Affairs within the State Department, and United States Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security.[94]

Like all agencies, immigration agencies must interpret the governing statute to determine whether a particular provision applies to a given case.[95] In the immigration context, however, the governing statute employs exceptionally broad and ambiguous language.[96] For

92. *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7–13 (2015) (describing the extent of prosecutorial discretion in the immigration system); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751–52 (1997) ("Although administrative discretion permeates many aspects of contemporary U.S. law, its impact in immigration law is exceptional."); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 625–26 (2006) (discussing scope of discretion vested in immigration officials).

93. Arizona v. United States, 132 S. Ct. 2492, 2499 (2012); *see also e.g.*, Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437, 499–504 (2013) (criticizing wide discretion afforded to removal officers); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 709–12 (2014) (discussing scope of executive branch discretion in immigration law); Neuman, *supra* note 92, at 611 (criticizing agency discretion in determining which noncitizens to deport).

94. For a discussion of the respective roles of agency leadership and street-level bureaucrats in developing immigration policy, see Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1187–88 (2016). For an overview of the various agencies involved in the U.S. immigration system, see *id.* at 1190–92; *Immigration Law (U.S.) Research Guide: Federal Agencies*, GEORGETOWN LAW LIBRARY, http://guides.ll.georgetown.edu/c.php?g=273371&p=1824781 [https://perma.cc/U5N4-VEG5] (last updated Apr. 8, 2016) (listing federal agencies with immigration authority).

95. *See* Kanstroom, *supra* note 92, at 759.

96. *See id.* In fact, the Supreme Court is currently considering whether the statutory provision authorizing the removal of noncitizens convicted of a "crime of violence" is unconstitutionally void for vagueness. *See* Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir.

example, the INA precludes the entry of most aliens who have committed "a crime involving moral turpitude" but provides no guidelines for which offenses constitute such crimes.[97] Similarly, it requires an alien to have "good moral character" to qualify for certain visa categories[98] and certain types of relief from removal.[99] The statute lists examples that would preclude a finding of good moral character but explicitly provides that the list is non-exhaustive, leaving agency officials free to conclude that virtually any noncitizen lacks the requisite good moral character.[100]

Moreover, statutory requirements for entry into the United States frequently hinge on the applicant's subjective state of mind, leaving to agencies the discretion to develop indicia for compliance. For example, many temporary visas require the alien to have a "residence in a foreign country which he has no intention of abandoning,"[101] which agency officials determine based on a wide range of factors such as land ownership, financial security, and family relations. Similarly, to determine whether an asylum applicant has the requisite "well-founded fear of persecution" if returned to her homeland,[102] agencies have developed extensive and complex rules to define the types of "persecution" that qualify and determine whether the alien's fear is "well-founded."[103]

The scope of delegated authority vested in immigration agencies exceeds that in other regulatory areas in another respect: numerous

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2015) (quoting 8 U.S.C. § 1101(a)(43)(F) (2015)), *cert. granted*, 137 S. Ct. 31 (2016), *reargued sub nom.*, Sessions v. Dimaya, No. 15-1498 (Oct. 2 2017), https://www.supremecourt.gov/docket/docketfiles/html/public/15-1498.html [https://perma.cc/C3DD-J8KE].

97. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012); *cf. id.* § 1101 (providing definitions for various terms used in the INA but omitting definition of "crime of moral turpitude").

98. *See, e.g., id.* § 1154(a)(1)(A)(iv) (allowing certain noncitizen victims of domestic violence to self-petition for immigrant visa only where they show they have "good moral character"); *id.* § 1259 (providing for legal permanent resident status to certain noncitizens who have resided continuously in the United States since prior to January 1, 1972 upon showing of "good moral character").

99. *See, e.g., id.* § 1229b(b)(1)(B) (requiring "good moral character" as criterion for eligibility for discretionary cancellation of removal and adjustment of status to lawful permanent resident).

100. *Id.* § 1101(f).

101. *See id.* § 1101(a)(15)(B), (F)(i), (H)(ii), (J), (O)(ii)(IV), (P), (Q)(i).

102. *Id.* § 1101(a)(42) (setting forth definition of "refugee"); *id.* § 1158 (setting forth criteria for asylum).

103. *See, e.g.*, M-E-V-G-, 26 I. & N. Dec. 227, 234 (B.I.A. 2014) (interpreting meaning of "particular social group" for purposes of qualification for asylum); T-Z-, 24 I. & N. Dec. 163, 170 (B.I.A. 2007) (interpreting meaning of "persecution" in cases involving economic harm); O-Z-, 22 I. & N. Dec. 23, 26–27 (B.I.A. 1998) (interpreting meaning of "persecution" in context of actions by non-governmental actors).

INA provisions set forth minimum statutory eligibility requirements but then delegate to agencies virtually unfettered discretion to make a decision once those minimum criteria are satisfied. More specifically, the INA explicitly delegates to immigration agencies wide authority to *exclude* aliens who otherwise fall within statutory categories for admission, as well as to *admit* those who otherwise fall within statutory categories for exclusion. For example, section 208 of the INA provides that a noncitizen qualifies for admission as an asylee only if she establishes a "well-founded fear of persecution on account of" one of five protected grounds, among other requirements.[104] Satisfaction of these statutory requirements is insufficient for admission, however, as the asylum applicant must also obtain a favorable exercise of discretion from the immigration agency: a decision subject to no statutory guidelines.[105] On the flip side, section 212(a) sets forth an extensive list of grounds precluding an individual's entry into the United States, such as the commission of certain crimes or the absence of requisite travel documents, but section 212(d) delegates to agency officials discretion to admit, on a temporary non-immigrant basis, virtually any alien who would otherwise be statutorily barred from entering the United States.[106]

Immigration officials enjoy even wider latitude to allow aliens who fall within statutory categories for removal to nonetheless remain in the United States. In 1996, Congress vastly expanded the types of criminal conduct that would render an alien deportable.[107] As a consequence, thousands of noncitizens, including many longtime legal residents, suddenly became deportable.[108] Historically, the only way an alien subject to removal could escape deportation was through the enactment of a private bill in Congress.[109] Since 1940, however, the

104. 8 U.S.C. § 1101(a)(42)(A); *id.* § 1158(b)(1)(A).

105. *Id.* § 1158(b)(1)(A).

106. *See id.* § 1182(a) (setting forth extensive grounds for inadmissibility); *id.* § 1182(d)(3)(A) (granting administrative discretion to waive virtually any ground of inadmissibility for temporary nonimmigrants).

107. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546, at 3009-627 to -628 (codified as amended at 8 U.S.C. 1101(a)(43) (2016)) (expanding definition of "aggravated felony"); *id.* § 350, 110 Stat. at 3009-639 to -640 (codified as amended at 8 U.S.C. 1227(a)(2)(E) (2012)) (adding offenses of domestic violence and stalking as grounds for removal); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274–75 (codified as amended at 8 U.S.C. 1227(a)(2)(A)(i)(II) (2012)) (expanding grounds for removal based on commission of crimes).

108. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 462 (2009).

109. *See* INS v. Chadha, 462 U.S. 919, 933 (1983).

mechanisms for granting relief to an alien otherwise subject to removal have proliferated. The INA today sets forth a wide variety of forms of relief, including "cancellation of removal,"[110] waivers of specific grounds for removal,[111] "stay[s] of removal,"[112] and "parole."[113] Pursuant to these provisions, once an alien establishes minimum threshold eligibility criteria, immigration officers are directed to exercise discretion in determining whether such relief from removal will be awarded.[114] Moreover, such officials enjoy virtually limitless power to determine whether the alien will be detained or released, with or without a bond, pending removal proceedings.[115]

Congress has further expanded the power of immigration agencies by insulating many of their decisions from any form of judicial review.[116] The INA explicitly precludes judicial review over a wide swath of immigration decisions, including those relating to the "expedited removal" of aliens alleged to be inadmissible on grounds of fraud or lack of documentation;[117] those relating to the removal of

110. 8 U.S.C. § 1229b.

111. *See, e.g.*, *id.* § 1182(a)(9)(B)(v) (waiver for inadmissibility based on prior unlawful presence); *id.* § 1182(d)(3) (waiver for nonimmigrant inadmissibility); *id.* § 1182(g) (waiver for inadmissibility based on health-related grounds); *id.* § 1182(h) (waiver of inadmissibility based on commission of certain offenses); *id.* § 1182(i) (waiver of inadmissibility for fraud or misrepresentation); *id.* § 1183 (waiver of inadmissibility based on becoming a public charge); *id.* § 1227(a)(1)(E)(iii) (waiver for deportability based on smuggling of family members); *id.* § 1227(a)(1)(H) (waiver for deportability based on fraud or misrepresentation).

112. *Id.* § 1231(c)(2).

113. *Id.* § 1182(d)(5)(A).

114. *See, e.g.*, *id.* ("The Attorney General may ... in his discretion parole into the United States ... any alien applying for admission to the United States[.]").

115. *Id.* § 1226(a). *But see id.* §§ 1226(c), 1226a (imposing mandatory detention for certain criminal aliens or suspected terrorists). Although the statute provides no guidelines for how detention determinations shall be made, the agencies have concluded that the decision should be based on whether the alien poses a flight risk or a danger to the community. *See* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006). These officials consider a range of factors such as employment history, length of residence in the United States, community ties, and criminal record. *See* Sugay, 17 I. & N. Dec. 637, 638–39 (B.I.A. 1981).

116. *See, e.g.*, 8 U.S.C. §§ 1158(a)(3), 1158(b)(2)(D), 1252(a)(2). The judge-made doctrine of consular nonreviewability has also played a role in insulating immigration agency decisions from external constraints. Pursuant to this doctrine, policies relating to visa denials by overseas consular officers are not subject to judicial review. *See generally* James A.R. Nafziger, *Review of Visa Denials by Consular Officials*, 66 WASH. L. REV. 1 (1991) (describing limits on supervisory review over consular officers); Tatyana E. Delgado, Note, *Leaving the Doctrine of Consular Absolutism Behind*, 24 GEO. IMMIGR. L.J. 55 (2009) (criticizing absence of supervisory and judicial checks on visa decisions).

