Oklahoma Law Review

Volume 68 | Number 1

Symposium: Chae Chan Ping v. United States: 125 Years of Immigration's Plenary Power Doctrine

2015

Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism

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IMMIGRATION IN THE SUPREME COURT, 2009-13: A NEW ERA OF IMMIGRATION LAW UNEXCEPTIONALISM

KEVIN R. JOHNSON*

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Introduction

Immigration law is most well-known among law professors for its marked departure from mainstream U.S. constitutional law. First invoked 125 years ago to shield the "Chinese exclusion laws"[1] from judicial review, the plenary power doctrine in effect immunizes the substantive immigration judgments of Congress about which noncitizens to admit into, and deport from, the United States. Through the application of the doctrine, courts

1. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889). For cogent criticism of The Chinese Exclusion Case, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

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have allowed the U.S. immigration laws to discriminate against noncitizens in ways that would be patently unconstitutional if the rights of U.S. citizens were at stake.[2]

Slowly chipping away at the plenary power doctrine, the Supreme Court has increasingly protected the procedural due process rights of noncitizens facing removal from the country.[3] Nevertheless, the core of the doctrine continues to protect the substantive immigration judgments of Congress from judicial review.[4] The doctrine's deviation from fundamental conceptions of constitutional review epitomizes what immigration law professors have characterized as "immigration exceptionalism."[5]

Commentators long have criticized the plenary power doctrine as being out of step with the revolution in constitutional law that took place over the twentieth century.[6] Nonetheless, despite acting at various times to avoid the

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2. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2003) (analyzing the history of discrimination against people of color, women, political minorities, and other disfavored groups in the U.S. immigration laws).

3. *See generally* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (analyzing the evolution of immigration law and showing its movement toward increasing constitutional protections for noncitizens). A well-known example of a modern decision of this variety is *Landon v. Plasencia*, 459 U.S. 21, 22 (1982), in which the Supreme Court held that a lawful permanent resident who departed the United States for a brief period was entitled to a hearing comporting with Due Process before she could be denied return into the country.

4. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

5. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392-94 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981-89 (2013). Besides immunizing the substantive immigration judgments of Congress from judicial review, immigration exceptionalism also afflicts the Supreme Court's Fourth Amendment decisions permitting the consideration of race in the enforcement of the immigration laws. *See generally* Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV 365 (2003). The development of that form of immigration exceptionalism, its racially disparate impacts on communities of color, and similar developments in the Court's Fourth Amendment decisions are analyzed in Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

6. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L.

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doctrine's harsh impacts,[7] the Supreme Court to this point has failed to eliminate, or substantially limit, the doctrine. Consequently, lower courts occasionally invoke the plenary power doctrine to justify deference to Congress and the executive branch in immigration matters.[8]

Around the turn of the century, immigration scholars opined that the Court was on the verge of abrogating, or otherwise limiting, the plenary power doctrine.[9] The events of September 11, 2001, however, abruptly ended talk of the doctrine's demise. Indeed, when promulgating a regulation creating a program that required certain Arab and Muslim noncitizens to register with the Immigration and Naturalization Service,

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REV. 701 (2005); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965.

7. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 36-37 (1982) (holding that lawful permanent resident seeking to return to the United States after a brief departure from the country was entitled to a hearing consistent with due process); Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) (interpreting the U.S. immigration laws to avoid the question of the constitutionality of the prohibition or the admission of homosexuals). *See generally* Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879 (2015) (contending that Supreme Court's due process jurisprudence has produced a body of law weakening immigration and national security exceptionalism); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (analyzing reliance by the Supreme Court in immigration cases on procedural due process norms as "surrogates" for substantive constitutional protections to avoid harsh results); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (offering examples of the Court employing "phantom norms" in interpreting the immigration laws in order to avoid the application of the plenary power doctrine). For a capsule summary of "cracks" in the plenary power doctrine in the Supreme Court's decisions, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 164-66 (5th ed. 2009).

8. *See, e.g.*, Angov v. Holder, 736 F.3d 1263, 1273 (9th Cir. 2013), *amended and superseded by* 788 F.3d 893 (2015); Diop v. ICE, 656 F.3d 221, 232 (3d Cir. 2011); Johnson v. Whitehead, 647 F.3d 120, 126 (4th Cir. 2011); United States v. Loaiza-Sanchez, 622 F.3d 939, 941 (8th Cir. 2010).

9. *See, e.g.*, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1 (1999); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002). For skepticism about the claim that the end of the plenary power doctrine was imminent, see Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289 (2000).

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then-Attorney General John Ashcroft expressly invoked the plenary power doctrine to protect the facially discriminatory measure from the inevitable constitutional challenges; he emphasized matter-of-factly that "[t]he political branches of the government have *plenary authority* in the immigration area. *In the context of immigration and nationality laws, the Supreme Court has particularly 'underscore[d] the limited scope of judicial inquiry*.'"[10] Accepting the Attorney General's assertions, courts rejected various constitutional challenges to the special registration program.[11]

Security fears expanded beyond the events of September 11, 2001, and ultimately translated into calls for greater enforcement of the U.S.-Mexico border.[12] The focus on public safety also appeared, at least temporarily, to subtly influence the Supreme Court's approach to various immigration measures, including the detention of immigrants convicted of crimes.[13] As worries about terrorism in the United States have receded with the passage of time since September 11, the aggressive push for extraordinary immigration enforcement measures has generally diminished.

This Article posits that the trend in the Supreme Court's contemporary immigration decisions suggests that the plenary power doctrine—the bedrock of immigration exceptionalism—is once again heading toward its ultimate demise. To test that thesis, the Article scrutinizes the Court's immigration decisions, as well as some other actions, such as certiorari

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10. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52584, 52585 (Aug. 12, 2002) (emphasis added) (citing Fiallo v. Bell, 430 U.S. 787, 702 (1977); Matthews v. Diaz, 476 U.S. 67, 80-82 (1976)). Special registration was one of a number of much-criticized security measures directed at Arab and Muslim noncitizens after September 11. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2005) (analyzing such measures); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 NYU ANN. SURV. AM. L. 295 (2002) (to the same effect); Leti Volpp, *The Citizens and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (same).

11. *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006); Ahmed v. Gonzales, 447 F.3d 433 (5th Cir. 2006).

12. *See* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1387 (2007).

13. *See* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343-45 (David A. Martin & Peter H. Schuck eds., 2005) (contending that the Supreme Court's decision upholding mandatory detention of noncitizens convicted of certain crimes in *Demore v. Kim*, 538 U.S. 510 (2003), was influenced by national security fears following September 11, 2001 and explained the decision's departure from *Zadvydas v. Davis*, 533 U.S. 679 (2001), which was decided shortly before September 11).

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denials in significant immigration cases, from the 2009 to the 2013 Terms. This period coincides with the first five years of the Obama presidency, during which time the executive branch has infrequently relied on the plenary power doctrine as a justification for its immigration positions.[14]

The Supreme Court's decisions reveal that, although it now reviews considerably fewer cases than it once did,[15] immigration matters regularly comprise a bread-and-butter part of its docket. Indeed, the Court decided five immigration-related merits cases in the 2011 Term, which represents a large number for a specialty area of the law.[16] Such a steady diet of immigration cases is consistent with the observation that it is an important national issue worthy of attention, and that the cases raise questions that go to the core of the modern administrative state. Considerable controversy has surrounded some of the immigration cases that have come before the Court,[17] especially the much-publicized constitutional challenge to Arizona's landmark immigration law known as SB 1070 and many other state and local efforts to push the federal government toward more vigorous enforcement of the immigration laws.[18] What perhaps stands out most from the review of the five Terms is that a conservative Supreme Court, characterized by some observers as ideologically extreme,[19] has consistently followed generally applicable legal principles in its immigration decisions. The Roberts Court's immigration decisions indeed fit comfortably within the jurisprudential mainstream of its decisions in other substantive areas of law.[20] The Court consistently has applied ordinary, standard, and unremarkable legal doctrines in ordinary, standard, and unremarkable ways.

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14. *See infra* Part VI (analyzing trends in Supreme Court's immigration decisions and arguments made by the executive branch to the Court).

15. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368-69 (2006).

16. *See infra* Part III (analyzing decisions from the 2011 Term).

17. *See infra* Parts I-V.

18. *See infra* Parts III.A, IV.C, V.B. (discussing Supreme Court's approaches in federal preemption cases).

19. *See* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 218 (2011).

20. *See infra* Parts I-V.

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In addition, the Court has declined to stretch its ordinary rules to review immigration cases with decidedly political overtones,[21] such as the growing number of cases evaluating the constitutionality of state and local immigration enforcement laws. Rather, in selecting immigration cases for review, the Court has adhered to its standard practice of resolving circuit splits and considering legal questions of national importance.[22] It has denied certiorari and refused to review a number of cases involving politically charged state and local immigration measures.[23] For now, the Court has allowed its two recent decisions on federal preemption of such laws to be applied by the lower courts.

The Supreme Court under Chief Justice John Roberts has decided several cases dealing with the U.S. government's efforts to remove from the country lawful permanent residents convicted of crimes.[24] That development reflects Congress's steady expansion of the criminal grounds for the removal of noncitizens combined with the dramatic increase in the U.S. government's efforts at directing immigration enforcement at criminal noncitizens.[25]

In response to the growing number of states attempting to "assist" in the enforcement of the federal immigration laws, the Court has shown keen interest in the constitutional distribution of power between the state and national governments.[26] In consecutive Terms, the Court decided a pair of federal preemption cases squarely raising the constitutionality of immigration enforcement laws arising out of Arizona—ground zero in the heated national debate over immigration. Workmanlike in approach, the decisions clarified the relative spheres of federal versus state power with respect to modern immigration enforcement and reined in Arizona's novel efforts (and, through its decision, similar moves by other state and local

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21. *See infra* Parts II.C.1., IV.C., V.B.

22. *See, e.g.*, *infra* note 88 (noting that Court granted certiorari in *Carachuri-Rosendo v. Holder* to resolve a circuit split).

23. *See infra* text Parts IV.C, V.B and accompanying text.

24. *See, e.g.*, *infra* Parts I.B. (discussing Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010)); IV.A (analyzing Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)).

25. *See infra* text accompanying notes 67-77.

26. *See, e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607-09 (2012) (upholding the constitutionality of the individual mandate component of the Affordable Care Act and rejecting challenges from several states); McDonald v. City of Chi., 130 S. Ct. 3020 (2010) (addressing federalism issues in holding that the Second Amendment applies to the states).

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governments) to encroach upon the federal immigration enforcement power.[27]

Analyzing the body of immigration decisions of the Supreme Court in the 2009-13 Terms, this Article concludes that the Court has, to a large extent, continued to bring U.S. immigration law into the jurisprudential mainstream. Consistent with its efforts over more than a decade to avoid deciding serious constitutional questions,[28] the Court has interpreted the immigration laws in ways that allow it to bypass such questions and to not invoke the plenary power doctrine to shield constitutionally dubious statutes from judicial review.[29] Thus, without eliminating the doctrine, the Court has silently moved away from anything that might be characterized as immigration exceptionalism.

In applying U.S. immigration laws, both conservative and liberal Supreme Court Justices look first to the text of the comprehensive federal immigration statute, the Immigration and Nationality Act (INA),[30] and spend considerable time debating the proper interpretation of the often complex statutory provisions. The Justices frequently differ about the application of conventional legal doctrines to immigration cases, but rarely raise the considerably more controversial question whether conventional doctrines should apply at all to these cases.

As those knowledgeable of contemporary developments in administrative law would suspect, the deference properly afforded the Board of Immigration Appeals (BIA) is a common battleground for advocates in the Supreme Court. The arguments on this important question

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27. *See infra* Parts II.A, III.A.

28. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 298 (2001) (acknowledging the "strong presumption in favor of judicial review of administrative action" that requires "a clear statement of congressional intent to repeal habeas jurisdiction" of a removal order); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (holding that, because Congress had not made a clear statement barring judicial review of class action, the Court would in a class action decide the lawfulness of the implementation of a program in the Immigration Reform and Control Act of 1986). Several other recent Supreme Court decisions have ensured judicial review of removal orders in the face of apparent congressional attempts to restrict, if not eliminate, judicial review. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 516-17 (2003); Zadvydas v. Davis, 533 U.S. 678, 687 (2001). This pattern of constitutional avoidance in ensuring judicial review of immigration matters can be understood as an effort by the Court to avoid invoking the plenary power doctrine. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013 (2008) (making similar observation in connection with litigation over the rights of enemy combatants).

29. *See supra* note 28 (citing authority).

30. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (as amended).

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are central to modern administrative law, in which there is much debate over the proper degree of deference due administrative agencies. As in many substantive areas of law, the issue results in differences of opinion among the Justices in immigration cases.[31] Arguments about agency deference are related to arguments about statutory interpretation because, under well-established administrative law doctrine, the Court frequently defers to what it determines to be reasonable agency interpretations of ambiguous statutes. It was rare for any Justice—much less a majority of the Court—to advocate for the kind of extreme deference embodied by the plenary power doctrine.[32]

In applying conventional methods to immigration cases, the Court has on a regular basis—although not always—rejected the U.S. government's positions. It therefore is difficult to convincingly contend that the Court consistently extends extreme, undue, or exceptional deference to the government's immigration decision-making. Some commentators might even contend that the Court in some cases is less deferential to the agencies administering the immigration laws than what arguably is called for by general administrative law principles.[33]

As we shall see, a Supreme Court on the conservative side of the ideological spectrum has consistently taken a lawyerly—some might say judicious—case-by-case approach to the judicial review of immigration decisions. It applies generally applicable legal doctrines in its review.[34] That development is unquestionably disappointing to advocates of an immigration jurisprudence more protective of immigrants.[35] However, the trend in the Court's decisions reflects what can be positively viewed as bringing immigration law more in line with conventional norms of judicial review. If the trend continues, the Court may ultimately relegate immigration exceptionalism, and the plenary power doctrine itself, to the history books, merely an artifact primarily of interest to legal historians.[36] This Article predicts that unduly deferential approaches will likely not return with regularity in the foreseeable future. Such approaches, however,

31. *See, e.g.*, *infra* Part III.B.