117. *See* 8 U.S.C. §§ 1252(a)(2)(A), 1225(b)(1)(A)(i) (mandating removal for arriving aliens without sufficient documentation "without further hearing or review" and insulating such actions from judicial review).

aliens based on the commission of past crimes;[118] those designated in the INA as being within the discretion of the Attorney General or Secretary of Homeland Security;[119] and those relating to certain forms of relief from removal.[120] Such insulation from judicial review ensures that agency officials have the final word in defining large swaths of our nation's immigration policy.

Immigration agencies also exercise forms of discretion beyond those delegated by statute, and such decisions are not subject to any form of judicial review. Congress and the courts have not only tolerated these practices, but have endorsed them. First, as in any enforcement context, immigration officials exercise prosecutorial discretion to determine which removal cases to initiate and pursue.[121] As Professors Cox and Rodriguez have noted, the scope of prosecutorial discretion vested in immigration agencies is particularly broad, given that Congress has statutorily mandated the full removal of one-third of all resident noncitizens while providing the immigration agencies with the resources to actually effectuate removal in only four percent of these cases.[122] Second, immigration agencies routinely exercise prosecutorial discretion to grant *affirmative* relief allowing statutorily deportable aliens to remain in the United States through the mechanisms of "administrative

118. *Id.* § 1252(a)(2)(C). The Supreme Court interpreted this provision narrowly to avoid constitutional concerns. INS v. St. Cyr, 533 U.S. 289, 305 (2001).

119. 8 U.S.C. § 1252(a)(2)(B)(ii).

120. *Id.* § 1252(a)(2)(B)(i).

121. *See* WADHIA, *supra* note 92, at 7–13.

122. Cox & Rodriguez, *supra* note 108, at 462–63; *see also* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 26–27 (2014) ("The practical reality of immigration law enforcement is that the federal government tries to remove only a small fraction of the unauthorized migrants in the United States."); Memorandum from John Morton, Dir. of Immigration and Customs Enf't, to all ICE Employees 1 (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [https://perma.cc/5ZYS-D7CM] (noting that then-current funding levels would have allowed the federal government to remove at most four percent of the estimated 12 million undocumented aliens from the United States each year).

The Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), which did not involve immigration, held that administrative exercises of such prosecutorial discretion generally are not subject to judicial review. *Id.* at 837–38 (holding the FDA's refusal to enforce FDCA requirements against states that utilized lethal injection drugs was not judicially reviewable). For examples of the vast body of scholarship criticizing this decision, see Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 856 (1988) (arguing the Heckler decision "demonstrate[d] the Court's rejection of its prior checks and balances approach."); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 653–54 (1985) (casting doubt on the usefulness of the distinction between agency action and inaction and arguing judicial review serves as important constraint on regulation).

closure"[123] and "deferred action."[124] Far from limiting administrative authority, Congress has appeared to approve of such extra-statutory grants of administrative relief.[125] In these ways, the power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.

### 2. Threats to Separation-of-Powers Norms

Administrative exercises of such exceedingly broad discretion, not only in the immigration context but also across the regulatory state, present a significant departure from the separation of powers contemplated by our constitutional framers. Our constitutional text and structure have long been understood to vest the federal lawmaking authority exclusively in an elected Congress,[126] and require this body to submit any proposed legislation to an extensive set of

123. *See* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges, Court Administrators, Attorney Advisors, Judicial Law Clerks, and Immigration Court Staff 3 (Mar. 7, 2013), https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf [https://perma.cc/P8PV-93SM]. Both immigration agencies and federal courts have described administrative closure as a mechanism by which an immigration judge removes a case from the court's active docket. Such relief does not grant the noncitizen any form of lawful status, and prosecutors remain free to reinstate removal proceedings. *See* Lopez-Reyes v. Gonzales, 496 F.3d 20, 21 (1st Cir. 2007) (describing administrative closure); Avetisyan, 25 I. & N. Dec. 688, 692, 695 (B.I.A. 2012); *EOIR Notice Regarding Prosecutorial Discretion and Administrative Closure*, DEP'T. OF JUST., EXEC. OFF. FOR IMMIGR. REV. (July 23, 2012), https://web.archive.org/web/20160319131659/https://www.justice.gov/eoir/fact-sheet-prosecutorial-discretion [https://perma.cc/EC9M-K3UG].

124. Deferred action is an administrative device allowing a variety of low-level enforcement officers in local offices to grant an alien permission to remain and work in the United States, typically for period of one, two, or three years. *See* 8 C.F.R. § 274a.12(c)(14) (2017); *see also* CITIZENSHIP & IMMIGRATION SERVS. OMBUDSMAN, DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS 2 (July 11, 2011), https://www.dhs.gov/sites/default/files/publications/cisomb-combined-dar.pdf [https://perma.cc/EK9S-DD9Y]; DEP'T OF HOMELAND SEC., DELEGATION TO THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES 1 (Mar. 1, 2003), https://www.hsdl.org/?view&did=234775 [https://perma.cc/NZ4U-WDAT] (describing authority to grant deferred action).

125. *See* REAL ID Act of 2005, Pub. L. No 109-13, § 202(c)(2)(B)(viii), 119 Stat. 302, 313 (codified at 49 U.S.C. § 30301 note (Minimum Document Requirements and Issuance Standards for Federal Recognition)) (identifying deferred action status as one of the forms of proof acceptable for federal approval of states' issuance of driver's licenses); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 487 (1999).

126. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States."); *id.* §§ 2–3 (specifying electoral process for membership in House and Senate, respectively); Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

procedures prior to enactment.[127] The non-delegation principle, that Congress may not delegate its lawmaking power to another body, "represent[s] the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[128]

These structural features promote a number of related constitutional norms. First, by vesting the lawmaking power exclusively in a body composed of elected officials, the non-delegation requirement ensures that those who are responsible for enacting federal laws are subject to an electoral check.[129] Second, by requiring all proposed legislation to obtain the approval of a large and varied number of individual actors—a majority of both the House and the Senate, as well as the President (subject, of course, to a supermajority veto override)—this structure mitigates the risk of factionalism, in which the interests of a small group dominate over the interests of the greater public, while at the same time protecting minority interests from majoritarian oppression.[130] Relatedly, these procedures enhance the likelihood that all federal enactments have been subject to extensive public debate and careful deliberation.[131] In these ways, the non-delegation principle serves a constellation of norms relating to democratic accountability, individual fairness, and efficacy. John Manning describes the constitutional goals served by the constitutional lawmaking procedure as follows:

> [I]t makes it more difficult for factions ... to capture the legislative process for private advantage, it promotes caution and restrains momentary passions, it gives special protection to the residents of small states through the states' equal representation in the Senate, and it generally creates a bias in favor of filtering out bad laws by raising the decision costs of passing any law.[132]

Notwithstanding these norms, immigration agencies and, indeed, agencies across the administrative state, routinely exercise exceedingly broad authority to promulgate national policy in

127. *See* U.S. CONST. art. 1, § 7.

128. INS v. Chadha, 462 U.S. 919, 951 (1983).

129. *See* U.S. CONST. art 1, §§ 1–3.

130. *See* Macey, *supra* note 13, at 819.

131. *See* Clark, *supra* note 13, at 1340–42.

132. Manning, *supra* note 13, at 239. For additional discussion of the constitutional norms served by the non-delegation doctrine, see, for example, Clark, *supra* note 13, at 1324; (describing how federal lawmaking procedures protect separation of powers goals); Macey, *supra* note 13, at 819 (describing normative goals of constitutional lawmaking requirements).

circumvention of the lawmaking procedures mandated by the Constitution.

### C. *The Judicial Response*

The Supreme Court has been famously unwilling to enforce non-delegation requirements directly,[133] but as scholars of administrative law have noted, it has developed a series of doctrines to protect non-delegation interests *indirectly*, deploying both constitutional and sub-constitutional frameworks to cabin the delegated discretion of agencies across the administrative state. The application of these doctrines to impose judicial constraints on agency discretion in the *immigration* context represents a sharp departure from the plenary power principles of the classical era, which insulated the political branches' immigration decisions—whether issued by Congress or administrative officials—from judicial review.

#### 1. Constitutional Mechanism to Limit Agency Power

The role that delegation concerns have played in the evolution of immigration law is particularly apparent in the Supreme Court's decision in *INS v. Chadha*,[134] which invalidated the one-house legislative veto.[135] That case challenged the constitutionality of the 1952 Immigration and Nationality Act, which delegated to administrative officials the power to grant discretionary relief from removal to an otherwise deportable alien but allowed that such a decision could be overridden by a majority vote in either the House or the Senate.[136] While the plenary power doctrine would disavow judicial interference with any of the political branches' immigration decisions, the Supreme Court in *Chadha* invalidated the one-house legislative veto on the ground that it violated constitutional lawmaking requirements:

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133. The Supreme Court tolerates the delegation of much discretionary authority to agencies: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). It has found a violation of this exceedingly forgiving standard only twice in its history, both during the height of the New Deal. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating statute delegating authority to create "codes of fair competition"); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935) (invalidating statute delegating authority to regulate transportation of petroleum).

134. 462 U.S. 919 (1983).

135. *See id.* at 954.

136. *Id.* at 923; *see also* Immigration and Nationality Act, Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (1952) (repealed 1996).

> Disagreement with the Attorney General's decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[137]

By enforcing constitutional lawmaking requirements to prevent Congress from overriding an administrative agency's grant of relief, the Supreme Court departed from the plenary power principle precluding judicial interference in immigration matters. In doing so, the majority did not appear particularly concerned about protecting individual rights.[138] Rather, the opinion has been understood as motivated by delegation concerns.[139]

To remedy the statute, the Court severed the one-house veto provision from the remainder of the statute, thus preserving the delegation of agency authority to grant discretionary relief.[140] At first blush, this remedy would appear to *exacerbate* delegation concerns because it results in *more* discretionary authority to the agency than Congress intended. Further consideration shows, however, that *Chadha* in fact promotes non-delegation norms. By striking down the one-house legislative veto, the Court created incentives for future legislators to limit the scope of authority they would be willing to grant to agencies *ex ante* because they would no longer be permitted to override agency decisions *ex post*. As Jonathan Macey explains, "the legislative veto ... made it easier for Congress to effectuate broad, unconstitutional delegations of authority to administrative agencies. Declaring the legislative veto unconstitutional makes it more costly for Congress to make broad delegations of power ...."[141] In this way, *Chadha* may properly be understood to respond to delegation concerns.

2. Sub-Constitutional Mechanisms to Limit Agency Power

The role played by delegation concerns in the evolution of immigration jurisprudence is further evident in cases subjecting

137. *Chadha*, 462 U.S. at 954–55.

138. *Cf. id.* at 966 (Powell, J., concurring) (discussing incursion on judicial power to protect individual rights).

139. *See* Macey, *supra* note 13, at 823.

140. *Chadha*, 462 U.S. at 959.

141. Macey, *supra* note 13, at 825.

immigration decisions to sub-constitutional administrative law rules designed to cabin the growing power of agencies across the regulatory state. Administrative law scholars have shown how various administrative law doctrines serve non-delegation goals by ensuring that agency decisions conform to the norms of political accountability, deliberation, and fairness that the constitutional lawmaking requirements were designed to protect.[142] Far from deferring to immigration decisions under the plenary power principles, courts routinely apply these ordinary administrative law rules to exercise meaningful scrutiny in immigration cases.

a) The Mid-Twentieth Century

During the 1950s, even while the Court in *Knauff* and *Mezei* extended plenary power principles to shield the immigration decisions of agency officials, in two other cases it granted review over, and indeed went on to reverse such decisions. In *Wong Yang Sung v. McGrath*,[143] a noncitizen challenged her removal on the ground that the immigration inspector who ordered her deportation not only adjudicated removals, but also prosecuted them.[144] Sustaining the claim, the Supreme Court held that immigration proceedings were subject to the recently enacted Administrative Procedure Act ("APA"), which prohibited such mixing of prosecutorial and adjudicative functions.[145] Rejecting the government's contention that immigration proceedings are unique, the Supreme Court held they were subject to the same disciplining constraints that the APA imposed on all agencies.[146]

142. *See, e.g.*, Manning, *supra* note 13, at 223–24 (discussing influence of non-delegation norms on doctrines of administrative deference); Metzger, *supra* note 15, at 484 (arguing that non-delegation concerns animate much of contemporary administrative law); Michaels, *supra* note 15, at 520; Stack, *supra* note 15, at 981–82 (discussing non-delegation norms promoted by administrative law doctrine announced in *Chenery I*); Sunstein, *supra* note 15, at 315–16 (identifying canons of statutory construction that substitute for under-enforcement of non-delegation doctrine). Congressional enactment of the Administrative Procedure Act in 1934 was explicitly animated by a desire to develop checks and balances on agency decisionmaking by strengthening provisions for judicial review. *See* Heckler v. Chaney, 470 U.S. 821, 848 (1985) (Marshall, J., concurring) ("[T]he *sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion").

143. 339 U.S. 33 (1950).

144. *Id.* at 35.

145. *Id.* at 35 n.1, 51; *see also* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 702–06 (2016)).

146. *Wong Yang Sung*, 339 U.S. at 53. Congress immediately enacted legislation making clear that deportation proceedings were *not* subject to APA procedural requirements. *See* Marcello v. Bonds, 349 U.S. 302, 306 (1955) (noting congressional

The Court went further in *United States ex rel. Accardi v. Shaughnessy*,[147] vacating a denial of discretionary relief by generating a new judge-made rule, now known as the *Accardi* principle.[148] In that case, the BIA denied Accardi's request for "suspension of deportation," a form of discretionary relief that would have allowed him to remain in the United States notwithstanding his prior unlawful entry.[149] Congress had delegated authority to grant such relief to the Attorney General, who in turn enacted regulations vesting this authority with the BIA.[150] Although the regulations preserved the Attorney General's ultimate discretion to overturn the BIA's decisions, Accardi claimed that the Attorney General violated his own regulations when he identified Accardi on a list of "unsavory characters" circulated to administrative officials while his removal proceedings were pending, precluding the Board's fair and independent consideration of his claim for relief.[151] The Supreme Court agreed, concluding that by promulgating regulations contemplating that the Board would "exercise its own judgment when considering appeals, . . . the Attorney General denie[d] himself the right to sidestep the Board or dictate its decision in any manner."[152] In other words, although the statute delegated to the Attorney General discretion to grant or deny relief, the Attorney General was bound by his own regulations limiting his ability to do so. In *Accardi*, now famous for the foundational principle—generic to administrative law—that an agency is bound by its own discretionary regulations, the Court proved willing to impose limits on administrative immigration decisions beyond those developed by Congress itself.

b) Modern Cases

Today, federal courts routinely employ generally applicable administrative law rules to closely scrutinize, and oftentimes reject, immigration decisions. These modern cases underscore the extent to which concerns about agencies' political accountability, deliberation, rationality, and fairness have supplanted the classical-era notion of immigration exceptionalism. The 2009 decision in *Negusie v.*

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passage of appropriations bill six months after *Wong Yang Sung* to exempt deportation proceedings from APA procedural requirements).

147. 347 U.S. 260 (1954).

148. *Id.* at 268.

149. *Id.* at 261.

150. *Id.* at 262–63.

151. *Id.* at 264.

152. *Id.* at 266–67.

*Holder*,[153] vacating an administrative denial of asylum, is instructive.[154] In that case, the BIA denied asylum to a noncitizen pursuant to a statutory provision disqualifying individuals who "participated in the persecution" of others.[155] The applicant argued that his participation in such persecution was coerced, but the BIA denied relief, relying on judicial precedent interpreting a different statutory provision to conclude that the bar on past persecutors applied even in cases of coercion.[156]

On review, the Supreme Court held that the BIA had relied on the earlier judicial precedent in error.[157] But rather than affirming on other grounds, such as the fact that the agency retained unfettered discretion to deny asylum even to aliens who satisfy the statutory criteria, the Court applied the rule developed in *Securities Exchange Commission v. Chenery* (*Chenery I*)[158] to vacate and remand.[159]

*Chenery I* established the fundamental administrative law principle that a court must evaluate an agency's decision based on the rationales it provided at the time of the decision; it may not sustain a decision that relied on faulty grounds, even if the decision might fully be justified on other grounds.[160] The requirement that an agency supply a contemporaneous reasoned explanation for its decision exerts a powerful disciplinary force on the administrative decisionmaking process.[161] As Kevin Stack has pointed out, *Chenery I*'s prohibition against post-hoc justifications promotes norms of deliberation by requiring agencies to engage in reasoned

153. 555 U.S. 511 (2009).

154. *See id.* at 513–14.

155. *Id.*; *see also* 8 U.S.C. § 1158(b)(2)(A)(i) (2012).

156. *Negusie*, 555 U.S. at 514.

157. *Id.*

158. 318 U.S. 80 (1943).

159. *See Negusie*, 555 U.S. at 522–23.

160. *Chenery I*, 318 U.S. at 87. *Chenery I* involved the SEC's exercise of its delegated authority to reject corporate restructurings that were not "fair and equitable" or were "detrimental to the public interest." *Id.* at 90. The SEC required, as a condition of its approval of one public utility's restructuring proposal, that managing shareholders of the company surrender shares they had purchased during the reorganization. *Id.* at 81. Initially, the SEC justified its decision on the ground that judicial precedent precluded such purchases. *Id.* at 87. By the time the case reached the Supreme Court, however, the SEC conceded that its decision was not mandated by judicial precedent, but nonetheless decided, based on its independent assessment, that such purchases in the course of a restructuring were unfair. *Id.* at 85. The Supreme Court vacated the decision. *Id.* at 90. In doing so, it expressly held that the SEC was entitled to find that the purchases were unfair and thereby reject the restructuring. *Id.* at 91. The problem, however, was that the SEC had not reached such a conclusion at the time it rendered its decision. *Id.* at 94–95.

161. *See* Stack, *supra* note 15, at 996–98.

decisionmaking *before* they promulgate a new policy.[162] Moreover, it promotes norms of accountability by ensuring that the agency's actual rationales for a given policy are "exposed to the public light" and that responsibility for the policy is laid at the feet of the officials who actually made the decision.[163] By imposing requirements for deliberation and accountability on immigration decisions, the Court's application of *Chenery I* to vacate an asylum decision can be understood as an attempt to mitigate the delegation concerns raised by administrative policymaking.

The Supreme Court has been particularly active in employing administrative law rules to exercise review over, and ultimately circumscribe, agency discretion to deport legal permanent residents with criminal convictions,[164] an area in which administrative officials exercise particularly expansive discretion.[165] In *Judulang v. Holder*, the Court applied the doctrine of "hard look" review announced in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[166] to closely scrutinize, and ultimately vacate, the deportation order.[167] In *State Farm*, the Court held that a reviewing court must set aside an agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA[168] any time the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it

162. *See id.*

163. *See id.* at 993–96.

164. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1984 (2015) (rejecting deportation of alien who had hidden pills in a sock); Moncrieffe v. Holder, 133 S. Ct. 1678, 1682 (2013) (reversing BIA conclusion that conviction for "social sharing of a small amount of marijuana" disqualifies deportable alien from discretionary relief); Judulang v. Holder, 565 U.S. 42, 45 (2011); Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010) (vacating BIA decision that second conviction of simple drug possession disqualifies deportable alien from discretionary relief); Lopez v. Gonzales, 549 U.S. 47, 50 (2006) (vacating BIA decision that conviction for aiding and abetting possession of cocaine disqualifies deportable alien from discretionary relief).