32. *See infra* notes 188-92 and accompanying text (discussing Justice Scalia's scathing dissent in part in Arizona v. United States, 132 S. Ct. 2492 (2012)).

33. *See infra* Part III.B. (analyzing Court's decision in Judulang v. Holder, 132 S. Ct. 476 (2011)).

34. *See infra* Part VI.A.

35. *See infra* Part VI.B.

36. *See infra* Part VI (summarizing the general trends in the Roberts Court's immigration jurisprudence).

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conceivably could return in truly exceptional cases, such as ones implicating an imminent mass migration[37] or following another catastrophic act of terrorism.

I. The 2009 Term

In the 2009 Term, the Supreme Court extended a fundamental constitutional protection to noncitizens that has affected the vast majority of criminal prosecutions of noncitizens in the United States.[38] The Court also decided two more ordinary immigration cases.[39] Noncitizens prevailed in all three.

A. Padilla v. Kentucky*: Ineffective Assistance of Counsel Based on Immigration Advice*

Addressing an issue that had been percolating in the lower federal and state courts,[40] the Supreme Court in *Padilla v. Kentucky* held that a lawful permanent resident could base a Sixth Amendment ineffective assistance of counsel claim on an attorney's alleged failure to accurately inform the defendant of the possible immigration consequences of a criminal conviction—namely, possible removal from the United States.[41]

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37. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (rejecting legal challenges to U.S. government program in which the Coast Guard interdicted large numbers of Haitian migrants on the high seas before they could reach the shores of the United States and apply for relief from removal). For a time, the publicity over the "surge" of unaccompanied minors coming to the United States from Central America in 2014 threatened to influence the Supreme Court's approach to immigration matters. *See* Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 10, 2014, at A1. The number of Central Americans coming to this country has diminished, however, along with the sense of urgency to respond. *See* Michael Muskal, *Border Crossings by Children Decline as Immigration Debate Intensifies*, L.A. TIMES, Nov. 14, 2014, http://www.latimes.com/nation/nationnow/ la-na-immigration-numbers-2014114-story.html.

38. *See* Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1 (2011), *available at* http:// www.californialawreview.org/wp-content/uploads/2014/10/does-the-crime-fit-the-punishment -recent-judicial-actions-expan.pdf (analyzing *Padilla v. Kentucky* and *Carachuri-Rosendo v. Holder*, two immigration decisions from the 2009 Term) (last visited June 30, 2015).

39. *See infra* Parts I.B., C.

40. *See, e.g.*, United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010); United States v. Couto, 311 F.3d 179 (2d Cir. 2002), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010); Utah v. Rojas-Martinez, 125 P.3d 930 (Utah 2005), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010).

41. 559 U.S. 356, 374-75 (2010).

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After pleading guilty to drug trafficking charges in Kentucky state court, Jose Padilla, a native of Honduras and a lawful permanent resident for more than forty years with U.S. citizen children, faced removal from the country.[42] He claimed that his criminal defense counsel failed to advise him of the likely deportation resulting from a drug conviction before he entered a guilty plea; Padilla in fact alleged that his counsel had affirmatively told him not to worry about removal, because he had lived in this country for so many years.[43] Padilla contended that, had he been properly informed of the likelihood of removal resulting from the plea bargain, he would have taken his chances at trial.[44]

Rejecting the ineffective assistance of counsel claim, the Kentucky Supreme Court affirmed Padilla's criminal conviction.[45] It reasoned that, because deportation is a *civil* matter and a mere "collateral" consequence of a *criminal* conviction, the Sixth Amendment does not protect criminal defendants from erroneous advice about the possible immigration consequences of a conviction.[46]

In one of his last opinions before retirement, Justice Stevens wrote for a majority of the Court. The Court held that the Sixth Amendment requires counsel to inform a noncitizen client that a plea carries the risk of deportation; consequently, Padilla had sufficiently alleged that his counsel's representation was constitutionally deficient.[47] In reaching that conclusion, the Court recognized that removal from the country is now virtually inevitable for many noncitizens convicted of crimes.[48] Therefore, the receipt of accurate legal advice is more important than ever for noncitizens deciding whether to accept a plea deal.[49] For many noncitizens, deportation is one of the most important parts of the total penalty that may flow from a criminal conviction.[50]

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42. *Id.* at 359.

43. *Id.*

44. *Id.*

45. Kentucky v. Padilla, 253 S.W.3d 482, 484-85 (Ky. 2008), *rev'd*, Padilla v. Kentucky, 559 U.S. 356 (2010).

46. *See id.* at 485. In the Supreme Court, the Solicitor General filed a brief in support of affirmance of the Kentucky Supreme Court's decision. *See* Brief for the United States as Amicus Curiae Supporting Respondents, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_651_AffirmanceAmCuUSA.authcheckdam.pdf.

47. *See Padilla*, 559 U.S. at 373-74.

48. *Id.* at 360.

49. *Id.* at 364.

50. *Id.*

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The Court previously had held that the Sixth Amendment entitles a criminal defendant to "the effective assistance of competent counsel," before he or she decides whether to plead guilty.[51] In evaluating the merits of Padilla's claim, the Court applied the generally applicable test for ineffective assistance of counsel set forth in its 1984 decision of *Strickland v. Washington*.[52]

Disagreeing with the Kentucky Supreme Court, the majority emphasized that, in deciding the scope of the right to effective assistance of counsel, it had never previously distinguished between "direct" and "collateral" consequences.[53] The Court observed that, although removal proceedings are classified as civil matters, removal based on a criminal conviction is deeply intertwined with the modern criminal justice process. It thus is extraordinarily difficult to classify it as either a "direct" or "collateral" consequence of a criminal conviction.[54] The Court further acknowledged that "[t]he weight of prevailing professional norms supports the view that [criminal defense] counsel must advise her client regarding the risk of deportation."[55]

The Court ultimately concluded that advice about possible removal from the United States is within the ambit of the Sixth Amendment right to effective assistance of counsel.[56] Finding that Padilla had sufficiently alleged a constitutional violation, the Court remanded the case to the Kentucky courts for further proceedings to determine whether he had suffered the prejudice necessary to prevail under *Strickland*.[57]

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment.[58] He agreed with the majority that Padilla had established a

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51. *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

52. *See id.* at 366 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

53. *Id.* at 365.

54. *Id.* at 365-66.

55. *Id.* at 367 (citing, inter alia, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713-18 (2002)).

56. *Id.* at 374.

57. *Id.* at 369; *see* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 695 (2011) (analyzing proof of prejudice required to prevail on an ineffective assistance of counsel claim after the Supreme Court's decision in *Padilla v. Kentucky*). On remand, the Court of Appeals of Kentucky found that violation of the right to effective assistance of counsel prejudiced Padilla and vacated the conviction. *See* Padilla v. Kentucky, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012).

58. *Padilla*, 559 U.S. at 375 (Alito, J., concurring).

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prima facie case of violation of his right to effective assistance of counsel.[59] Justice Alito, however, understood the right to be narrower than the majority did.[60] In his view, the right to effective assistance of counsel should only protect criminal defendants from defense counsel who affirmatively provide them with incorrect legal advice on immigration matters (as Padilla alleged).[61] For Justice Alito, the right would ordinarily be limited to requiring counsel to advise the noncitizen defendant of the possible need to consult an immigration attorney about the adverse immigration consequences of a criminal conviction.[62]

Justice Scalia, joined by Justice Thomas, dissented.[63] The dissent emphatically disagreed with the majority that the effective assistance of counsel obligation under the Sixth Amendment extended to what he insisted were merely "collateral" civil consequences, including the possible immigration consequences, of a criminal conviction.[64]

All of the justices on the Court decided Padilla's ineffective assistance of counsel claim under the Sixth Amendment through the application of generally applicable precedent, even though the case involved a noncitizen defendant. In so doing, the majority brought removal-related advice under the purview of the general right to effective assistance of counsel.

Padilla v. Kentucky is one of the most significant decisions affecting the rights of immigrants in the United States in decades.[65] Although only decided in 2010, the decision has already generated a voluminous body of scholarly commentary.[66] The far-reaching practical impacts of the decision

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59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 384-88.
63. *Id.* at 388 (Scalia, J., dissenting).
64. *See id.* at 389-90.
65. *See infra* note 66 (citing authorities).
66. *See, e.g.*, Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 7 (2012); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1118 (2011); Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010, at 21; César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 476 (2012); César Cuauhtémoc García Hernández, Strickland-*Lite:* Padilla's *Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 847 (2013); Maurice Hew, Jr., *Under the Circumstances:* Padilla v. Kentucky *Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J.L. & SOC. JUST. 31, 32 (2012); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1462 (2011);

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in no small part result from the U.S. government's increasingly aggressive efforts to deport "criminal aliens."[67] Virtually every noncitizen plea agreement—a central part of the contemporary criminal justice system[68]—

Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 563-71 (2013); Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 4 (2011); Rachel E. Rosenbloom, *Will* Padilla *Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 328 (2011); Maureen A. Sweeney, *Where Do We Go from* Padilla v. Kentucky*? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 354 (2011); Yolanda Vázquez, *Realizing* Padilla*'s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 170 (2011); Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1516 (2011); Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims,* 121 YALE L.J. 944, 947 (2012); Joanna Rosenberg, Note, *A Game Changer? The Impact of* Padilla v. Kentucky *on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 FORDHAM L. REV. 1407, 1409 (2013); *see also* Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131, 2132 (2014) (stating that *Padilla* recognized "the right to effective crimmigration counsel–the right to effective advice concerning the potential immigration consequences of a criminal conviction") (footnote omitted) (internal quotation marks omitted). *See generally* MARGARET COLGATE LOVE, ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013) (summarizing law concerning collateral consequences of criminal convictions).

67. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. & CRIMINOLOGY 613 (2012); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006); Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 494-512 (2011); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

68. As the Supreme Court emphasized in *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012):

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not

has immigration consequences and, as such, is subject to the mandate of the Court's ruling.

B. Carachuri-Rosendo v. Holder*: Removal for Misdemeanor Drug Possession*[69]

The immigration statute makes lawful permanent residents convicted of an "aggravated felony"[70] ineligible for a form of relief from removal known as "cancellation of removal."[71] Such relief, if granted, permits the noncitizen to lawfully remain in the United States. Over the last several decades, Congress has progressively expanded the definition of an aggravated felony and thus subjected growing numbers of immigrants convicted of crimes to mandatory detention and removal.[72] The trend reflects the political unpopularity in Congress of noncitizens convicted of crimes, as well as the consistent popularity of tough enforcement measures directed at immigrants.[73]

> some adjunct to the criminal justice system; it *is* the criminal justice system."

(alteration in original) (citations omitted).

69. A preview of the issues raised by this case can be found in Kevin R. Johnson & Raha Jorjani, *Only in Immigration Law and in Alice in Wonderland: Aggravated Misdemeanors?*, AMERICAN CONSTITUTION SOCIETY BLOG (Apr. 7, 2010), http://www.acslaw.org/acsblog/node/15775.

70. *See* 8 U.S.C. § 1101(a)(43) (2012).

71. *See id.* § 1229b(a)(3).

72. As one commentator summarized the evolution of the definition of an "aggravated felony,"

> When Congress first enacted the aggravated felony removal category in 1988, only three serious crimes were included: murder, drug trafficking, and firearms trafficking. The current list—now at twenty-eight offenses, some of which create further sub-categories—includes crimes that are neither aggravated nor felonies under criminal law. Misdemeanor drug possession with a one-year sentence can qualify as an aggravated felony, as does a year of probation with a suspended sentence for pulling hair—a misdemeanor under Georgia law. Convictions for selling ten dollars worth of marijuana, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held to be aggravated felonies. Aggravated felonies trigger mandatory detention, deportation without the possibility of almost all forms of discretionary relief, including asylum and cancellation of removal, and a permanent bar on lawful reentry.

Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-59 (2013) (footnotes omitted).

73. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1531-34 (1995); *see, e.g.*, Demore v. Kim, 538 U.S. 510, 518-19 (2003) (describing congressional findings of high level of criminal activity among noncitizens); Zadvydas v. Davis, 533 U.S. 678, 713

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With congressional expansion of the criminal grounds for removal, combined with the executive branch's increased removal efforts directed at noncitizens convicted of crimes,[74] the U.S. government now removes from the country approximately 400,000 immigrants each year.[75] Many are lawful permanent residents convicted of relatively minor criminal offenses.[76] As one commentator has aptly observed, "[t]he deportation of 'criminal aliens' is now the driving force in American immigration enforcement. . . . *In effect, federal immigration enforcement has become a criminal removal system*."[77]

In *Carachuri-Rosendo v. Holder*,[78] the Court held that Carachuri-Rosendo's second minor drug possession offense did not constitute an aggravated felony and therefore could not serve as grounds for automatic removal of a lawful permanent resident. It specifically addressed the question whether a state misdemeanor conviction for drug possession may amount to an aggravated felony under the U.S. immigration laws.[79] A lawful permanent resident with four U.S. citizen children, Jose Angel Carachuri-Rosendo immigrated to the United States from Mexico in 1993.[80] He subsequently was convicted for (1) misdemeanor possession of marijuana, for which he received a twenty-day jail sentence, and (2) misdemeanor possession of one tablet of a prescription drug (Xanax), for

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(2001) (Kennedy, J., dissenting) (discussing data showing high rates of recidivism among noncitizen criminals).