165. *See supra* note 118 and accompanying text.

166. 463 U.S. 29 (1983).

167. *Judulang*, 565 U.S. at 52–53; *see also* Jeffrey D. Stein, *Delineating Discretion: How* Judulang *Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 57 (2012) (characterizing *Judulang* as an unremarkable application of ordinary administrative law rules).

168. *State Farm*, 463 U.S. at 29 (quoting 5 U.S.C. § 706(2)(A) (2012)).

> could not be ascribed to a difference in view or the product of agency expertise.[169]

In doing so, the Court imposed a standard of review far less deferential to an agency's substantive policy choice than the "arbitrary and capricious" standard provided by statute. Gillian Metzger has characterized this reduction in deference as reflective of a broader skepticism toward agency decisions, resulting from a "dramatic expansion in regulatory authority" coupled with an "increasing loss of faith in administrative expertise."[170]

The Court echoed these concerns in *Judulang*, applying "hard look" review to reject the BIA's denial of relief under now-repealed section 212(c), which allowed discretionary grants of relief to aliens removable on the basis of certain criminal convictions.[171] Although section 212(c) by its own terms applies only to "excludable" aliens—i.e., aliens who entered the United States without inspection—the Board's longstanding practice was to extend section 212(c) relief as well to "deportable" aliens including longtime legal residents like as Judulang, who became removable after a formal admission.[172]

The statutory categories of crime-based excludability are not identical to those for crime-based deportability, however. To resolve this discrepancy, the BIA adopted a "comparable-grounds" approach, allowing a deportable alien to be eligible for section 212(c) relief only if he or she was charged with a category of crime corresponding with one of the categories of excludable crimes listed in section 212(c).[173] On review, the Court relied on *State Farm* to reject the use of the comparable grounds approach as follows:

> [C]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking.... That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.... The BIA has flunked that test here. By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's

169. *Id.* at 43.

170. Metzger, *supra* note 15, at 491–92.

171. *Judulang*, 565 U.S. at 45–46.

172. *Id.* at 46–47.

173. *Id.* at 49. Judulang's crime, manslaughter, fell within the deportability category of a "crime of violence," and he was charged with removability on this ground. *Id.* at 56. Had he been seeking initial entry, his crime would have been classified as a "crime involving moral turpitude," an excludability ground eligible for section 212(c) relief. *Id.* at 54. But because a "crime of violence" does not correspond with any of the excludability grounds, the BIA concluded he was ineligible for section 212(c) relief. *Id.* at 56.

> fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.[174]

This demand for a better-reasoned decision from the Board departs sharply from the deference to political branches contemplated under plenary power principles.

At the same time, *Judulang* did not go so far as to deny plenary power to *Congress*. On the contrary, the Court emphasized the distinction between the immigration authority of the legislature and that of agencies, stating "the case would be different if Congress had intended § 212(c) relief to depend on the interaction of exclusion grounds and deportation grounds."[175] Emphasizing the heightened risk of arbitrariness inherent in administrative, as opposed to congressional, decisionmaking, the Court observed:

> [U]nderneath this layer of arbitrariness lies yet another, because the outcome of the Board's comparable-grounds analysis itself may rest on the happenstance of an immigration official's charging decision.... So at base everything hangs on the fortuity of an individual official's decision. An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country.[176]

The rigorous scrutiny applied in *Judulang* thus reflects a particular concern about the power of agency officials, even while preserving deference to Congress with respect to immigration decisionmaking.

The Supreme Court has also relied on recent changes to the *Chevron* doctrine to deny deference to decisions to deport legal residents on the basis of criminal convictions. In *Chevron, U.S.A. v. Natural Resources Defense Council*,[177] the Court famously announced its two-step framework for reviewing agencies' interpretations of statutes they are charged with administering.[178] At the first step, courts determine whether Congress has spoken on the issue.[179] If the statutory language is silent or ambiguous, courts proceed to the

174. *Id.* at 53.
175. *Id.* at 56 n.9.
176. *Id.* at 58.
177. 467 U.S. 837 (1984).
178. *See id.* at 842–43.
179. At this first step, courts are directed to employ the "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question at issue." *Id.* at 843 n.9.

second step of the inquiry, in which they must defer to the agency's interpretation so long as it was reasonable.[180]

The *Chevron* doctrine has evolved considerably since it was first announced, however, narrowing the circumstances under which a reviewing court will defer to an agency. In *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[181] the FDA concluded that tobacco products fall within the statutory meaning of "drugs" subject to the agency's regulation.[182] On review, the Court declined to defer to the agency's conclusion that the term "drug" encompassed tobacco products.[183] In doing so, it suggested that, a reviewing court may deny *Chevron* deference to agencies even in cases of statutory ambiguity, where the agency decision would result in a policy change of significant "economic and political magnitude."[184] John Manning has characterized the *Brown & Williamson* decision as "reflect[ing] an evident desire to avoid otherwise serious nondelegation concerns," by ensuring that Congress, rather than an agency, accepted responsibility for important policy decisions.[185] This decision and others denying *Chevron* deference to agencies signal a growing distrust of agency policymaking and corresponding willingness to exercise meaningful judicial scrutiny to constrain it.[186]

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180. *Id.* at 843. *See generally* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (surveying the *Chevron* doctrine in practice).

181. 529 U.S. 120 (2000).

182. *Id.* at 125.

183. *Id.* at 125–26.

184. *Id.* at 133.

185. Manning, *supra* note 13, at 227–28.

186. The Supreme Court retreated further from *Chevron*'s principle of administrative deference in *United States v. Mead Corp.*, 533 U.S. 218 (2001), holding that only formalized agency decisions, such as those made pursuant to formal adjudication or notice-and-comment rulemaking, are entitled to *Chevron* deference; other types of agency decisions are subject to the more exacting judicial scrutiny described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 533 U.S. at 221, 226–27 (providing that agency decision entitled only to level of "respect according to its persuasiveness" (citing *Skidmore*, 323 U.S. 134, 140)). *Mead*, like *Brown & Williamson*, promotes non-delegation norms by offering *Chevron* deference as a reward for agencies employing procedural mechanisms that ensure some degree of public participation and require the agency to engage in extensive deliberation and reason-giving. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 886 (2001) (noting that reserving *Chevron* deference to decisions made pursuant to formal procedures "provides important assurance that interpretations entitled to mandatory deference will be open to public criticism before they are rendered, and agencies will have incentives to be responsive to these criticism"); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 539–40 (2003) (noting that *Mead* promotes consistency and uniformity in decisionmaking); *see also* Michigan v. EPA, 134 S. Ct. 2699,

The Court has employed this gloss on the *Chevron* doctrine in the immigration context to limit agencies' power to deport legal residents on the basis of criminal convictions on several occasions. Just this past term, *Esquivel-Quintana v. Sessions*[187] used this approach to deny *Chevron* deference to the BIA.[188] Esquivel-Quintana had been convicted of statutory rape under California law, which defines the crime as consensual intercourse with a minor who is more than three years younger than the perpetrator.[189] The BIA concluded that such as crime constituted "sexual abuse of a minor" within the meaning of the INA's deportability provisions and accordingly ordered Esquivel-Quintana deported. Vacating that order, the Supreme Court concluded that term "sexual abuse of a minor ... unambiguously" excludes convictions for statutory rape unless the state law under which the alien is convicted limits the definition of that crime to cases involving victims younger than sixteen years old.[190] This willingness to mandate a judicial construction wholly untethered from the statutory text reveals a deep discomfort with the breadth of discretion exercised by agency officials in determining when legal residents can be deported on the basis of criminal convictions.

*Mellouli v. Lynch*[191] presents another example of the Court's willingness to limit the agency's discretion to deport residents on the basis of criminal convictions. Mellouli pled "guilty to a misdemeanor offense under Kansas law," which prohibits the use of drug paraphernalia to store or conceal a controlled substance after he was found hiding four Adderall tablets in his sock.[192] The BIA ordered him removed pursuant to section 237 of the INA, which provides for the deportation of any alien "convicted of a violation of ... any law or regulation of a State ... relating to a controlled substance (as defined in § 802 of Title 21)."[193] The referenced provision, 21 U.S.C. § 802, defines "controlled substance" as including only those drugs listed in one of five federal schedules.[194] The BIA in earlier cases had held that

2707–08 (2015) (purporting to apply *Chevron* deference to agency interpretation of statutory authority to impose "appropriate and necessary" regulations but concluding that interpretation that precludes consideration of cost in regulation unreasonable).

187. 137 S. Ct. 1562 (2017).

188. *Id.* at 1572.

189. *Id.* at 1567.

190. *Id.* at 1572.

191. 135 S. Ct. 1980 (2015).

192. *Id.* at 1983.

193. *See id.* at 1983–84 (first omission in original) (quoting 8 U.S.C. § 1227(a)(2)(B)(i) (2012)).

194. *See* 21 U.S.C. § 802(6) (2012).

conviction under a state law prohibiting drug possession or distribution would trigger deportation under this provision only if the state law was limited to the controlled substances included in the federal definition.[195] It subsequently held, however, that a state law conviction for using drug *paraphernalia* triggered deportation regardless of any correspondence between the state law and federal definitions of a "controlled substance."[196] The definition of "controlled substance" under Kansas law is broader than the federal definition of that term.[197] But because Mellouli had a conviction for drug paraphernalia rather than for possession or distribution, the BIA concluded that the overbreadth of Kansas's definition of "controlled substance" posed no obstacle to his deportability.[198]

On review, the Supreme Court summarily denied *Chevron* deference to the agency's construction of the statute.[199] As in *Esquivel-Quintana*, the Court placed little reliance on the statutory text, rejecting the BIA's interpretation on the ground that it "ma[d]e scant sense," producing the "anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses."[200]

*Mellouli* thus conforms to a larger pattern. Far from extending "plenary" deference to administrative decisions relating to the exclusion, detention, or deportation of aliens, the modern Court has repeatedly applied ordinary administrative law rules to deny any deference at all.