74. *See supra* text accompanying notes 67-73.

75. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014, at 1 (2014), *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

76. *See* Bruce Robert Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 865 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1942 (2000).

77. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (emphasis added) (footnote omitted).

78. 560 U.S. 563, 566 (2010).

79. *Id.* A difference of opinion exists on the question whether the courts should defer to the Board of Immigration Appeals (BIA) interpretation of "aggravated felony," in light of the fact that the Board's expertise is in immigration, not criminal, law. *See* Michael Dorfman-Gonzalez, Note, Chevron*'s Flexible Agency Expertise Model: Applying the* Chevron *Doctrine to the BIA's Interpretation of the INA's Criminal Law—Based Aggravated Felony Provision*, 82 FORDHAM L. REV. 973, 976-77 (2013).

80. *Carachuri-Rosendo,* 560 U.S at 570.

which he received a ten-day sentence.[81] His two relatively minor drug possession convictions suggest that Carachuri-Rosendo was little more than a small-time drug offender.

Federal law provides that, when a person is convicted of possessing a controlled substance after a previous drug conviction, the prosecutor may seek what is known as a "recidivist enhancement," which converts the second misdemeanor into a felony conviction.[82] To secure such an enhancement, the prosecutor must comply with a number of procedural safeguards designed to protect the defendant.[83]

The prosecutor failed to pursue a recidivist enhancement in Carachuri-Rosendo's second drug possession prosecution.[84] Nonetheless, the immigration court reasoned that, because Carachuri-Rosendo *could have been prosecuted* for a felony, he effectively *had been convicted* of an aggravated felony and, thus, was not eligible for cancellation of removal.[85] The BIA agreed.[86] The court of appeals denied Carachuri-Rosendo's petition for review of the removal order.[87] To resolve a conflict among the circuits,[88] the Supreme Court granted certiorari.

In another opinion by Justice Stevens, the Court held that Carachuri-Rosendo's second minor drug possession offense did not constitute an aggravated felony and, thus, could not serve as grounds for automatic removal.[89] The Court found that, unless the second conviction is in fact based on a prior conviction (and the recidivist enhancement procedure followed), a misdemeanor drug possession offense cannot constitute an aggravated felony.[90]

The Court reasoned that the U.S. government's position ignored the plain language of the INA, which only prohibits the award of cancellation of removal when a noncitizen "has . . . been *convicted* of a[n] aggravated

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81. *Id.* at 570-71.

82. *See id.* at 568 (citing 21 U.S.C. § 851(a)(1) (2006)).

83. *Id.* at 567-69.

84. *See id.* at 563.

85. *See In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 394 (BIA 2007).

86. *See id.* at 390-94.

87. *See* Carachuri-Rosendo v. Holder, 570 F.3d 263, 268 (5th Cir. 2009), *rev'd*, 560 U.S. 563 (2010).

88. *Compare id.* (holding that state conviction for simple drug possession after prior conviction for simple possession is a felony under the Controlled Substances Act and therefore an aggravated felony under the immigration laws), *with* Alsol v. Mukasey, 548 F.3d 207, 219 (2d Cir. 2008) (reaching a contrary conclusion).

89. *Carachuri-Rosendo*, 560 U.S. at 581-82.

90. *See id.* at 582.

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felony."[91] The Court further observed that one does not ordinarily think of a ten-day sentence for unauthorized possession of a single prescription pill as an aggravated felony.[92] Citing 2004 precedent, the Court noted that courts should construe any ambiguities in criminal statutes cross-referenced in the immigration laws in favor of the noncitizen, a variation of the time-honored rule of lenity historically applied to the interpretation of penal laws.[93]

Justices Scalia[94] and Thomas[95] each separately concurred in the judgment. Both Justices agreed with the holding of the majority. Each, however, would have reached the conclusion through slightly different analyses of the statutory text and relevant precedent.[96]

In sum, the Supreme Court in *Carachuri-Rosendo v. Holder* engaged in unremarkable statutory interpretation of the immigration laws and rejected the U.S. government's reading of the statute.[97] A majority of the Court relied on a variant of the rule of lenity to interpret statutory ambiguities in favor of Carachuri-Rosendo and to find him eligible for relief from removal.[98] The Justices unanimously agreed on the ultimate disposition of the case.

Following standard practice,[99] the Supreme Court granted certiorari, vacated the judgments, and remanded for further consideration eighteen cases raising similar issues in light of its decision in *Carachuri-Rosendo v. Holder*.[100] The relatively large number of cases subject to the Court's ruling is a by-product of the Obama administration's concentrated efforts to remove noncitizens with criminal convictions.[101]

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91. *Id.* at 576 (quoting 8 U.S.C. § 1229b(a)(3) (2006)) (alteration in original).

92. *See id.* at 564.

93. *See id*. at 581 (citing Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)).

94. *Id.* at 582 (Scalia, J., concurring).

95. *Id.* at 584 (Thomas, J., concurring).

96. *See supra* text accompanying notes 94-95 (citing concurring opinions).

97. For analysis of the Court's decision in *Carachuri-Rosendo v. Holder*, see Asher Steinberg, *Supreme Court Holds That a Finding of Recidivism Must Be Made in Court of Conviction for Repeat Offenses to Qualify as Recidivist Offenses When Ruling on Applications for Cancellations of Removal,* 25 GEO. IMMIGR. L.J. 539 (2011); Inna Zazulevskaya, Comment, Carachuri-Rosendo v. Holder: *To Be Deemed Convicted of an Aggravated Felony, an Actual Conviction Is Required*, 44 LOY. L.A. L. REV. 1215 (2011).

98. *Carachuri-Rosendo*, 560 U.S. at 576-80.

99. *See* Sena Ku, Comment, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U.L. REV. 383 (2008) (reviewing Court's grants of certiorari, vacation of judgments, and remands).

100. *See Supreme Court Grants Cert, Vacates Judgments in Eighteen Cases in Light of* Carachuri-Rosendo, 87 INTERPRETER RELEASES 1287 (June 28, 2010).

101. *See supra* text accompanying notes 67-77.

C. Kucana v. Holder: *Judicial Review of Motions to Reopen*

Having overslept, Agron Kucana, who entered the country on a business visa but stayed after it expired, missed his removal hearing in the immigration court; at that hearing, he would have had the opportunity to produce evidence in support of asylum and withholding-of-removal claims based on his alleged fear of persecution if he were returned to his native country of Albania.[102] The immigration court in absentia ordered Kucana removed from the United States.[103] As authorized by regulation,[104] he filed a motion to reopen the proceedings to seek relief from removal.[105] The immigration court and Board of Immigration Appeals denied the motion.[106]

The U.S. Court of Appeals for the Seventh Circuit, in an opinion by Chief Judge Easterbrook, dismissed the petition for review of the denial of the motion to reopen for lack of jurisdiction; the court based the dismissal on 1996 amendments to the immigration laws that greatly limited judicial review of the discretionary judgments of the Attorney General.[107] Judge Cudahy dissented, asserting that the majority opinion "giv[es] the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction."[108] To resolve a conflict among the circuits, the Supreme Court granted certiorari.[109]

Taking an exceedingly rare step, then-Solicitor General Elena Kagan refused to defend the lower court's holding that the court lacked jurisdiction to review the denial of the motion to reopen.[110] Her refusal to defend the

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102. *See* Kucana v. Holder, 558 U.S. 233, 239-40 (2010). In the seminal case of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Court delineated the relative burdens of proving claims to asylum and withholding of removal.

103. *Kucana*, 558 U.S. at 240.

104. *See* 8 C.F.R. § 1003.2(c) (2014).

105. *Kucana*, 558 U.S. at 240.

106. *Id.*

107. *See* Kucana v. Mukasey, 533 F.3d 534 (7th Cir. 2008).

108. *Id.* at 540 (Cudahy, J., dissenting).

109. *See Kucana*, 558 U.S. at 241. For circuits reaching conclusions contrary to that of the Seventh Circuit, see Jahjaga v. Attorney General, 512 F.3d 80 (3d Cir. 2008); Singh v. Mukasey, 536 F.3d 149 (2d Cir. 2008); Zhao v. Gonzales, 404 F.3d 295 (5th Cir. 2005); Infanzon v. Ashcroft, 386 F.3d 1359 (10th Cir. 2004); Medina-Morales v. Ashcroft, 371 F.3d 520 (9th Cir. 2004). The Obama administration also later refused to defend a court of appeals ruling that it lacked jurisdiction to review equitable tolling of the deadline to file a motion to reopen. *See* Mata v. Holder, 135 S. Ct. 1039 (2015).

110. *See Kucana*, 558 U.S. at 241-42.

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lower court ruling unquestionably signaled to the Supreme Court the vulnerability of the decision and foreshadowed the ultimate outcome of the case.[111] The Court appointed a law professor to defend the court of appeals' decision.[112]

Justice Ginsburg wrote the opinion for the Supreme Court, which was joined by all of the Justices except Justice Alito.[113] The Court acknowledged that a motion to reopen removal proceedings is an "'important safeguard'" for noncitizens facing removal.[114] In the Court's estimation, the language of the statute, relevant legislative and regulatory history, and the longstanding presumption favoring judicial review of administrative action[115] all favored judicial review of the denial of a motion to reopen the removal proceedings.[116] The Court relied on the plain language of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[117] The statute expressly barred the review of the discretionary judgments by the *Attorney General*, not discretionary decisions delegated by regulation by the Attorney General to the *Board of Immigration Appeals*.[118]

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111. *Id.*

112. *See id.* The Court appointed Professor Amanda Leiter of Washington College of Law at American University as counsel to defend the lower court ruling. *Id.*

113. *Id.* at 236.

114. *Id.* at 242 (quoting Dada v. Mukasey, 554 U.S. 1, 18 (2008) (citation omitted)). The Court previously had afforded considerable deference to the judgment of the BIA in reviewing motions to reopen. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 110 (1988); INS v. Wang, 450 U.S. 139, 146 (1981). Lower courts frequently found that the Court's decisions generally required broad deference to the rulings of the Board. *See, e.g.*, Jara-Navarrette v. INS, 813 F.2d 1340, 1342 (9th Cir. 1986); Hamid v. INS, 648 F.2d 635, 637 (9th Cir. 1981).

115. *See Kucana*, 558 U.S. at 251-52 (citing, inter alia, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995)).

116. *See id.* at 243-53. For analysis of the Supreme Court's decision in *Kucana v. Holder*, see Michelle R. Slack, *No One Agrees . . . But Me? An Alternative Approach to Interpreting the Limits on Judicial Review of Procedural Motions and Requests for Discretionary Immigration Relief After* Kucana v. Holder, 26 GEO. IMMIGR. L.J. 1 (2011); Michael A. Keough, Note, Kucana v. Holder *and Judicial Review of the Decision Not to Reopen Sua Sponte in Immigration Removal Proceedings*, 80 FORDHAM L. REV. 2075, *passim* (2012).

117. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (2012) (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (providing that discretionary "action *of the Attorney General* or the Secretary of Homeland Security" is not subject to judicial review) (emphasis added).

118. *See Kucana*, 558 U.S. at 252.

Contending the Court should have decided the case on narrower statutory and regulatory grounds, Justice Alito concurred in the judgment.[119] Thus, the Justices unanimously rejected the court of appeals's conclusion that motions to reopen were not subject to judicial review under the 1996 immigration reform legislation.

The Supreme Court in *Kucana v. Holder* therefore held that courts of appeals continue to have jurisdiction under the 1996 reforms to review denials of motions to reopen removal proceedings by the BIA.[120] This holding builds on the Court's line of decisions ensuring the judicial review of removal decisions in the face of increasingly stringent congressional restrictions.

It unquestionably would have represented a major change in the law if the Supreme Court had eliminated the long-established judicial authority to review motions to reopen removal proceedings. Noncitizens subject to removal from the United States regularly file motions to reopen, seeking among other things, to present new evidence in support of claims for relief from removal.[121] Rather than taking what would have been an extraordinary step of uncertain constitutionality, the Court cautiously opted to protect the right to judicial review—a holding in tension with the plenary power doctrine's immunity from judicial scrutiny—and ensured the possibility for courts to correct erroneous action by the executive branch. The Court adhered to the general presumption favoring judicial review of agency action. Congress, of course, could intervene to foreclose judicial review of motions to reopen, but has not yet done so.

II. The 2010 Term

In the 2010 Term, the Supreme Court decided the first of two cases from Arizona in consecutive Terms raising the contentious issue of state versus federal power over immigration enforcement.[122] Even though recognizing federal primacy over immigration regulation, the Court relied on the plain language of the statutory provision in question to conclude that federal immigration law did not preempt the Arizona law.[123]

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119. *Id.* at 253 (Alito, J., concurring).

120. *See id.* at 237; *see, e.g.,* INS v. Doherty, 502 U.S. 314 (1992); INS v. Abudu, 485 U.S. 94 (1988); INS. v. Rios-Pineda, 471 U.S. 444 (1985); INS v. Wang, 450 U.S. 139 (1981).

121. *See supra* note 120 (citing a series of Supreme Court motion to reopen decisions).

122. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

123. *See infra* Part II.A.

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In a rare occurrence, the Term also saw a deadlocked Court affirm the refusal of a court of appeals to invalidate what amounts to discrimination based on gender stereotypes in the nationality laws.[124] The fact that the Court was evenly split on the question suggests that the plenary power doctrine—which the case implicated and which, if invoked, would have barred judicial review—is in jeopardy. A near-majority of the Court, which would likely have been a majority if Justice Kagan had not recused herself,[125] appears to be ready to limit, if not eliminate, the scope of the doctrine.

In two cases involving state and local laws touching on immigration, the Court took actions that, although not deciding the merits, followed its generally applicable practices.[126]

A. Chamber of Commerce v. Whiting*: Federal Preemption of a State Immigration Enforcement Law*

In 1986, Congress passed a major immigration reform bill; the Immigration Reform and Control Act (IRCA) sought to deter undocumented immigration by expressly prohibiting the employment of undocumented immigrants.[127] The Act allows the imposition of civil penalties, known as "employer sanctions," on employers who violate the proscription.[128] IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[129]

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124. *See infra* Part II.B.

125. *Flores-Villar*, 131 S. Ct. at 2312.

126. *See infra* Part II.C.

127. *See* Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (2012)).

128. 8 U.S.C. § 1324a(e)(4) (2012). The adverse impacts of employer sanctions, including increased discrimination against national origin minorities, have been the subject of considerable criticism. *See, e.g.*, Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 389 (1994) (concluding that the elimination of employer sanctions is the most expedient way to remedy the increased racial discrimination caused by their enforcement); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780-82 (2008) (analyzing the ineffectiveness of employer sanctions and the national origin discrimination against lawful workers resulting from their enforcement); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (arguing that employer sanctions regime has failed to deter undocumented immigration).

129. 8 U.S.C. § 1324a(h)(2) (2012) (emphasis added).

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In an effort to improve the ability of employers to comply with the employer sanctions provisions, Congress in 1996 authorized the creation of E-Verify, an internet-based system that allows employers to verify the work authorization status of employees and job applicants.[130] The law also prohibits the U.S. government from mandating any person or entity (including the states) other than the federal government to use E-Verify.[131]

In a purported effort to facilitate immigration enforcement, the Arizona legislature in 2007 passed the Arizona Legal Workers Act.[132] It provides for the suspension or revocation of the licenses of Arizona businesses that knowingly and intentionally employ undocumented immigrants.[133] The Act further requires employers in Arizona to utilize the federal E-Verify database.[134]

The Chamber of Commerce of the United States of America and various business and civil rights organizations challenged the constitutionality of the Arizona Legal Workers Act. They argued that federal immigration law preempted its provisions. Both the district court and U.S. Court of Appeals for the Ninth Circuit rejected the challenges.[135] Before the Supreme Court, the Solicitor General filed a brief registering support of the U.S. government for the federal preemption position advocated by the Chamber of Commerce.[136]

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130. *See* 8 U.S.C. § 1324a(b). The accuracy of the E-Verify database has been questioned. *See* WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION 114 (2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf; Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475, 482-83; *see also* T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1313, 1314 (2008) ("There is no clear way to fix employer sanctions anytime soon. The widely discussed 'smart cards' or 'swipe cards' will be years in the making. Meanwhile, massive work will need to be done on government databases to clean up misspelled, duplicate, and false names.") (citation omitted).

131. *See* Illegal Immigration Reform and Immigrant Responsibility Act §§ 402(a),(e), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

132. *See* ARIZ. REV. STAT. ANN. § 23-212 (2014).

133. *Id.*

134. *See id.* § 23-212(I).

135. *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 864 (9th Cir. 2009); Arizona Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp.2d 1036, 1045 (D. Ariz. 2008).

136. *See* Brief for the United States of America as Amicus Curiae Supporting Petitioner, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_115_PetitionerAmCuUSA.authcheckdam.pdf.

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In *Chamber of Commerce v. Whiting,*[137] the Supreme Court, in a majority opinion written by Chief Justice Roberts, concluded that federal immigration law did not preempt the Arizona law. Although reiterating that the "'[p]ower to regulate immigration is *unquestionably . . . a federal power*,'"[138] the Court held that IRCA's preemption provision expressly preserves state authority to impose sanctions on employers of undocumented immigrants "through licensing and similar laws"; it thus was not expressly preempted.[139] A plurality of the Court also found that the Arizona licensing law was not impliedly preempted by federal law.[140]

The Court further concluded that federal immigration law did not preempt Arizona's E-Verify mandate.[141] In reaching that conclusion, the majority reasoned that the fact that the statute expressly prohibits the *federal* government from mandating use of E-Verify by private employers does not mean that the *states* cannot do so.[142]

Justice Breyer, joined by Justice Ginsburg, dissented.[143] Justice Sotomayor dissented separately.[144] The analysis of the two dissents differed from the majority primarily with respect to the interpretation and application of IRCA's preemption provision to the Arizona Legal Workers Act.[145]

Whiting is a narrowly drawn decision dealing with the interpretation and application of the language of the Immigration Reform and Control Act. The Court carefully adhered to the plain meaning of the statute, which

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137. 131 S. Ct. 1968, 1987 (2011). Justice Kagan took no part in the consideration or decision of the case. *See id.*

138. *Id.* at 1974 (quoting DeCanas v. Bica, 424 U.S. 351, 354 (1976)) (emphasis added).

139. *Id.* at 1977-81 (citing 8 U.S.C. § 1324a(h)(2) (2012)).

140. *See id.* at 1981-85.

141. *See id.* at 1985-86.

142. *See id.* at 1985.

143. *See id.* at 1987 (Breyer, J., dissenting). Justice Breyer expressed concern with the possible civil rights impacts of the Arizona Legal Workers Act on Latina/o workers resulting from its heightened penalties for the employment of undocumented immigrants, which included suspension and possible loss of a business license. *See id.* at 1061-26; *see also supra* note 128 and accompanying text (citing authorities expressing concern that employer sanction provisions contribute to national origin discrimination).

144. *See Whiting*, 131 S. Ct. at 1998 (Sotomayor, J., dissenting). In Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009), Justice Sotomayor employed the term "undocumented immigrants" for the first time in a Supreme Court opinion. *See* Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decision of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499 (2014) (analyzing Justice Sotomayor's immigration opinions on the court of appeals and Supreme Court).

145. *See supra* text accompanying notes 137-44.

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expressly preserves state authority to exercise the licensing power to facilitate enforcement of the employer sanctions provisions of the federal immigration laws. In so doing, the Court declined to find that the Arizona Legal Workers Act impermissibly infringed on the federal power to regulate immigration.[146] A majority of the Court applied a conventional reading of the text of the statute to find that federal immigration law did not preempt the Arizona law.

A number of commentators expressed concern that the decision in *Chamber of Commerce v. Whiting* signaled the Supreme Court's willingness to uphold other more aggressive state and local immigration enforcement measures.[147] The Court's refusal to disturb the Arizona law appears to have encouraged state legislatures to enact increasingly strict immigration enforcement laws.[148] Nonetheless, the *Whiting* decision employed a straightforward federal preemption analysis based on a plain meaning interpretation of the statutory provision in question. The analysis is clearly within the jurisprudential mainstream.

146. *See Whiting*, 131 S. Ct. at 1977-81.

147. *See* Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of* Chamber of Commerce v. Whiting *for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 117 (2012); *see also* Gregory Delassus, Note, Chamber of Commerce v. Whiting *and the Future of State Immigration Laws*, 56 ST. LOUIS U. L.J. 613, 614 (2012) ("[T]he Supreme Court [in *Whiting*] should have reversed existing precedents and secured control of immigration law at the Federal level. Such an outcome would have prevented further impractical immigration restrictions, created a more uniform and predictable frame of reference for employers' immigration questions, and enhanced compliance with the law."); Keelan Diana, Comment, Chamber of Commerce of U.S. v. Whiting*: The Possibility of Anti-Discriminatory Immigration Reform in an Era of Resurgent Federalism*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 196, 199 (2012) ("In an era of extreme anti-immigrant sentiment, *Whiting* signifies not only that the Supreme Court will allow states to perform functions that have traditionally fallen within the purview of the federal government, but *more importantly that the Court may be willing to tolerate states like Arizona and Alabama enacting even more harmful legislation*.") (emphasis added); Krystal D. Norton, Note, Chamber of Commerce v. Whiting*: Why the States Are Permitted to Pass a Tidal Wave of New State Laws So Dangerously Intertwined with Federal Immigration Law*, 57 LOY. L. REV. 673, 675 (2011) ("In *Whiting*, the Court . . . started the ball rolling on allowing states to pass more restrictive statutes on the basis of U.S. immigration status.").

148. *See* Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 617 (2012) (contending that the enactment of increasing numbers of state and local immigration enforcement laws had potential negative civil rights implications for Latina/os).

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B. Flores-Villar v. United States*: The Plenary Power Doctrine and Gender Distinctions in the Nationality Laws*

In *United States v. Flores-Villar*,[149] the Ninth Circuit rejected a constitutional challenge to a federal law that established different standards for obtaining U.S. citizenship for children born outside of the United States to unmarried parents, depending on whether the child's mother or father was a U.S. citizen; the law favored mothers over fathers with respect to bestowing citizenship on children.[150] An equally divided four-four Court, with Justice Kagan recusing herself, deadlocked, thereby affirming the court of appeals' ruling that upheld the gender distinction in the nationality law.[151]

Flores-Villar is one of several occasions in recent years in which the Supreme Court has grappled with the constitutionality of gender-based distinctions in the immigration and nationality laws.[152] The Court has not hesitated to invalidate similar distinctions based on gender stereotypes in other laws.[153] Such distinctions, however, remain in several provisions of the Immigration and Nationality Act, which the plenary power doctrine historically has shielded from meaningful constitutional review.[154]

The fact that the Supreme Court was equally divided in *Flores-Villar* places in doubt the future vitality of the plenary power doctrine, which is

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149. United States v. Flores-Villar, 536 F.3d 990, 994-98 (9th Cir. 2008). For criticism of the Ninth Circuit's decision, see Eric Newhouse, Note, *"He's Not Your Real Dad": In* United States v. Flores-Villar*, The Ninth Circuit Erroneously Denied Equal Protection that Would Enable a Father to Transmit United States Citizenship to His Foreign-Born Child*, 45 CREIGHTON L. REV. 581 (2012).

150. *See Flores-Villar*, 536 F.3d at 994-95 (citing 8 U.S.C. §§ 1401(a)(7), 1409 (1976)).

151. Flores-Villar v. United States, 131 S. Ct. 2312, 2313 (2011).

152. *See* Nguyen v. INS, 533 U.S. 53, 60-62, 73 (2001) (upholding U.S. citizenship provision favoring illegitimate children of naturalized mothers over fathers); Miller v. Albright, 523 U.S. 420, 444-45 (1998) (refusing to invalidate a similar gender-based distinction in nationality laws). For analysis of the Supreme Court decisions in this area, see generally Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 HARV. J.L. & GENDER 405 (2013); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014); Nina Pillard, Comment, *Plenary Power Underground in* Nguyen v. INS*: A Response to Professor Spiro*, 16 GEO. IMMIGR. L.J. 835 (2002); Jessica Portmess, Comment, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After* Flores-Villar, 61 AM. U.L. REV. 1825 (2012).

153. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 558 (1996) (striking down Virginia Military Institute's male-only admission policy); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (invalidating university's single-sex admission policy).

154. *See supra* text accompanying notes 1-11.

the bedrock of immigration exceptionalism. At least four Justices apparently would not have applied the doctrine to protect the law in question from judicial review and would have struck down the gender-based distinction. Although speculation about the votes of Justices is hazardous at best, the Justice who recused herself, Elena Kagan, might well be expected to side in the future, as she often does, with the Court's more liberal Justices.[155]

C. Federal Preemption of State and Local Immigration Enforcement Laws

Besides the merits decisions of the 2010 Term, the Supreme Court took notable action in two cases addressing the lawfulness of state and local laws touching on immigration.

1. Lozano v. City of Hazleton*: Federal Preemption of a Local Immigration Enforcement Ordinance*

In light of *Chamber of Commerce v. Whiting*,[156] the Supreme Court granted certiorari, vacated, and remanded a court of appeals decision striking down, on federal preemption grounds, much of a controversial ordinance that the Hazleton, Pennsylvania city council passed in the name of facilitating immigration enforcement.[157] The council passed the ordinance after heated public debate marred by palpable expression of anti-Latina/o sentiment.[158] Along with other immigration enforcement-oriented measures, the Hazleton ordinance would have, among other things, prohibited landlords from renting housing to undocumented immigrants.[159] The ordinance was one of the plethora of state and local immigration enforcement laws passed in the early years of the new millennium that

155. *See* Adam Liptak, *With Eyes on His Vote in Health Subsidies Case, Roberts Lets on Little*, N.Y. TIMES, Mar. 6, 2015, at A17 (reiterating the view that, based on voting patterns, Justice Kagan is one of the liberal members of the current Supreme Court).

156. *See supra* Part II.A.

157. *See* Lozano v. City of Hazleton, 620 F.3d 170, 176-81, 219, 224 (3d Cir. 2010), *vacated by* City of Hazleton v. Lozano, 131 S. Ct. 2958 (2011).