* * *

These cases contextualize the retreat from plenary power principles within a larger administrative law project to constrain the scope of discretion delegated to unelected agency officials. As such, they suggest that contemporary standards of judicial review over immigration cases may owe as much to concerns about administrative power as to any concern for noncitizens' individual rights. Indeed, some of these cases appear to disavow concern for the individual alien's interest altogether by expressly declining to rely on any "immigration rule of lenity," a doctrine directing courts to construe statutes in favor of noncitizens faced with removal.[201]

195. *See, e.g.*, Paulus, 11 I. & N. Dec. 274, 276 (B.I.A. 1965).
196. *See* Martinez Espinoza, 25 I. & N. Dec. 118, 122 (B.I.A. 2009).
197. *See Mellouli*, 135 S. Ct. at 1985.
198. *See id.* at 1988.
199. *Id.* at 1989.
200. *Id.*
201. In 1948, the Court in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), held:

Of course, any given judicial decision may be motivated by a multitude of concerns, and a non-delegation theory need not be mutually exclusive from an individual-rights theory. Rather, it is entirely plausible that concerns relating to both individual rights *and* the expanding scope of agency power have played a role in the retreat from plenary power principles in immigration law. After all, it is not as though the Supreme Court has been entirely blind to the implications of its decisions on non-citizens' rights.[202] In *Judulang*, for example, the Court emphasized the "high stakes for an alien who has long resided in this country" in rejecting the agency's decision.[203] In *Zadvydas*, the Court held that the alien's constitutional due process interests required it to read the detention statute narrowly.[204] And the

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> We resolve the doubts in favor of [the] construction [favoring aliens] because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

*Id.* at 10 (citation omitted). For a discussion of the rule of lenity in the immigration context, see David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 79, 491–94 (2007); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 519–28 (2003).

202. In the distinct but related area of citizenship, the Court has relied more explicitly on an individual-rights theory to reject the government's decisionmaking. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1697–98 (2017) (applying ordinary equal protection analysis to invalidate use of gender classification in determining citizenship based on parentage but distinguishing from cases involving use of such classifications in determining alien admissions).

Even in citizenship cases, however, the Court has expressed concern about the scope of discretionary authority delegated to agency officials. Such concerns were apparent in the majority's recent opinion in *Maslenjak v. United States*, 137 S. Ct. 1918 (2017), involving an individual stripped of citizenship pursuant to a statute allowing for the denaturalization of an individual convicted of procuring naturalization through false statements. *Id.* at 1923–24. Although the agency had interpreted the statute as allowing revocation regardless of the false statement's materiality, the Court unanimously concluded that the statute requires a causal connection between the false statement and the conferral of citizenship. *Id.* at 1925. In reaching this conclusion, Justice Sotomayor's opinion for six Justices expressed particular concern about the breadth of discretionary authority, noting that the government's interpretation "would give prosecutors nearly limitless leverage—and afford newly naturalized Americans precious little security" and concluding that "[t]he defendant in a 1425(a) case should neither benefit nor suffer from a wayward official's deviations from legal requirements." *Id.* at 1927–28.

203. Judulang v. Holder, 565 U.S. 42, 58 (2011).

204. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

Court's decision in *Padilla v. Kentucky*[205] squarely employed an individual-rights analysis to hold that noncitizens are constitutionally entitled to reasonable legal advice regarding the immigration consequences of criminal convictions.[206] Nonetheless, understanding the Court's retreat from plenary power as driven at least in part by delegation concerns helps explain one of the central puzzles in contemporary immigration law—why courts defer to immigration decisions in some cases but not others.

### *D. Explaining the Persistence of Plenary Power*

A retreat from plenary power principles rooted in delegation concerns suggests that courts have not necessarily rejected the plenary power doctrine outright but have instead concluded that such authority is not freely delegable to unelected agency officials. This understanding helps resolve a number of seeming inconsistencies in contemporary immigration law. In a variety of contexts, courts have retreated from plenary power principles to reject certain types of decisions made by an immigration agency. Yet they have extended plenary deference to similar types of decisions when made directly by Congress or even the President. It is important to note here that the Supreme Court has stated that, unlike in ordinary domestic regulatory contexts, both the President and Congress share inherent authority to regulate immigration, that is, presidential authority over immigration is not limited to that delegated by Congress.[207] The principle that both Congress and the President retain plenary power to regulate immigration, but that neither may delegate this unfettered discretion to agency officials, helps explain apparent contradictions in immigration cases involving immigrant detention, sexual orientation, procedural rights, and national origin discrimination.

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205. 559 U.S. 356 (2010).

206. *See id.* at 366. Even *Padilla*, arguably the strongest support for the conventional individual-rights thesis, may be understood in part as a response to a shift in the locus of immigration decisionmaking authority away from the judiciary in favor of administrative officials. Historically, sentencing judges in criminal courts exercised authority to issue "judicial recommendations against deportation," binding on the nation's immigration agencies. *Id.* at 361–62. But then Congress circumscribed this provision in 1952 and eliminated it altogether in 1990, so that today, immigration officials rather than criminal judges exercise exclusive authority to determine the immigration consequences of any criminal conviction. *Id.* at 363–64. The *Padilla* majority's emphasis on these statutory changes suggests that the decision was at least partly motivated by a desire to reassert judicial control over deportation decisions. *See id.* at 361–64.

207. *See* Kim, *supra* note 93, at 711.

### 1. Immigrant Detention

The non-delegation theory clarifies the ongoing vitality of plenary power principles in determining the scope of review over immigrant detention. In *Zadvydas v. Davis*, the Supreme Court discarded plenary power principles to invalidate the indefinite detention of aliens.[208] Yet only two years later in *Demore v. Kim*, the Supreme Court applied plenary power to sustain the mandatory detention of aliens.[209] The key to understanding the invocation of plenary power principles in *Kim* but not in *Zadvydas* lies in the identity of the institutional actor making the detention decision. In *Zadvydas*, the detention decision required the intervening discretionary judgment of an unelected agency official, while in *Kim*, the decision was made by Congress directly.[210]

In *Zadvydas*, the Court reviewed a due process challenge brought by an alien who had been adjudicated deportable but remained in detention because no other country was willing to accept him.[211] Congress delegated to the agency the authority to detain an individual beyond the 90-day period in which removal is typically effectuated.[212] In light of the "serious constitutional concerns" implicated by an alien's indefinite detention, however, the Court imposed a presumptive six-month limitation to such detention, a remedy wholly untethered from the statutory text.[213] In doing so, the Court emphasized, "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[214] In this manner, the Court underscored the need for constraints on administrative exercises of delegated discretion.

In *Demore v. Kim*, respondent raised a due process challenge to a different detention provision, also enacted in 1996, which mandated detention without bail for certain aliens pending their removal proceedings.[215] Rejecting the challenge, the Court applied the plenary power doctrine, affirming that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules

208. *See Zadvydas*, 533 U.S. at 682.
209. *See* Demore v. Kim, 538 U.S. 510, 516 (2003).
210. *See id.* at 513; *Zadvydas*, 533 U.S. at 683.
211. *Zadvydas*, 533 U.S. at 684–85.
212. *See id.* at 682, 701.
213. *See id.* at 692.
214. *Id.* (quoting Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 450 (1985)).
215. *See Kim*, 538 U.S. at 513–14.

that would be unacceptable if applied to citizens."[216] Unlike in *Zadvydas*, the detention decision in *Kim* originated directly from Congress; indeed, Congress added the mandatory detention provision to eliminate the discretion of administrative officials to release aliens on bail pending their removal proceedings.[217] Where the detention decision stemmed from Congress rather than agency officials, the Court applied the plenary power doctrine to sustain the detention.

### 2. Sexual Orientation

The non-delegation theory of plenary power similarly helps explain a pair of earlier cases involving the deportation of noncitizens on the basis of sexual orientation. In both *Rosenberg v. Fleuti*[218] and *Boutilier v. INS*,[219] a statutory provision barring any alien "afflicted with a psychopathic personality" had been applied to exclude gay men from the United States.[220] The Court rejected the alien's exclusion in *Fleuti* but four years later sustained it in *Boutilier*.[221] A focus on delegation concerns helps resolve this apparent inconsistency.

In *Fleuti*, where the application of the statutory provision depended on the discretionary judgment of an agency official, the Court intervened. Fleuti was admitted as a legal permanent resident into the United States before the "psychopathic personality" provision came into effect.[222] The terms of the statute denied "entry" to covered individuals but did not affect aliens already within the United States.[223] Years later Fleuti crossed the Mexican border for a brief trip of "about a couple hours."[224] On his return, agency officials concluded that he was seeking "entry" into the United States and applied the newly enacted bar to exclude him.[225] The Supreme Court rejected the exclusion, holding that the agency improperly applied the statute to Fleuti because a legal resident returning to the United States after "an innocent, casual, and brief" trip abroad is not deemed to be seeking "entry" within the meaning of the statute.[226]

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216. *Id.* at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).
217. *See id.* at 520–21.
218. 374 U.S. 449 (1963).
219. 387 U.S. 118 (1967).
220. *Id.* at 118 (quoting 8 U.S.C. § 1182(a)(4) (1964)); *Fleuti*, 374 U.S. at 450–51 (same).
221. *See Boutilier*, 387 U.S. at 119; *Fleuti*, 374 U.S. at 463.
222. *Fleuti*, 374 U.S. at 453.
223. *Id.* at 452–53.
224. *Id.* at 450.
225. *See id.* at 450, 452.
226. *Id.* at 462.

Four years later in *Boutilier*, however, where the exclusion decision was directed by Congress itself, the Court adhered to plenary power principles to sustain it. Unlike Fleuti, Boutilier's initial entry into the United States clearly post-dated the enactment of the new entry restriction.[227] He argued, however, that the excludability bar was void for vagueness as applied to him.[228] Rejecting the challenge, the Court noted that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that Congress intended the phrase 'psychopathic personality' to include homosexuals such as petitioner."[229] Squarely confronted with the question of *Congress*'s power to exclude aliens on the basis of sexual orientation, the Court proved unwilling to delimit it.[230] These comparisons of cases demonstrate that while the Court may impose meaningful judicial constraints on the immigration decisions of federal agencies, it is far less willing to do so with respect to decisions by Congress.

### 3. Procedural Rights of Refugees

Inconsistencies in the procedural rights afforded to refugees can also be understood when viewed from a non-delegation perspective. In accordance with international treaty obligations,[231] Congress enacted what is known as the "withholding of removal" provision in the Refugee Act of 1980 which provided: "The Attorney General shall not deport or return any alien ... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[232] Grants of withholding, unlike grants of asylum, are not discretionary;

227. Boutilier v. INS, 387 U.S. 118, 118–19 (1967).

228. *Id.* at 120

229. *See id.*

230. *See id.* at 123–24.

231. *See* Protocol Relating to the Status of Refugees arts. 1, 33, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

232. Refugee Act of 1980, Pub. L. No. 96-212, sec. 203(e), §243(h)(1), 94 Stat. 102, 107 (repealed 1996). A substantially similar provision was enacted at the time of repeal. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 305(a)(3) § 241(b)(3)(A), 110 Stat. 3009-546, at 3009-602 (codified at 8 U.S.C. § 1231(b)(3)(A) (2012)) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

an individual who satisfies the threshold showing is *legally entitled* to withholding.[233]

Lower courts have repeatedly rejected attempts by administrative agencies to deny procedural protections to noncitizens pursuant to this provision. In *Maldonado-Perez v. INS*,[234] the Court of Appeals for the District of Columbia held that a noncitizen is legally entitled to an evidentiary hearing to show that repatriation would threaten his or her life or freedom.[235] The Second Circuit went further in *Augustin v. Sava*[236] to vest aliens with a right to translation services during such hearings.[237] And in *Selgeka v. Carroll*,[238] the Fourth Circuit rejected the agency's attempt to provide stowaways with only an informal interview before an INS officer as opposed to a full hearing before an Immigration Judge.[239]

Yet, the Supreme Court has denied any such procedural protections where repatriation without hearing was ordered by the President himself. *Sale v. Haitian Centers Council*, discussed in Section I.B.1, was decided in the context of a humanitarian crisis beginning in the 1970s, in which political and economic turmoil in Haiti caused tens of thousands to flee for the United States, often on unseaworthy vessels.[240] Although many had valid claims for withholding of removal, the sheer volume of migrants exceeded the government's capacity to process their claims.[241] In response, President Bush issued an Executive Order directing the Coast Guard to forcibly repatriate migrants found on the high seas without any process for screening aliens for valid claims of persecution.[242] Deferring to the President's decision to deny procedural protections for withholding claims, the Court stated: "We cannot say that the interdiction program created by the President ... usurped authority that Congress had delegated to, or implicated responsibilities that it had imposed on, the Attorney General alone."[243] The President,

233. *Compare* 8 U.S.C. § 1231(b)(3)(A) (2012) (withholding provision), *with id.* § 1158(b)(1)(A) (asylum provision). In *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), the Supreme Court held that withholding of removal requires the noncitizen to establish a higher likelihood of persecution than asylum. *Id.* at 429.

234. 865 F.2d 328 (D.C. Cir. 1989).

235. *Id.* at 332.

236. 735 F.2d 32 (2d Cir. 1984).

237. *Id.* at 37.

238. 184 F.3d 337 (4th Cir. 1999).

239. *Id.* at 345.

240. Sale v. Haitian Ctrs. Council, 509 U.S. 155,160–64 (1993)

241. *Id.* at 163.

242. *Id.* at 164.

243. *Id.* at 172.

exercising inherent authority to regulate immigration rather than power delegated by Congress, was thus free to deny even the truncated hearings that agencies were judicially mandated to provide.[244]

### 4. Nationality Classifications

Distinctions based on nationality present particularly thorny questions in immigration law. Such distinctions are presumed to be invidious and thus impermissible in almost every other context.[245] Yet they arguably inhere in the very notion of an immigration system, premised as it is on a distinction between United States citizens versus noncitizens. Moreover, nationality distinctions among non-U.S. citizens are deeply rooted in historical practice, evident not only in the Chinese Exclusion Acts, but indeed the preceding laws implementing an immigration policy *favoring* Chinese immigrants, as negotiated through a bilateral treaty with the Emperor of China.[246]

Even today, nationality classifications are pervasive in our immigration system. For example, the visa waiver program allows nationals of some countries to visit the United States without first obtaining a visa, while requiring nationals of other countries to apply for a visa at a U.S. consular office before traveling to the United States.[247] Uniform per-country ceiling limits on immigrant admissions require nationals of Mexico or the Philippines to wait ten to fourteen years longer than applicants from other countries for certain categories of visas.[248] The Supreme Court has not definitively ruled on

244. *Sale* differed from the other cases involving withholding procedures in another important respect: the claimants in *Sale* never reached the territorial United States. *Id.* at 162–63. The extraterritorial nature of the claim as well as the identity of the decisionmaker—the President rather than agency officials—virtually ensured the Court's refusal to intervene. *See id.* at 188.

245. *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (noting that "the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" (footnotes omitted)).

246. *See* Additional Articles to the Treaty Between the United States of America and the Ta-Tsing Empire (Burlingame Treaty), China-U.S., art. V, July 28, 1868, 16 Stat. 739.

247. *See* 8 U.S.C. § 1187(a), (c) (2012). The program currently exempts nationals of thirty-eight countries from visa requirements. *Visa Waiver Program*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html [https://perma.cc/6SHP-DT3X]. In addition, nationals of Canada and Mexico may enter the United States without a visa. 8 C.F.R. § 212.6(a), (b) (2017).

248. Pursuant to the per-country visa ceiling limits imposed by section 202 of the INA, an applicant from Mexico can wait fourteen years longer than other applicants for the same type of visa; another type of visa requires Filipinos to wait ten years longer than other applicants. *See, e.g.*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, VISA

the constitutionality of nationality classifications in immigration law since the Chinese Exclusion era. In modern times, the permissibility of such distinctions, presumed to be invidious in other contexts, has been unclear. Courts appear to be struggling with the circumstances under which distinctions on the basis of nationality should be tolerated in immigration law. Nonetheless, the non-delegation theory underscores one important variable influencing judicial willingness to tolerate such classifications: the identity of the government actor.

Courts have generally been skeptical toward the use of nationality classifications where they are a result of an administrative exercise of delegated power. The Supreme Court's decision in *Jean v. Nelson*,[249] while declining to issue a direct constitutional ruling, suggested a deep reluctance to vest agencies with plenary power to discriminate on this basis.[250] That case involved the INS's exercise of delegated discretion to grant parole to aliens arriving into the United States who would otherwise be subject to detention pending removal proceedings.[251] Although the agency historically opted in favor of granting parole to aliens arriving on our nation's shores without documentation, it changed course in 1981 in response to the influx of Haitian and Cuban migrants sailing to South Florida, implementing a new policy of detaining rather than releasing such aliens.[252]

In *Jean*, a group of Black Haitian migrants challenged the new policy, alleging that it discriminated against them on the basis of race and nationality.[253] The lower court rejected this claim, reasoning that "the grant of discretionary authority to the Attorney General ...

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BULLETIN 2 (Nov. 2016) https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_November2016.pdf [https://perma.cc/F8WZ-D5HV] The wait-times for each visa category, by nationality, are provided on a monthly basis by the State Department. *See Visa Bulletin*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html [https://perma.cc/B7TJ-FN4X]; *see also* 8 U.S.C. § 1152(a)(2) (allowing per-country visa quotas).

249. 472 U.S. 846 (1985).

250. *Id.* at 857.

251. *Id.* at 848 ("[INA section 212] authorizes the Attorney General 'in his discretion' to parole into the United States any such alien applying for admission 'under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest.'" (quoting 8 U.S.C. § 1182(d)(5)(A)(1982)).

252. *See id.* at 848–49.

253. The Court appeared to use the terms "nationality" and "national-origin" interchangeably. *See id.* at 856–57. *But see id.* at 863–64 (Marshall, J., dissenting) (noting distinction between national origin and nationality). *See generally* Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection 20 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 247 (2010) (using term "nationality to include two concepts: the first refers to one's country of birth or of current citizenship. The second refers to one's national or ethnic origins, regardless of citizenship.").

permit[s] the Executive to discriminate on the basis of national origin in making parole decisions."[254] On appeal, however, the Supreme Court reversed, concluding that the lower court improperly reached the constitutional question.[255] Instead, it employed the doctrine of constitutional avoidance to impose a textually untethered limit to discretionary grants of parole, concluding that both the relevant statute as well as the Attorney General's regulations prohibited considerations of race or nationality in parole determinations.[256] It concluded:

> This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes . . . and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.[257]

This decision is noteworthy for several reasons. First, the Court imposed a textually unsupported limit to a broad delegation of statutory authority, concluding that Congress had not intended to allow lower-level agency officials to exercise such authority in a discriminatory manner. Second, the decision was careful to distinguish the scope of discretionary authority delegated to these lower-level officials from that of Congress and the President, declining to issue a ruling that would limit the plenary power vested in these constitutional heads of the political branches. In this way, *Jean v. Nelson* appears more concerned with the delegation of power to "politically unresponsive" agency officials than with the premise of plenary power principles more generally.[258]

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254. *Jean*, 472 U.S. at 852.

255. *Id.* at 854–55.