158. *See Lozano*, 620 F.3d at 209 n.31.

159. For analysis of legal issues raised by the challenge to the Hazleton ordinance, see Jamie Longazel & Benjamin Fleury-Steiner, *Exploiting Borders: The Political Economy of Local Backlash Against Undocumented Immigrants*, 30 CHICANO-LATINO L. REV. 43 (2011); Rachel E. Morse, *Following* Lozano v. Hazleton: *Keep States and Cities Out of the Immigration Business*, 28 B.C. THIRD WORLD L.J. 513 (2008) (book review); Mark S. Grube, Note, *Preemption of Local Regulations Beyond* Lozano v. City of Hazleton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010).

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signaled increasing public frustration with federal immigration enforcement.[160]

When issues raised in a petition for certiorari are similar to those recently decided by the Court, the Supreme Court routinely grants certiorari, vacates, and remands the lower court decision for further consideration in light of the new decision.[161] The Court in the Hazleton case followed its standard practice and vacated and remanded the court of appeals's decision in light of *Chamber of Commerce v. Whiting*.[162] Some commentators read the Court's action as suggesting that the Court in the future might be willing to approve more aggressive state and local immigration enforcement measures.[163] Such a development would signify a deviation from past practice and represent an arguably extreme change in the law.[164]

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160. *See* Johnson, *supra* note 148, at 617 (explaining how the changing regional demographics of immigration and tightening state and local budgets contributed to the enactment of a record number of state and local immigration laws); *supra* text accompanying note and note 147 (mentioning commentators who feared that the Supreme Court decision in *Chamber of Commerce v. Whiting* would result in an increase in state and local efforts to enforce the U.S. immigration laws); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE STATES (JANUARY-MARCH 2010), at 1 (Apr. 27, 2010), *available at* http://ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf ("With federal immigration reform currently stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate."). *See generally* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014) (collecting essays analyzing the propriety of increased state and local immigration enforcement).

161. *See, e.g.*, *supra* text accompanying notes 99-101 (mentioning how the Court vacated and remanded the rulings in eighteen cases in light of its decision in *Carachuri-Rosendo v. Holder*).

162. *See supra* text accompanying notes 99-101.

163. *See supra* text accompanying notes 147-148. The fear that *Chamber of Commerce v. Whiting* would open the door to courts upholding state and local immigration enforcement laws proved to be unfounded. On remand, the Third Circuit reaffirmed its earlier holding that federal immigration law preempted the core provisions of the Hazleton ordinance. *See* Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013). The Court subsequently denied the City of Hazleton's petition for certiorari and declined to review the court of appeals decision invalidating much of the city ordinance. *See* City of Hazleton v. Lozano, 134 S. Ct. 1491 (2014); *infra* Part V.B.1.

164. *See supra* Part II.A.

2. Martinez v. Regents of the University of California*: Public University Fees for Undocumented Residents*

In *Martinez v. Regents of the University of California*, the California Supreme Court unanimously rejected a challenge under federal law [165] to a state law [166] that allows certain graduates of California high schools, including undocumented immigrants, to pay the same fees as state residents to attend the University of California, state universities, and community colleges.[167] The Supreme Court denied certiorari in the case.[168]

The California Supreme Court decision rested on the interpretation of federal law and garnered considerable public attention.[169] Nonetheless, the U.S. Supreme Court refused to disturb the court's ruling. That refusal suggests that the Court is reluctant to interfere in decisions generally reserved to the states, such as those concerning the fees that state public colleges and universities charge to undocumented residents, including immigrant students.[170]

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165. 8 U.S.C. § 1623(a) (2012) ("[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within in a state (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.").

166. CAL. EDUC. CODE § 68130.5 (West 2014). Through this and other laws, California in recent years has sought to improve access of undocumented students to California public colleges and universities. *See* CALIFORNIA DREAM ACT OF 2011 BILL ANALYSIS 1-6 (2011), *available at* http://www.legin fo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_130_cfa_20110607_133225_sen_comm.html*; see also* California DREAM Act, A.B. 130, 2011-12 Sess. (Cal. 2011) (making undocumented California residents eligible to receive scholarships derived from nonfederal funds).

167. Martinez v. Regents of the University of California, 241 P.3d 855, 860 (Cal. 2010). For analysis of the *Martinez* decision, see Kyle William Colvin, Note, *In-State Tuition and Illegal Immigrants: An Analysis of* Martinez v. Regents of the University of California, 2010 B.Y.U. EDUC. & L.J. 391; Beverly N. Rich, Note, *Tracking AB 540's Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of* Martinez v. Regents of the University of California, 19 S. CAL. REV. L. & SOC. JUST. 297 (2010).

168. Martinez v. Regents of Univ. of Cal., 131 S. Ct. 2961 (2011).

169. *See supra* note 165 and accompanying text (citing federal statute).

170. *See* Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 108-29 (2008). *But see* Toll v. Moreno, 458 U.S. 1, 18-19 (1982) (holding that federal law barred state of Maryland from denying in-state resident fees at a public university to lawfully admitted nonimmigrant students).

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III. The 2011 Term

The 2011 Term saw the Supreme Court decide five immigration cases, a relatively large number for one Term. In one of the most important immigration decisions in years, the Court in *Arizona v. United States*[171] ruled in a rather unremarkable, workmanlike way to reinforce federal supremacy over immigration enforcement and invalidate core provisions of a controversial Arizona immigration enforcement law.

In addition, the Supreme Court decided four more ordinary immigration cases in the 2011 Term, a large number of immigration cases for it to decide on the merits in a single Term. Those decisions offer critically important insights into how the Court approaches the bread-and-butter of the federal courts' immigration docket. Despite the fact that the immigration laws are tough on noncitizens convicted of criminal offenses,[172] the Court approached the cases as standard exercises of statutory interpretation, administrative deference, and the application of other generally applicable doctrines.

All five immigration decisions of the 2011 Term fall squarely into the mainstream of the Supreme Court's jurisprudence. Immigrants won three of the cases, which is not a bad win-loss percentage in light of the strict laws being applied and the deference generally afforded the government.

A. Arizona v. United States*: Federal Preemption of a State Immigration Enforcement Law*

With Congress failing to enact immigration reform, despite attempts spanning nearly a decade,[173] a growing number of state legislatures passed laws purportedly designed to facilitate immigration enforcement.[174] The Supreme Court's decision in *Chamber of Commerce v. Whiting*, which upheld Arizona's business licensing law, arguably encouraged state and local governments to act in the name of immigration enforcement.[175]

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171. 132 S. Ct. 2492, 2511 (2012); *see* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 299 (2013) ("*Arizona v. United States* was a watershed decision because it reaffirmed a model of federalism that accords deference to Congress in regulating immigration and in delegating broad rule-making authority to the Executive.").

172. *See supra* text accompanying notes 67-77.

173. *See, e.g.*, Kevin. R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1600 (2009).

174. *See* Johnson, *supra* note 148, at 617.

175. *See supra* text accompanying notes 147-48.

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In 2010, the Arizona legislature passed the Support Our Law Enforcement and Safe Neighborhoods Act, popularly known as SB 1070.[176] This new immigration enforcement measure was considerably broader in scope than the Arizona Legal Workers Act upheld by the Court in *Whiting*; SB 1070 generated substantial national controversy for its tough brand of state immigration enforcement.[177]

SB 1070's "stated purpose is to 'discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States. . . . The law's provisions establish an official state policy of 'attrition through enforcement.'"[178] The court of appeals struck down four central provisions of the law.[179]

The Supreme Court "granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status."[180] Court watchers predicted that a conservative Court might well uphold much, if not all, of the Arizona law, which many conservatives championed.[181]

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176. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). For analysis of the myriad of legal issues raised by SB 1070, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

177. *See, e.g.*, Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J.L. & POL. 367, 368-69 (2013); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, *passim* (2012); Andrea Christina Nill, *Latinos and SB 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35 (2011); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523 (2011); *see also* George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175 (2012) (analyzing adverse impacts on Latina/os, immigrants and citizens alike, of a series of laws enacted by the Arizona legislature, including SB 1070).

178. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (citations omitted) (internal quotation marks omitted). For a vigorous defense of the "attrition by enforcement" strategy, which sees increased removals as a path toward decreasing the overall size of the undocumented immigrant population in the United States, see Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008).

179. *See* United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), *aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012).

180. Arizona v. United States, 132 S. Ct. at 2498 (citation omitted).

181. *See* Dan Nowicki, *SB 1070 Supreme Court Ruling May Impact U.S. Races*, ARIZ. CENT. (June 2, 2012), http://www.azcentral.com/news/politics/articles/2012/05/31/20120531sb-1070-supreme-court-impact-races.html; Mike Sacks, *SB 1070: Supreme Court Appears to Favor Arizona on Controversial Immigration Law*, HUFFINGTON POST, Apr. 25, 2012,

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In *Arizona v. United States*, the Court—in a majority opinion by Justice Kennedy joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor—largely agreed with the Ninth Circuit and invalidated three core provisions of SB 1070.[182] A five-three Court found that federal immigration law preempted sections 3 (creating a state crime for failing to carry an alien registration document), 5(c) (making it a crime under state law to work without authorization), and 6 (authorizing the warrantless arrest of persons believed to have committed an offense making them removable from the United States).[183]

A majority of the Court upheld one provision of SB 1070.[184] Section 2(B) of the law requires state and local law enforcement officers to verify the immigration status of persons who they reasonably suspect of being in the country in violation of the immigration laws.[185] Refusing to invalidate the provision on its face, the Court left open the possibility of challenges to its application by Arizona law enforcement authorities in individual cases.[186]

Not able to agree among themselves, Justices Scalia, Thomas, and Alito all filed separate opinions concurring in part and dissenting in part.[187] Most jarring among the opinions was Justice Scalia's, who would have upheld SB 1070 in its entirety.[188] Exhibiting a strident ideological tone relatively rare in a Supreme Court opinion, his partial dissent noted at the outset that

> [t]he United States is an indivisible "Union of sovereign States." Today's opinion, approving virtually all of the Ninth Circuit's injunction against enforcement of the four challenged provisions of Arizona's law, deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be

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http://huffingtonpost.com/2012/04/25/sb-1070-supreme-court-arizona-immigration-law_n_1451622.html; Hannah Yi, *Arizona Preps for SB 1070 Ruling*, PBS, (June 15, 2012), http://www.pbs.org/wnet/need-to-know/the-daily-need/arizona-preps-for-sb-1070-ruling/14067/.

182. *See* 132 S. Ct. at 2510-11. Justice Kagan did not participate in the consideration or decision in the case. *See id.* at 2511.

183. *See id.* at 2510.

184. *See id.* at 2507-10.

185. *See id.*

186. *See id.* at 2510.

187. *See infra* text accompanying notes 188-194.

188. *See* Arizona v. United States, 132 S. Ct. at 2511-22 (Scalia, J., concurring in part, dissenting in part).

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> there. Neither the Constitution itself nor even any law passed by Congress supports this result. . . .
>
> . . . .
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> . . . As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.[189]

Justice Scalia proceeded to express disapproval of, if not outright disdain for, the Obama administration's immigration policy choices, including some that appeared to be only marginally related to the Arizona law before the Court.[190] In conclusion, Justice Scalia sarcastically quipped that "[i]f securing its territory [through SB 1070] is not within the power of Arizona, we should cease referring to it as a sovereign State."[191] Attracting considerable media attention, his stinging rebuke of the majority opinion was more often than not criticized as excessive.[192]

Although agreeing with Justice Scalia that federal law did not preempt any of SB 1070, Justice Thomas reached that conclusion through more conventional federal preemption analysis and without Justice Scalia's strident criticism of the Obama administration's immigration policy choices.[193] Adhering to precedent, Justice Alito would have only found section 3, involving noncitizen registration, to be preempted by federal immigration law.[194]

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189. *Id.* at 2511 (Scalia, J., dissenting) (citations omitted).

190. *See id.* at 2521 (criticizing the Obama administration's 2012 Deferred Action for Childhood Arrivals program that temporarily deferred the removal of undocumented immigrants brought to the United States as children).

191. *Id.* at 2522.

192. *See* Dana Milbank, *On Arizona Immigration Law, Justice Scalia and Street Protesters Make Same Case*, WASH. POST, Apr. 25, 2012, http://www.washingtonpost.com/ opinions/on-arizona-immigration-law-justice-scalia-and-street-protesters-make-same-case/2012/04/25/gIQ Ar6LmhT_story.html; Nathan Pippenger, *Scalia Reveals How Little He Knows About Immigration Policy*, NEW REPUBLIC, Apr. 26, 2012, *available at* http://www.newrepublic.com/ article/politics/102973/justices-supreme-court-conservative-immigration-laws; David G. Savage, *Did Justice Antonin Scalia Go Too Far This Time?*, L.A. TIMES, June 27, 2012, http:// articles.latimes.com/2012/jun/27/nation/la-na-scalia-20120627.

193. Arizona v. United States, 132 S. Ct. at 2522 (Thomas, J., concurring in part, dissenting in part).

194. *Id.* at 2524 (Alito, J., concurring in part, dissenting in part). The Court previously had invalidated a similar provision in a Pennsylvania law. *See* Hines v. Davidowitz, 312 U.S. 52, 72 (1941).

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As noted above, the Court's upholding of section 2(B) of SB 1070 generated considerable concern and criticism.[195] Popularly known as the "show your papers" requirement, this provision, which can be found in many of the new immigration enforcement laws passed by the states,[196] mandates state and local police to verify the immigration status of anyone about whom they have a "reasonable suspicion" of unlawful presence in the United States.[197] Critics worried that implementation of section 2(B) would result in increased racial profiling of Latina/os by state and local officers in criminal law enforcement.[198] By focusing on the technical federal preemption challenge and reserving the possibility of future "as applied" challenges, the majority's approach allowed the Court to sidestep the most frequently voiced civil rights concern with SB 1070.[199]

The Court in *Arizona v. United States*, including all of the separate opinions (except perhaps Justice Scalia's), applied generally applicable federal preemption doctrine in a relatively unremarkable way. That application resembled the analysis in which the Court has engaged in deciding whether federal law preempted state laws in other substantive areas,[200] as well as its by-the-books decision the previous Term in *Chamber of Commerce v. Whiting*.[201]

Although the Court made it clear that federal power preempted various enforcement efforts in *Arizona v. United States* and ensured federal primacy over immigration regulation,[202] its decision the previous term in *Whiting*

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195. *See* Johnson, *supra* note 148, at 630 (describing how § 2(B)'s requirement that state and local police verify the immigration status of persons whom they have a "reasonable suspicion" to believe are unlawfully in the United States is one of the most controversial features of SB 1070); *see also* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's SB 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 331-33 (2012) (analyzing claim that SB 1070 would increase racial profiling by local law enforcement).

196. *See* Johnson, *supra* note 148, at 617.

197. *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

198. *See supra* note 177.

199. *See* Arizona v. United States, 132 S. Ct. at 2500-01.

200. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 387-88 (2000) (holding that federal law preempted Massachusetts law that restricted the ability of state agencies to purchase goods or services from companies that did business with Burma (Myanmar)); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (ruling that the federal Occupational Safety and Health Act preempted state environmental regulation).

201. *See supra* Part II.A (discussing *Whiting*).

202. For analysis of recent developments in federal preemption of state and local immigration enforcement laws, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. &

made it equally clear that Congress ensured some room for the states to act in the realm of immigration enforcement.[203] In striking down core provisions of Arizona's SB 1070 as intruding on the federal power to regulate immigration, the Supreme Court surprised many observers who predicted that the conservative Roberts Court would uphold the law in its entirety.[204]

B. Judulang v. Holder*: Relief from Removal*

Section 212(c) of the Immigration and Nationality Act, repealed in 1996,[205] provided for a "waiver of excludability" allowing a noncitizen to secure relief preventing removal from the country despite a criminal conviction.[206] The Supreme Court in *Judulang v. Holder* addressed a question about the availability of that form of relief to a lawful permanent resident convicted of a crime.[207]

The U.S. government sought to remove from the United States Joel Judulang, a lawful permanent resident from the Philippines who had lived in this country since 1974, based on a 1989 voluntary manslaughter conviction.[208] The U.S. government argued that Judulang should be removed from the United States because he had committed an "aggravated felony" involving a "crime of violence."[209] The BIA ruled, and the Ninth

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MARY BILL RTS. J. 577 (2012); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 NYU L. REV. 2074 (2013); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2013); Kit Johnson & Peter J. Spiro, *Debate: Immigration Preemption After* United States v. Arizona, 161 U. PA. L. REV. ONLINE 100 (2012), *available at* http://scholarship.law.upenn.edu/cgl/viewcontent/cgi?article=1095&context=penn_law_review_online; Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333 (2013); Daniel J. Tichenor & Alexandra Filindra, *Raising* Arizona v. United States*: Historical Patterns of American Immigration Federalism*, 16 LEWIS & CLARK L. REV. 1215, *passim* (2012).

203. *See supra* Part II.A.

204. *See supra* note 181 (citing news reports to this effect).

205. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c), *repealed by* Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (1952) (repealed 1996).

206. The Court had previously ruled that noncitizens could apply for § 212(c) relief based on criminal convictions before Congress repealed the statutory provision in 1996 immigration reforms. *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001).

207. 132 S. Ct. 476, 479-82 (2011).

208. *See id.* at 477.

209. *Id*.

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Circuit agreed, that a "crime of violence" was not "comparable" to any ground for exclusion for which a waiver of excludability was available and Judulang thus was not eligible for relief from removal under section 212(c).[210] The Court granted certiorari to resolve a circuit split on the question.[211]

Writing for a unanimous Court, Justice Kagan flatly rejected the BIA's interpretation of the relevant statutory provisions:

> This case concerns the Board of Immigration Appeals' . . . policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of the immigration laws. We hold that the BIA's approach is arbitrary and capricious.
>
> The legal background of this case is complex, but the principle guiding our decision is anything but. *When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one. Here, the BIA has failed to meet it.*[212]

In reaching that conclusion, the Court applied mainstream administrative law principles borrowed from the Administrative Procedure Act[213] and, far from rubber-stamping the agency ruling, found that the BIA's ruling "flunked" minimal judicial review.[214] The Court bluntly emphasized that "[w]e must reverse an agency policy when we cannot discern a reason for it. That is the trouble in this case."[215] The Court further noted that the BIA's arbitrary and capricious interpretation of the statute failed to warrant

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210. *See In re* Judulang, A34 461 941-EL Centro, 2006 WL 557842, at *2 (B.I.A. Feb. 3, 2006); Judulang v. Gonzales, 249 F. App'x 499, 502 (9th Cir. 2007), *rev'd and remanded by* 132 S. Ct. 476 (2011).

211. *See Judulang*, 132 S. Ct. at 483 & n.6 (citing lower court decisions in conflict on this question).

212. *Id.* at 479 (emphasis added).

213. *See id.* at 483 (emphasis added) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)). The Court looked to the Administrative Procedure Act even though it technically does not apply to removal proceedings. *See* Marcello v. Bonds, 349 U.S. 302, 309-10 (1955).

214. *Judulang*, 132 S. Ct. at 484.

215. *Id.* at 490. Influential jurist Judge Richard Posner, well known for his law and economics approach to the law, has been similarly harsh in criticizing BIA rulings. *See* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679-87 (2007).

deference under *Chevron v. Natural Resources Defense Council, Inc.*,[216] the seminal administrative law decision articulating the standard applicable to the review of an agency interpretation of an ambiguous statute.[217]

The *Judulang* Court applied the same basic principles of statutory interpretation to the immigration laws that it generally applies to the interpretation of other statutes.[218] The Court's unanimous opinion is nothing less than a stinging rebuke of the BIA's reasoning and the U.S. government's defense of it. In addition, the decision follows the trend of subjecting the immigration decisions of the BIA to the same general standards of judicial review that apply to actions of other administrative agencies.[219]

C. Kawashima v. Holder*: Removal for Tax Crimes*

In *Kawashima v. Holder*,[220] the U.S. Supreme Court, in a six-three decision by Justice Thomas, affirmed a court of appeals holding that a tax crime was an aggravated felony under the U.S. immigration laws, which

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216. *See Judulang*, 132 S. Ct. at 483 n.7 (citing Chevron v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984)).

217. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 455 (1989); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 838 (2001); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074 (1990). For provocative questioning of the meaningfulness of judicial review of administrative decisions under *Chevron* and other deference doctrines, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

218. *See* Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens,* 26 GEO. IMMIGR. L.J. 313, 332 (2012). *See generally* Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 NYU ANN. SURV AM. L. 503 (2013).

219. For analysis of *Judulang v. Holder*, see Adjoa Anim-Appiah, *Raising the Standard:* Judulang v. Holder *Condemns the Use of Arbitrary and Capricious Policies When Determining Eligibility for the Section 212(c) Waiver*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 261 (2013); Patrick Glen, Judulang v. Holder *and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1 (2012); 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 (2012); *see also* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 403-07 (2013) (viewing Court's reliance on administrative law principles in *Judulang* as a way of avoiding the recognition of constitutional rights of immigrants). The BIA later implemented the Court's decision in *Judulang v. Holder* to ensure the appropriate availability of § 212(c) relief. *See In re* Abdelghany, 26 I. & N. Dec. 254 (BIA 2014).

220. 132 S. Ct. 1166, 1176 (2012).

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would subject an immigrant to mandatory removal from the United States. Akio and Fusako Kawashima, lawful permanent residents from Japan who had lived in the United States since 1984, were convicted for the filing, and aiding and abetting in the filing, of a false statement on a corporate tax return. The immigration question was whether the crimes constituted aggravated felonies, thereby requiring removal.[221] Engaging in a straightforward interpretation of the text of the statute, the Court agreed with the BIA and the court of appeals that the tax crimes at issue did in fact constitute aggravated felonies.[222]

At times, the Supreme Court has applied the rule of lenity to interpret ambiguities in the removal provisions of the immigration laws in favor of the noncitizen resisting deportation.[223] However, a majority of the Court in *Kawashima* found that there was no ambiguity in the statutory provision in question.[224]

Joined by Justices Breyer and Kagan, Justice Ginsburg dissented.[225] Reading the statute as more ambiguous than the majority, she relied on the rule of lenity as justifying interpretation of the statute in favor of the noncitizens.[226] Justice Ginsburg, therefore, concluded that the Kawashimas' tax crimes failed to constitute aggravated felonies.[227]

As often is the case in immigration cases, the majority and the dissent in *Kawashima* engaged in a debate over the proper construction of complex U.S. immigration laws. And, as is common in the Court's decisions, the majority and dissent employed contrasting methods of statutory interpretation.[228] The majority focused on the plain meaning of the statute;

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221. *See id.* at 1170.

222. *See id.* at 1176.

223. *See, e.g.,* INS v. St. Cyr, 533 U.S. 289, 320 (2001); *supra* text accompanying notes 93-95.

224. *See Kawashima*, 132 S. Ct. at 1175-76 ("[T]he Kawashimas argue that [the statute] . . . is ambiguous, and that we should therefore construe the statute in their favor. It is true that we have, in the past, construed ambiguities in deportation statutes in the alien's favor. . . . *We think the application of the present statute clear enough that resort to the rule of lenity is not warranted.*") (emphasis added)).

225. *Kawashima*, 132 S. Ct. at 1176 (Ginsburg, J., dissenting).

226. *See id.* at 1177-80.

227. *See id.* at 1181.

228. *See, e.g.*, Corley v. United States, 556 U.S. 303 (2009); Hibbs v. Winn, 542 U.S. 88 (2004). For commentary on the Supreme Court's statutory interpretation jurisprudence, see generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to*

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Justice Ginsburg's dissent read the statutory text and its structure differently.[229] In interpreting the relevant provisions of the immigration law, all of the Justices looked to a generally-applicable legal principle—the rule of lenity—but reached different conclusions about whether it applied.[230]

D. Vartelas v. Holder*: Retroactive Application of Immigration Reforms*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added Immigration and Nationality Act section 101(a)(13)(C)(v),[231] which changed the definition of "admission" into the United States. That new provision deems a lawful permanent resident returning from a brief trip outside the country who had been convicted of certain criminal offenses to be seeking initial admission into the country; that noncitizen thus is subject to all of the inadmissibility provisions of the Immigration and Nationality Act.[232]

Panagis Vartelas originally came lawfully to the United States in 1979 on a student visa and later became a lawful permanent resident.[233] In 1994, he pleaded guilty to a felony of conspiring to make a counterfeit security and subsequently served a four-month sentence.[234] Relying on the 1996 amendment, the U.S. government denied admission to Vartelas upon his return to the United States after a brief visit to Greece in 2003, because the previous counterfeiting conviction was a "crime involving moral turpitude."[235]

Before 1996, a lawful permanent resident in Vartelas's situation would have been able to take a short trip out of the country without risking denial of re-entry.[236] Even after 1996, Vartelas would *not* have been subject to

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Hamdan, 96 GEO. L.J. 1083 (2008); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

229. *See supra* text accompanying notes 225-27.

230. *See supra* text accompanying notes 220-27.

231. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546.

232. *See* 8 U.S.C. § 1182(a).

233. *See* Vartelas v. Holder, 132 S. Ct. 1479, 1483, 1485 (2012).

234. *See id.* at 1483.

235. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

236. *See* Rosenberg v. Fleuti, 374 U.S. 449 (1963) (holding that an "innocent, casual and brief" trip outside the United States by a lawful permanent resident was not a departure warranting the treatment of the return to the country as a new "entry" subject to the full array of exclusion grounds).