256. *Id.*; *see also id.* at 862–64 (Marshall, J., dissenting) (parsing statutory text to conclude that it does not preclude agency from considering race or national origin in parole decisions).

257. *Id.* at 853 (majority opinion).

258. *Id.*; *see also* Orhorhaghe v. INS, 38 F.3d 488, 499 (9th Cir. 1994) (invalidating INS officer's decision to target aliens with Nigerian surnames); Olsen v. Albright, 990 F. Supp. 31, 38–39 (D.D.C. 1997) (rejecting consular policy of applying closer scrutiny to visa applicants from certain nations). *But see* Maldonado v. Holder, 763 F.3d 155, 162 (2d Cir. 2014) (holding in dicta that ICE officials were permitted to target particular nationalities). In *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995) the D.C. Circuit concluded that a statutory prohibition against nationality discrimination precluded the State Department from singling out Vietnamese applicants in this manner. *Id.* at 473–74. After Congress intervened, however, amending the relevant statute to expressly provide that "[n]othing in this section shall be construed to limit the

Consistent with this approach, lower court decisions continue to defer to the plenary power of *Congress* to employ nationality classifications in immigration law. The Fourth Circuit decision in *Appiah v. INS*,[259] upholding provisions of the Nicaraguan Adjustment and Central American Relief Act granting preferential treatment to nationals of Guatemala, El Salvador, and former Soviet bloc nations seeking relief from removal, is typical: "Although these provisions differentiate among aliens based on national origin, strict scrutiny does not apply here because Congress can favor some nationalities over others in immigration law."[260] Similarly, the Fifth Circuit in *Rodriguez-Silva v. INS*[261] observed:

> Due process does not require Congress to grant aliens from all nations the same chances for admission to or remaining within the United States. Congress may permissibly set immigration criteria that are sensitive to an alien's nationality or place of origin. It is not for this Court to question Congress's decisions on such matters.[262]

Courts have been unwilling to intervene in such decisions, deferring to the plenary power of Congress to regulate immigration.

Likewise, courts have deferred to nationality classifications employed by the President himself.[263] In *Narenji v. Civiletti*,[264] the

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authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed," the D.C. Circuit upheld the discriminatory treatment. Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, 104 F.3d 1349, 1351 (D.C. Cir. 1997) (quoting 8 U.S.C. 1152(a)(1) (2012)).

259. 202 F.3d 704 (4th Cir. 2000).

260. *Id.* at 710. Under the challenged provisions, individuals from the identified nations would not be subject to the "stop-time" provisions for determining whether they met the minimum time requirements for physical presence and residence. *Id.* at 706.

261. 242 F.3d 243 (5th Cir. 2001).

262. *Id.* at 248; *see also* Sad v. INS, 246 F.3d 811, 822 (6th Cir. 2001) (stating that "Congress may favor some nationalities over others when enacting immigration laws" and such decisions are subject to a "standard even more deferential than rational-basis review").

263. For assessments of the relationship between the President and administrative agencies, see generally Bressman, *supra* note 186, at 515 (criticizing presidential control over agencies for compromising good governance norms); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (challenging notion that president should control agencies on political accountability grounds); Kagan, *supra* note 88 (celebrating presidential control over agency decisionmaking); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009) (arguing that presidential interference in agency decisionmaking subverts transparency and accountability); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1402–03 (2013) (warning of risk that politics will completely eclipse norms of deliberation in the modern

Court of Appeals for the District of Columbia Circuit applied the plenary power doctrine to reject an equal protection challenge to a regulation targeting Iranian nationals for special reporting requirements.[265] In doing so, the court emphasized that the regulation had been promulgated at the direction of the President: "the present controversy involving Iranian students in the United States lies in the field of our country's foreign affairs and implicates matters over which the President has direct constitutional authority."[266] Given the President's personal imprimatur on the policy,[267] the court declined to restrain the explicit targeting of Iranian nationals.[268]

A series of cases sustaining the post-9/11 "special registration" program departs somewhat from the general pattern, exhibiting a willingness to extend plenary power principles to cabinet-level officials directly below the President. Shortly after the 9/11 terrorist attacks, the Attorney General personally announced a program requiring categories of aliens from a list of predominantly Muslim nations to report to immigration officials for fingerprinting and interrogation.[269] Although this program, unlike the one at issue in *Narenji*, did not bear the President's personal imprimatur, every circuit court to review the special registration program sustained it.[270] It may be that courts are willing to treat the Attorney General, a "principal officer" appointed by and serving at the pleasure of the President, as the functional equivalent of the President for purposes of assessing the scope of this official's immigration authority.[271] The

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administrative state); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 968 (1997) (expressing concern that presidential control over rulemaking erodes balance between law and politics); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016) (describing ways in which administrative law tools can be used to temper presidential control).

264. 617 F.2d 745 (D.C. Cir. 1979).

265. *Id* at 748.

266. *Id.*

267. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65, 728 (Nov. 14, 1979).

268. *See Narenji*, 617 F.2d at 748.

269. *See* Press Release, Dep't of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), https://www.justice.gov/archive/opa/pr/2002/August/02_ag_466.htm [https://perma.cc/C8FY-GCX2].

270. *See, e.g.*, Rajah v. Mukasey, 544 F.3d 427, 432–34 (2d Cir. 2008); Kandamar v. Gonzales, 464 F.3d 65, 73–74 (1st Cir. 2006); Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006); Ali v. Gonzales, 440 F.3d 678, 681 (5th Cir. 2006).

271. *But see* Texas v. United States, 86 F. Supp.3d 591, 606–07 (S.D. Tex. 2015) (applying ordinary administrative law principles to closely scrutinize immigration policy, emphasizing that decision was made by the Secretary of Homeland Security rather than the President himself), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

Second Circuit's opinion in *Rajah v. Mukasey*[272] supports this view, emphasizing the proximity of the Attorney General to the President even while acknowledging that judicial intervention would be appropriate had the policy targeting particular nationalities been made at a lower level of the executive branch.[273] The special registration cases thus suggest that the plenary power doctrine may extend not only to shield immigration decisions of Congress and the President, but also those made by cabinet-level officials directly below the President. At the same time, they also confirm a reluctance to extend plenary power principles further, to reach lower level agency officials.

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The continued judicial willingness to defer to the immigration decisions of Congress and the President even while denying such deference to lower-level administrative officials suggests that courts have not necessarily rejected plenary power principles outright, but concluded that such unreviewable power cannot be delegated to agency officials.

The Supreme Court may provide more clarity on this issue in connection with litigation challenges to President Trump's efforts to exclude noncitizens solely on the basis of nationality.[274] The Court had granted certiorari to review the validity of an earlier Executive Order imposing such an exclusion,[275] but that Order has since expired and been replaced by a new Proclamation, issued in September 2017.[276] As this Article goes to press, challenges to the Proclamation are working their way through the lower courts and are likely to present the Supreme Court with another opportunity to address the scope of judicial review over presidential immigration decisions.[277]

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272. 544 F.3d 427 (2d Cir. 2008).

273. *See id.* at 434–36 ("If the Program was in fact simply rogue conduct by immigration authorities, some remedy . . . would be called for.").

274. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)).

275. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (granting certiorari and consolidating *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (en banc) (4th Cir. 2017) and *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017)), *vacated and remanded*, Trump v. Hawaii, __ S. Ct. __, 2017 WL 4782860, (Oct. 24, 2017) (mem.), *dismissed as moot*, __ F.3d __, 2017 WL 5034677 (9th Cir. Nov. 2, 2017) and Trump v. Int'l Refugee Assistance Project, __ S. Ct. __, 2017 WL 4518553, (Oct. 10, 2017) (mem.), *dismissed as moot*, No. 17-1351 (4th Cir. Nov. 20, 2017).

276. *See* Proclamation No. 9645, 82 Fed. Reg. at 45,165–68.

277. *See* Hawaii v. Trump, No. 17–00050, 2017 WL 4639560, at *1 (D. Hawaii, Oct. 17, 2017); Int'l Regugee Assistance Project v. Trump, Civil Action No. 17-0361, 2017 WL 4674314, at *10 (D. Md. Oct. 17, 2017).

## III. A NORMATIVE ASSESSMENT OF A NON-DELEGATION THEORY OF PLENARY POWER

The preceding Part developed a non-delegation theory for the doctrinal retreat from plenary power principles, suggesting that courts have not necessarily rejected the notion of plenary power outright, but rather concluded that such power is not freely delegable to agency officials. This Part presents a normative assessment of this approach. It begins by defending judicial scrutiny over administrative immigration decisions as consistent with the plenary power doctrine's theoretical underpinnings. It continues, however, by critiquing the continued vitality of plenary power under the non-delegation theory. A retreat from plenary power principles rooted primarily in delegation concerns falls short of the ultimate goal of recognizing full constitutional protections to noncitizens because it fails to constrain the power of Congress and the President. And even where the relevant decisionmaker is an administrative officer, a non-delegation theory of plenary power may be as likely to reject agency decisions *favorable* to noncitizens' interests as those that harm them.

### *A. Defending the Denial of Plenary Power to Agency Officials*

The denial of deference to administrative immigration decisions is defensible on the plenary power doctrine's own terms. Courts have offered a number of rationales for vesting an unreviewable power to regulate immigration with the political branches. The most compelling of these are based on notions of democratic self-determination and the need for a uniform immigration policy, but neither justifies extending such power to unelected administrative officials.

The theory of plenary power—that unelected courts must defer to the immigration decisions of the political branches—rests primarily on a notion of democratic self-determination. In *Chae Chan Ping*, the Court emphasized the "undoubted right" of "[e]very society ... to determine who shall compose its members,"[278] apparently concluding that the polity, as represented by the political branches, must be free to define the terms of its membership without judicial interference.[279] Whatever the merits of this claim as applied to decisions of politically

278. Chae Chan Ping v. United States, 130 U.S. 581, 607 (1889).

279. *See id.* at 609 (stating that the decisions relating to the exclusion of noncitizens "are not questions for judicial determination. If there be any just ground of complaint ..., it must be made to the political department of our government, which is alone competent to act upon the subject").

representative bodies, it is unpersuasive as applied to the decisions of unelected agency officials. Legislative and even presidential decisions reflect the will of the electorate in a way that lower-level agency decisions simply do not.