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removal if he had not traveled outside the United States.[237] However, as the U.S. government interpreted the 1996 provision, Vartelas could be denied admission back into the country because of a brief trip outside the United States.[238]

The Supreme Court granted certiorari to resolve a conflict between the circuits on the question.[239] In an opinion by Justice Ginsburg for a six-three majority, the Court rejected the BIA's order that Vartelas be returned to Greece:

> We conclude that the relevant provision of IIRIRA, § 1101(a)(13)(C)(v), attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction). *Guided by the deeply rooted presumption against retroactive legislation, we hold that § 1101(a)(13)(C)(v) does not apply to Vartelas' conviction*.[240]

To reach that conclusion, the Court applied the general "presumption against retroactive legislation" and the retroactivity doctrine articulated in its 1994 decision in *Landgraf v. USI Film Products*.[241] The Court held that, in pleading guilty to the criminal charge in 1994, Vartelas "likely relied"[242] on the law as it existed at that time, which allowed him to take brief trips outside the United States without risking denial of re-entry into the country.[243]

Joined by Justices Thomas and Alito, Justice Scalia dissented.[244] The dissent viewed the activity regulated by the 1996 amendment to the immigration laws as Vartelas' reentry into the United States after a trip outside the country *after* 1996, rather than the decision to plead guilty to a criminal offense *before* 1996.[245] Consequently, the BIA, in Justice Scalia's estimation, did not retroactively apply the new statutory language of the 1996 act; the test for whether retroactive application of the law was constitutional therefore should not apply.[246] Vartelas's readmission to the United States involved a trip in 2003 that occurred years *after* the effective

237. *See Vartelas*, 132 S. Ct. at 1483.
238. *See id.* at 1483-84.
239. *Id.* at 1486 (citing cases).
240. *Id.* at 1483-84.
241. 511 U.S. 244, 265 (1994).
242. *Vartelas*, 132 S. Ct. at 1491.
243. *See id*. at 1483-84.
244. *See id.* at 1492 (Scalia, J., dissenting).
245. *See id.* at 1493.
246. *Id.* at 1493-94.

date of the legislation.[247] Justice Scalia chastised the majority for evading the plain meaning of the statute to achieve what it deemed to be the fair result in the case.[248]

In sum, the Supreme Court found for Vartelas in an opinion that, relying on the generally applicable test for the retroactive application of new laws, concluded that the application of the 1996 amendments to Vartelas' case would be unconstitutional.[249] The majority and the dissent differed primarily with respect to the application of standard retroactivity doctrine to Vartelas's brief trip to Greece. A majority ruled that he could not be constitutionally subject to retroactive application of the 1996 amendment.[250]

E. Holder v. Gutierrez*: Eligibility for Relief from Removal*

In consolidated cases, the Supreme Court reviewed the BIA's ruling that the years of a parent's residency in the United States could not be imputed to a minor child for purposes of calculating the years of residence necessary for eligibility for relief from removal known as "cancellation of removal."[251] A split in the circuits had developed on this question of statutory construction.[252]

In 1989, the family of five-year-old Carlos Martinez Gutierrez brought him unlawfully from Mexico to the United States.[253] Two years later, Martinez Gutierrez's father was admitted to the country as a lawful permanent resident.[254] More than a decade later, in 2003, the U.S. government granted Martinez Gutierrez lawful immigration status. He was later apprehended for smuggling undocumented immigrants across the U.S.-Mexico border.[255] To defend against removal from the United States, Martinez Gutierrez sought cancellation of removal.[256] The immigration court concluded that, even though Martinez Gutierrez himself did not

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247. *Id.* at 1496.
248. *See id.* at 1495.
249. For application of *Vartelas*, see *United States v. Gill*, 748 F.3d 491 (2d Cir. 2014).
250. *Vartelas*, 132 S. Ct. at 1491-92.
251. Holder v. Gutierrez, 132 S. Ct. 2011, 2020-21 (2012); *see* 8 U.S.C. § 1229b (requiring, among other things, continuing presence in the United States of seven years for lawful permanent residents, and ten years for undocumented immigrants and other noncitizens, to be eligible for cancellation of removal).
252. *See Gutierrez*, 132 S. Ct. at 2016 (citing conflicting court of appeals' decisions).
253. *Id.* at 2016-17.
254. *See id.* at 2016.
255. *Id.*
256. *Id.*

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satisfy the statutory requirement of seven years of continuous residence in the United States, he qualified for this relief based on his father's residency.[257] The BIA reversed.[258] The court of appeals granted Martinez Gutierrez's petition for review and remanded the case to the BIA for reconsideration.[259]

A companion case had similar facts. In 1995, fifteen-year-old Damien Sawyers was admitted as a lawful permanent resident from Jamaica.[260] At that time, his mother had lawfully entered the country and resided in the country for six years.[261] In 2002, Sawyers was convicted of a drug offense, and the U.S. government initiated proceedings to remove him from the country.[262] The immigration court found Sawyers to be ineligible for cancellation of removal because he was a few months short of the seven years of continuous residence required by the statute and refused to impute his mother's years of residency to him.[263] The BIA denied the petition for review, but the court of appeals disagreed.[264]

Writing for a unanimous Court, Justice Kagan deferred to the BIA's construction of the statutory provision in question.[265] The Court concluded that the Board's refusal to impute of the time of parent's residence to the child for purposes of eligibility for relief from removal was a reasonable construction of the ambiguous statutory provision in question.[266] Accordingly, the Court found that the agency's interpretation was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[267]

The Court's decision in *Holder v. Gutierrez* has all the trappings of the run-of-the-mill *Chevron* deference case.[268] That it was a unanimous

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257. *Id.*
258. *Id.*
259. *Id.* at 2017.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 2014-15.
266. *See* 8 U.S.C. § 1229b(a). For criticism of the Court's decision, see Johanna K.P. Dennis, *"Mommy, Where Is Home?": Imputing Parental Immigration Status and Residency for Undocumented Immigrant Children*, 45 J. MARSHALL L. REV. 991 (2012).
267. 467 U.S. 837 (1984). For analysis of the Supreme Court's application of *Chevron* deference to immigration cases, see *supra* note 218 (citing authorities).
268. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243 (2006); Christensen v. Harris County, 529 U.S. 576 (2000); Auer v. Robbins, 519 U.S. 452 (1997).

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decision, with the opinion assigned to the most junior Justice, suggests that the Court did not find the decision to be particularly controversial. The Court merely addressed an ordinary immigration case in a routine fashion.

IV. The 2012 Term

In the 2012 Term, the Supreme Court handed down two merits decisions in immigration cases. In one significant case, the Court rejected the mandatory removal of a long-term lawful permanent resident based on a single criminal conviction involving possession of a small amount of marijuana.[269] The Court in another case applied generally applicable legal doctrine in refusing to retroactively apply its decision in *Padilla v. Kentucky*, which expanded the right to effective assistance of counsel to include appraisal of the possible immigration consequences of a criminal conviction under a plea agreement.[270]

The Court in the 2012 Term also denied certiorari and declined to review a court of appeals decision striking down much of Alabama's controversial immigration enforcement law, which represented a brand of immigration enforcement even stricter, in certain respects, than Arizona's.[271]

A. Moncrieffe v. Holder*: Removal for Marijuana Possession*

Adrian Moncrieffe was lawfully brought to the United States from Jamaica in 1984 at age three.[272] He had two U.S. citizen children.[273] In 2007, local police stopped Moncrieffe while he was driving his automobile on the interstate in Georgia, en route to Miami, Florida, after a short visit with his daughter in Atlanta.[274] Police found 1.3 grams of marijuana (about two or three cigarettes) in the vehicle.[275] Moncrieffe pleaded guilty to

269. *See infra* Part IV.A.

270. *See infra* Part IV.B.

271. *See infra* Part IV.C.

272. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013).

273. *See* Brief for Petitioner at 4, Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (No. 11-702) *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-702_petitioner.authcheckdam.pdf.

274. *See id.* at 5. For a detailed analysis of the facts upon which about the stop and arrest culminating in Moncrieffe's criminal conviction, see Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 U. MICH. J.L. REFORM 967 (2015).

275. *See Moncrieffe*, 133 S. Ct. at 1683. Possession of a small amount of marijuana for personal use would not violate current law in several states. *See* Brandy Zadrozny, *From Dry to High: Your Guide to State Pot Laws*, DAILY BEAST (Jan. 29, 2014, 5:45 AM ET), http:// www. the dailybeast.com/articles/2014/01/29/from-dry-to-high-your-guide-to-state-pot-laws.html (reporting

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violating a Georgia law criminalizing a broad range of conduct, from the possession of a small amount of marijuana for personal use to distribution of large quantities for sale.[276] He successfully completed probation.[277] The marijuana conviction was Moncrieffe's *one and only* criminal conviction in his decades of lawful residence in the United States.[278]

Two years later, U.S. immigration officials arrested, detained, and initiated removal proceedings against Moncrieffe, claiming that the marijuana conviction constituted an aggravated felony under the immigrations laws.[279] The immigration court ordered Moncrieffe removed from the United States.[280] The BIA affirmed and the Fifth Circuit, in an opinion by Judge Edith Jones, denied the petition for review of the removal order.[281]

In a seven-two decision,[282] the Supreme Court resolved a split among the circuits[283] concerning whether a conviction under a state statute that criminalizes conduct characterized by both the Controlled Substance Act's felony and misdemeanor provisions constitutes an aggravated felony under the immigration laws, thus rendering the noncitizen ineligible for cancellation of removal.[284] Following the "categorical approach" to the classification of state criminal offenses as aggravated felonies for purposes of removal under federal law,[285] the Court, in an opinion by Justice Sonia Sotomayor, held that the conviction under Georgia law criminalizing possession of a small amount of marijuana (as was the case for Moncrieffe)

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that sixteen states have decriminalized the possession of small amounts of marijuana for personal use).

276. *See Moncrieffe*, 133 S. Ct. at 1685-87.

277. *See* Brief for Petitioner, *supra* note 273, at 5-6.

278. *See Moncrieffe*, 133 S. Ct. at 1683-84.

279. *See* 8 U.S.C. § 1227(a)(2)(A) (2012).

280. *Moncrieffe*, 133 S. Ct. at 1683.

281. Moncrieffe v. Holder, 662 F.3d 387, 389, 392-93 (5th Cir. 2011), *rev'd and remanded by* 133 S. Ct. 1678 (2013).

282. *Moncrieffe*, 133 S. Ct. at 1678.

283. *See id.* at 1684 n.3 (noting conflicting court of appeals decisions).

284. *Id.* at 1684.

285. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012); Laura Jean Eichten, Comment, *A Felony, I Presume? 21 USC § 841(b)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings,* 79 U. CHI. L. REV. 1093 (2012). The Court also followed the categorical approach in an analogous setting in another case in the 2012 Term, *Descamps v. United States*, 133 S. Ct. 2276 (2013).

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as well as actual distribution of controlled substances,[286] failed to constitute an aggravated felony

In *Moncrieffe*, the Supreme Court for the second time in the last five Terms rejected the U.S. government's assertion that a minor drug offense constituted an aggravated felony for immigration purposes.[287] Those decisions together demonstrate the Court's reluctance to subject long-term lawful permanent residents of the United States to the equival of mandatory removal based on relatively small-time drug convictions. In both instances, the Court exercised ordinary review of the administrative agency decision and rejected the agency's interpretation of the immigration laws.

B. Chaidez v. United States*: Retroactive Application of* Padilla v. Kentucky

Chaidez v. United States[288] involved the relatively commonplace question of the retroactive application of a Supreme Court decision. A native of Mexico, Roselva Chaidez entered the United States in 1971 and became a lawful permanent resident in 1977.[289] About twenty years later, she was involved in an automobile insurance fraud scheme in which she received less than two thousand dollars: on advice of counsel, Chaidez pleaded guilty to mail fraud and received a sentence of probation and restitution.[290]

In 2009, Chaidez filed a naturalization petition.[291] That filing brought her criminal conviction to the attention of the U.S. government, which instituted removal proceedings against her.[292] Seeking to avoid removal

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286. *See Moncrieffe*, 133 S. Ct. at 1686-87. In one case, the Court granted certiorari, vacated a court of appeals ruling, and remanded for further consideration in light of the decision in *Moncrieffe v. Holder*. *See* Garcia v. Holder, 638 F.3d 511 (6th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2019 (2013). For courts applying *Moncrieffe*'s categorical approach, see, for example, Bautista v. Att'y Gen., 744 F.3d 54, 61-62 (3d Cir. 2014); Garcia v. Holder, 756 F.3d 839 (5th Cir. 2014); United States v. Aguilera-Rios, 754 F.3d 1105 (9th Cir.), *amended and superseded on other grounds by* 769 F.3d 626 (9th Cir. 2014); United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014). The BIA offered direction in applying *Moncrieffe*'s categorical approach in *In re* Chairez-Castrejon, 26 I. & N. Dec. 349 (BIA 2014).

287. *See supra* Part I.B (analyzing *Carachuri-Rosendo v. Holder*). Importantly, the U.S. government still has the discretion to seek to remove Moncrieffe from the United States based on the marijuana offense. *See* Victor C. Romero, *A Meditation on* Moncrieffe*: On Marijuana, Misdemeanants, and Migration*, 49 GONZ. L. REV. 23, 32 (2014).

288. 133 S. Ct. 1103, 1105 (2013).

289. *Id.* at 1105.

290. *Id.* at 1105-06.

291. *Id.*

292. *Id.*

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after living in the country for more than thirty-five years, Chaidez brought an action to set aside the conviction, claiming that her attorney never warned her that the plea bargain and conviction might result in her removal from the United States.[293] While that action was pending, the Supreme Court decided *Padilla v. Kentucky*, holding that the Sixth Amendment requires attorneys in criminal cases to inform noncitizen defendants of the possible immigration consequences of guilty pleas.[294]

The U.S. Court of Appeals for the Seventh Circuit held that, because her criminal conviction had become final before the Court decided *Padilla v. Kentucky*, Chaidez was not entitled to the benefit of that ruling.[295] The Supreme Court "granted certiorari . . . to resolve a split among federal and state courts on whether *Padilla* applies retroactively."[296]

Agreeing with the Seventh Circuit, the Supreme Court refused to afford Chaidez the retroactive benefit of *Padilla v. Kentucky*.[297] Writing for the majority, Justice Kagan applied generally applicable retroactivity principles, including the Court's 1989 decision in *Teague v. Lane,*[298] and concluded that the *Padilla* decision did not apply to cases already final when it was decided.[299] The Court reasoned that the change in the law was sufficiently "new" that it should not apply retroactively.[300]

Justice Thomas concurred in the judgment, reiterating the view that the Court had incorrectly decided *Padilla*.[301]

Justice Sotomayor, joined by Justice Ginsburg, dissented.[302] Because in her view *Padilla* did not announce a "new" rule, Justice Sotomayor would have retroactively applied the decision.[303]

Chaidez is best understood as a run-of-the mill application of basic retroactivity doctrine.[304] The assignment of the junior Justice to write for

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293. *Id.* at 1106.