A second rationale that has been used to defend the plenary power doctrine is the need for a uniform policy toward foreign nations and their citizens. As the Court in *Chae Chan Ping* put it, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[280] Judicial intervention in immigration decisions, it has been argued, would compromise sensitive foreign relations and our nation's ability to speak with one voice.[281] Again, this rationale translates poorly to agency decisionmaking. The decisions of Congress and the President, constitutionally vested with authority to regulate foreign relations, are more likely to cohere as a national uniform policy as compared to the decisions of various states or federal courts. The same cannot be said, however, of the granular decisions of low-level immigration officials. The diffusion of authority across our nation's vast and sprawling immigration bureaucracy precludes any claim that vesting plenary power in agencies will improve uniformity.

There are, of course, valid reasons for courts to defer to agencies as a general matter, including expedience, efficiency, and administrative expertise.[282] But claims that low-level agency officials should be entrusted to exercise powers inherent in sovereignty, should engage in sensitive foreign relations, or would be likely to develop a uniform national policy, are not among them. The realization that there is simply no reason to carve out immigration officials from the legal rules generally applicable to the larger administrative state comes as a welcome development.

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280. *Id.* at 606.

281. *See id.* ("If the government of [a foreign] country ... is dissatisfied with [immigration decisions] it can make complaint to the executive head of our government ...; and there lies its only remedy.).

282. For a defense of these values over electoral accountability, see Bressman, *supra* note 186, at 516–18 (arguing that attempts to justify administrative legitimacy have focused too much on political accountability at the expense of concerns regarding agency arbitrariness); Criddle, *supra* note 263, at 470–78 (promoting view of administrative legitimacy based on norms of deliberation and reasonableness rather than exclusively based on electoral accountability); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 65–67 (2008) (characterizing recent administrative law decisions as "expertise-forcing," reflecting judicial disenchantment with politicization of administrative decisionmaking).

### B. *Shortcomings of the Non-Delegation Theory*

For the many who hoped that the shifts in immigration law would ultimately lead to the recognition of full constitutional protections for noncitizens, however, the non-delegation theory of plenary power does not go nearly far enough. First, it continues to deny meaningful judicial review when Congress or the President violates noncitizens' rights. Second, although courts may exercise robust review over the decisions of agency officials, such review may be as likely to reverse immigration decisions that *protect* aliens' interests as those that harm them.

#### 1. Failure to Protect Against Congress and the President

The non-delegation theory of plenary power continues to shield immigration decisions rendered directly by Congress or the President from meaningful judicial review. These institutional actors remain free to exclude, detain, and deport aliens, regardless of the extent to which such decisions violate other constitutional norms. And, while the vast majority of immigration decisions are made by agency officials and thus remain subject to judicial review, Congress and the President have been responsible for some of our nation's most troubling immigration policies.

President Trump's actions during his first year in office underscore the importance of this distinction. Through a series of executive orders, President Trump has promulgated a number of policies posing grave threats to noncitizens' interests. The "travel ban," prohibiting the entry of nationals from particular countries, is the most prominent among these.[283] Other provisions, which have received far less public attention, include the scaling back of procedural protections for noncitizens accused of deportability and expansion of policies to detain noncitizens without a bond hearing pending removal proceedings.[284]

It is true that the lower court decisions in the travel ban cases suggest a willingness to impose judicial checks on the President's immigration power. In those cases, courts have held that individual-rights concerns preclude even the President from making immigration decisions based on religion or arbitrary nationality classifications.[285]

283. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), and prohibiting entry).

284. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

285. Lower court decisions reviewing the first version of the travel ban include *Washington v. Trump*, 847 F.3d 1151, 1164–66 (9th Cir. 2017); *Aziz v. Trump*, 234 F. Supp.

Those decisions, however, relied on explicit statements made by President Trump himself expressing an intent to exclude all Muslims on terrorism grounds.[286] It is not at all clear that courts will be willing to constrain the President's immigration power in cases without direct evidence of animus.

We have yet to see whether courts will be similarly willing to constrain the President's authority to limit procedural protections for noncitizens charged with removability or expand the detention of noncitizens without a bond hearing pending deportation proceedings, for example. Contemporary immigration jurisprudence suggests that they will not. In these ways, the non-delegation theory falls short of the ultimate goal of protecting noncitizens' rights.

2. Close Judicial Scrutiny Regardless of Immigrants' Interests

Finally, even when a given immigration decision is made by an agency official, the denial of plenary power to such decisions pursuant to the non-delegation theory will not necessarily coincide with noncitizens' interests. That is, close judicial scrutiny may be as likely to reverse an agency decision *protecting* noncitizens as those harming them.

To be sure, most cases denying plenary power to agency officials have ultimately ruled in favor of noncitizens' interests. But that coincidence may be due to the structure of immigration decisionmaking. Most immigration cases litigated in federal court are brought by noncitizens who have been denied an immigration benefit such as admission, release from detention, or relief from removal. A *grant* of immigration benefits, by contrast, would not be appealed to federal court unless there is an intra-branch conflict, in which the prosecutorial arm of the executive branch (typically from Immigration and Customs Enforcement) disagrees with the decision of the adjudicative arm of the executive branch (typically the Executive Office for Immigration Review). As officials from both agencies ultimately answer to the President, such intra-branch disagreements are relatively infrequent. Where they do occur,

3d 724, 733 (E.D. Va. 2017); *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 32 (D. Mass. 2017). Lower court decisions reviewing the second version of the travel ban include *Hawaii v. Trump*, 859 F.3d 741, 772 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575–77 (en banc) (4th Cir. 2017); *Sarsour v. Trump*, 245 F. Supp. 3d 719, 724 (E.D. Va. 2017); *Doe v. Trump*, No. 17-cv-112, 2017 WL 975996, at *1 (W.D. Wisc. Mar. 10, 2017).

286. *See, e.g.*, *Hawaii*, 859 F.3d at 773 n.14; *Int'l Refugee Assistance Project*, 857 F.3d at 575–76; *Washington*, 847 F.3d at 1157.

however, a retreat from plenary power rooted in non-delegation principles may result in as much judicial skepticism toward agency decisions that promote an alien's interests as toward those that compromise such interests.

The lower court decisions enjoining the Obama administration's deferred action programs demonstrate that administrative decisions favoring noncitizens may be as susceptible to judicial reversal as those disfavoring them. In November 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum directing immigration officials to grant "deferred action" providing temporary relief from deportation and work authorization to millions of unauthorized aliens who were either brought to the United States as children or were parents of U.S. citizens or lawful permanent residence.[287] Twenty-five states filed suit to enjoin the policy, and in February of 2015, the District Court for the Southern District of Texas granted a preliminary injunction to enjoin implementation of the program. In doing so, it emphasized that it was *not* reviewing the power of the President himself, but rather the scope of power delegated to the administrative agency.[288] As such, the court concluded that the States were likely to succeed on the merits of their claim that the policy was required to undergo notice-and-comment rulemaking procedures set forth in the APA in order to take effect.[289]

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287. *See* Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf/ [https://perma.cc/PG76-2F55] (directing officials to grant deferred action to individuals who came to the United States as children and with respect to certain individuals who are the parents of U.S. citizens or permanent residents). *But see* Letter from Jefferson B. Sessions III, Att'y Gen., Dep't of Justice, to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 5, 2017), https://www.justice.gov/opa/speech/file/994651/download [https://perma.cc/P7AD-HQMWs] (advising the Department of Homeland Security to "consider and orderly and efficient wind-down" of the deferred action program).

288. Texas v. United States, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015) ("[B]oth sides agree that the President in his official capacity has not directly instituted any program at issue in this case. Regardless of the fact that the Executive Branch has made public statements to the contrary, there are no executive orders or other presidential proclamations or communique that exist regarding DAPA. The DAPA Memorandum issued by Secretary Johnson is the focus in this suit."), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

289. *See id.* at 676. *See generally* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012) (applying administrative law distinction between legislative rules and non-legislative rules for purposes of notice-and-comment rulemaking requirements to immigration law).

On appeal, the Fifth Circuit affirmed.[290] It agreed that the agency violated the procedural requirements of the APA and went further to hold that the policy was substantively invalid.[291] Concluding that even if the *Chevron* framework applied, the deferred action policy was not entitled to deference because it was "manifestly contrary" to the Immigration and Nationality Act.[292] In this case, then, the lower courts exercised close judicial scrutiny pursuant to ordinary administrative law standards to reverse an administrative immigration policy designed to *protect* aliens. These opinions suggest that under a non-delegation theory of plenary power, judicial review over the immigration decisions of agency officials may be as likely to harm noncitizens' interests as to promote them.

## CONCLUSION

The much-maligned plenary power doctrine, which categorically insulated immigration decisions from ordinary standards of judicial scrutiny, has been in decline. Contrary to conventional wisdom, this retreat may be less rooted in judicial solicitude toward noncitizens' rights than a growing concern regarding the breadth of policymaking power exercised by our nation's administrative agencies. This observation sheds new light on the scope and limits of the plenary power doctrine today. It suggests that courts will retreat from plenary power principles to exercise meaningful judicial scrutiny over immigration decisions made by agency officials, which constitute the vast majority of immigration decisions today. However, plenary power principles appear to remain intact to insulate immigration decisions rendered directly by Congress or the President from meaningful review. Moreover, even where the relevant decisionmaker is an administrative official, close scrutiny over immigration decisions may be as likely to reverse policies designed to protect noncitizens' interests as those designed to harm them.

290. Texas v. United States, 809 F.3d 135, 135 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

291. *Id.* at 146.

292. *See id.* at 182.