294. *See supra* Part I.A.

295. *See* Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011).

296. *Chaidez*, 133 S. Ct. at 1107 n.2 (footnote citing cases).

297. *See id.*

298. 489 U.S. 288 (1989).

299. *See Chaidez*, 133 S. Ct. at 1107-11.

300. *See id.*

301. *See Chaidez*, 133 S. Ct. at 1113 (Thomas, J., concurring in the judgment); *supra* text accompanying notes 63-64 (discussing Justice Scalia's dissent, which Justice Thomas joined, in *Padilla v. Kentucky*).

302. *See Chaidez*, 133 S. Ct. at 1114-21 (Sotomayor, J., dissenting).

303. *See id.* at 1114.

304. *See* Austen Ishii, Note, *There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law*, 83 FORDHAM L. REV. 949 (2014)

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the majority suggests that the case was relatively uncontroversial and that the Court did not see itself as breaking new ground. The majority and dissent both focused on the proper application of existing retroactivity precedent (*Teague v. Lane*) to the case before the Court.[305]

The holding in *Chaidez v. United States* that *Padilla* does not apply retroactively will affect plea bargains in which convictions were entered before the Supreme Court decided *Padilla*. Commentators have criticized the *Chaidez* decision.[306] Because the Obama administration has made it a priority to remove immigrants convicted of crimes from the United States by instituting removal actions based on relatively stale criminal convictions,[307] *Chaidez* is likely to affect thousands of lawful permanent residents facing removal who will potentially suffer separation from family, friends, employment, and community, if removed from the United States.[308]

Having lived in the United States for decades, Chaidez herself has three children and two grandchildren, all U.S. citizens.[309] Now facing removal based on a minor criminal conviction that under current law was secured in violation of the Constitution, she faces the possibility of being torn away

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(contending that courts had taken an unexceptional approach to questions of retroactive application of 1996 immigration legislation).

305. *See supra* text accompanying notes 297-303.

306. *See, e.g.*, Rebecca Sharpless & Andrew Stanton, Teague *New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of* Padilla, Chaidez *and* Martinez, 67 U. MIAMI L. REV. 795 (2013); Jennifer H. Berman, Comment, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667 (2012); Petra Bondra, Note, Chaidez v. United States *Erringly Resolves Non-Retroactivity of* Padilla v. Kentucky, 27 GEO. IMMIGR. L.J. 387 (2013); Tara M. Breslawski, Note, *"But My Attorney Didn't Tell Me I'd Be Deported!" – The Retroactivity of* Padilla, 29 TOURO L. REV. 1487 (2013); Allison C. Callaghan, Comment, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701 (2012); Levi Price, Comment, Chaidez v. United States*: Breaking Old Ground*, 91 DENV. U. L. REV. 533 (2014).

307. *See supra* text accompanying notes 67-77

308. Commentators have criticized the large number of removals of immigrants that separate families, including families with U.S. citizen children. *See* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006); Marie Weisenberger, Comment, *Broken Families: A Call for Consideration of the Family of Illegal Immigrants in U.S. Immigration Enforcement Efforts*, 39 CAP. U. L. REV. 495 (2011).

309. *See* Brief for Petitioner at 2, Chaidez v. United States, 133 S. Ct. 1103 (2013) (No. 11-820), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-820_pet.authcheckdam.pdf.

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from U.S. citizen family members and the only community she really knows.

C. Alabama v. United States*: Certiorari Denial in a Federal Preemption Case*

Building on Arizona's SB 1070,[310] the Alabama legislature in 2011 passed the Beason-Hammon Alabama Taxpayer and Citizen Protection Act.[311] In certain respects, the Alabama law was stricter than Arizona's SB 1070.[312] It, for example, would have required the Alabama public schools to collect data on the number of enrolled undocumented students.[313] This was an apparent step toward collecting the information necessary to mount a legal challenge to the Supreme Court's holding in *Plyler v. Doe*, which invalidated a Texas law effectively barring undocumented students from the public schools.[314]

The U.S. Court of Appeals for the Eleventh Circuit found that federal immigration law preempted large portions of Alabama's immigration enforcement law.[315] The Supreme Court, with Justice Scalia dissenting (consistent with his scathing dissent in *Arizona v. United States*),[316] denied certiorari in *Alabama v. United States*. In doing so, the Supreme Court

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310. *See supra* Part III.A (analyzing *Arizona v. United States*).

311. ALA. CODE §§ 31-13-1 to 31-13-35 (2011).

312. *See* William Arrocha, *From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W. L. REV. 245 (2012); Maria Pabón López et al., *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FIU L. REV. 231 (2011); Elizabeth M. Rieser-Murphy & Kathryn D. DeMarco, *The Unintended Consequences of Alabama's Immigration Law on Domestic Violence Victims*, 66 U. MIAMI L. REV. 1059 (2012).

313. ALA. CODE § 31-13-27 (2011), *invalidated by* United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012).

314. 457 U.S. 202, 229 (1982) (stating that the record in the case failed to support the claim of the state of Texas that undocumented immigrants burden the state's economy and that their exclusion from the public schools would improve the overall quality of education); *see also* Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same As the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 392-96 (2012) (explaining the adverse impacts of the Alabama immigration enforcement law on access to education of immigrants and Latina/os generally); Kevin R. Johnson, *Sweet Home Alabama? Immigration and Civil Rights in the "New" South*, 64 STAN. L. REV. ONLINE 22 (2011) (to the same effect).

315. United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013).

316. *See supra* text accompanying notes 188-92.

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declined to re-enter the fray of state immigration enforcement laws after *Arizona v. United States*.[317] It instead followed the conventional practice of allowing the Court's recent decision on similar issues to percolate through the lower courts. The Court's approach shows an unwillingness to reach to review a high profile case.

V. The 2013 Term

The 2013 Term was even slower than the previous Term with respect to immigration merit decisions. Focusing on the text of the relevant statute and the propriety of administrative deference, the Supreme Court's single immigration merits decision exemplifies the Roberts Court's unexceptional approach to immigration cases.[318]

In the 2013 Term, the Court also denied certiorari in four cases, all but one of which struck down the guts of a state or local immigration enforcement law.[319] Since deciding *Arizona v. United States*,[320] the Court for the time being has opted not to review any more cases that raise the question of federal preemption of state and local immigration enforcement laws.

A. Scialabba v. Cuellar de Osorio*: Visas for "Aged-out" Adult Children*

Due in no small part to limits in the U.S. immigration laws known as the per-country ceilings, which generally cap the number of visas that can issue annually to citizens from any particular country, many noncitizens face lengthy waits after filing visa applications before the U.S. government actually issues the visas.[321] The delays can be years and, in some instances, decades for prospective immigrants and their families from nations that annually send large numbers of immigrants to the United States, such as Mexico, the Philippines, and India.[322]

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317. *Alabama*, 133 S. Ct. 2022.

318. *See infra* Part V.A.

319. *See infra* Part V.B.

320. *See supra* Part III.A.

321. *See infra* note 322 (citing authorities).

322. *See* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 13 (2009) (contending that the long delays in lawful immigration disparately impact nationals of developing nations largely populated by people of color); Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713 (analyzing impacts of long lines for immigrant visas on prospective immigrants from Mexico). The current visa backlogs are a problem that various comprehensive immigration reform proposals promised to address, with some granting

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In 2002, Congress passed the Child Status Protection Act.[323] It amended the Immigration and Nationality Act to establish rules for determining answers to important practical questions caused by of the lengthy delays in the issuance of visas to noncitizens who initially qualified for visas as "children" but, due to the passage of time, "age out"—meaning that they would no longer qualify as children for immigrant visas under the immigration laws and would, therefore, no longer be eligible as derivative beneficiaries of their parents' visa applications.

Natives of El Salvador, Rosalina Cuellar de Osorio and her family waited seven years for immigrant visas that would allow them to rejoin Rosalina's U.S. citizen mother in the United States.[324] The government notified the family that they were next in line for visas, but they were also informed that the applicant's son, who had turned twenty-one while the visa application was pending and was thus no longer a "child" for purposes of the immigration laws, was not eligible for a visa.[325] He therefore could not lawfully immigrate to the United States with his mother.

In an action challenging the interpretation of the statute by the BIA that resulted in the denial of a visa to Cuellar de Osorio's son, the district court granted summary judgment for the U.S. government.[326] An en banc panel of the U.S. Court of Appeals of the Ninth Circuit reversed, concluding that the statute unambiguously grants relief to aged-out derivative beneficiaries; the court consequently found that, because the BIA's interpretation conflicts with the plain language of the statute, it was not entitled to deference.[327] The dissent disagreed and found that the statute "is ambiguous about whether aged-out . . . derivative beneficiaries are within its ambit," and, because the BIA's conclusion is reasonable, is entitled to deference.[328]

Under the U.S. government's interpretation of the immigration statute, a noncitizen family member who "ages out" due to years of waiting for a visa faces a situation in which the longer the child waits in line, the more likely she will be removed from the line. Aged out adult children basically must apply for a visa anew and move to the back of the immigration line. The

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sufficient numbers of visas to eliminate the backlog of applications. *See* Julia Preston, *Goal Set for Reducing Backlog on Citizenship Applications*, N.Y. TIMES, Mar. 15, 2008, at A13.

323. Pub. L. No 107-208, 116 Stat. 927 (2002).

324. Cuellar de Osorio v. Mayorkas, 695 F.3d 1003 (9th Cir. 2012) (en banc), *rev'd and remanded by* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014). The visa sought is known as a "F3" visa. *See* 8 U.S.C. § 1153(a)(3) (2006).

325. *Cuellar de Osorio*, 695 F.3d at 1010.

326. Zhang v. Napolitano, 663 F. Supp. 2d 913, 922 (C.D. Cal. 2009).

327. *Cuellar de Osorio*, 695 F.3d at 1013-14.

328. *Id.* at 1021 (Smith, J., dissenting).

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U.S. government's position denied families with aged out children the ability to lawfully immigrate together, an outcome that runs counter to a fundamental purpose of the U.S. immigration laws—to promote family reunification.[329]

The Supreme Court decided to resolve a circuit split on the question.[330] A bipartisan group of members of Congress, including two prominent Republicans, Senators Orrin Hatch and John McCain, who voted for the 2002 Child Status Protection Act, submitted an amici curiae brief in support of the Ninth Circuit's interpretation of the statute.[331]

The specific question presented by *Scialabba v. Cuellar de Osorio* was whether all noncitizens who qualify as a "child" at the time a visa petition is filed but "age out" by the time the visa becomes available should receive a visa at the same time as the visa applicant.[332] As amended by the Child Status Protection Act, Immigration and Nationality Act section 203(h) provides that

> [i]f the age of an alien is determined . . . to be 21 years of age or older . . . , the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.[333]

The BIA had interpreted that language to preclude the issuance of the visa to "aged out" children.[334]

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329. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 7, at 262; Donald Kerwin, *How Our Immigration Laws Divide, Impoverish, and Undermine American Families,* 76 INTERPRETER RELEASES 1213, 1214 (1999); *see also* Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643 (2014) (analyzing the intersection of immigration law and family law in the termination of parental rights of immigrant parents).

330. *See* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2202, 2227 n.9 (2014) (citing cases). *Compare* Li v. Renaud, 654 F.3d 376 (2d Cir. 2011) (disagreeing with the Ninth Circuit), *with* Khalid v. Holder, 655 F.3d 363 (5th Cir. 2011) (agreeing with the Ninth Circuit), *abrogated by Cuellar de Osorio*, 134 S. Ct. 2191.

331. *See* Brief of Current and Former Members of Congress as Amici Curiae Supporting Respondents, Mayorkas v. Cuellar de Osorio, 134 S. Ct. 2191 (2014) (No. 12-930), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/12-930-bsac-Current-and-Former-Members-of-Congress.pdf.

332. *See Cuellar de Osorio*, 134 S. Ct. at 2196-97.

333. 8 U.S.C. § 1153(h)(3) (2006).

334. *See In re* Xiuyi Wang, 25 I. & N. Dec. 28, 32 (BIA 2009). For analysis of the issues in the case, see Dianne Milner, Note, *No Child Left Unprotected: Adopting the Ninth Circuit's Interpretation of the Child Status Protection Act in* De Osorio v. Mayorkas, 46 CORNELL INT'L L.J. 683 (2013).

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Announcing the judgment of the Court, Justice Kagan wrote for the plurality, in an opinion joined by Justices Kennedy and Ginsburg.[335] She began the analysis in telling fashion:

> Principles of *Chevron* deference apply when the BIA interprets the immigration laws. Indeed, "judicial deference to the Executive Branch is especially appropriate in the immigration context," where decisions about a complex statutory scheme often implicate foreign relations.[336]

After analyzing the statutory text—replete with jocular references to its complexities,[337] Justice Kagan concluded that it was ambiguous and subject to "internal tension mak[ing] possible alternative reasonable constructions . . . ."[338] She ultimately concluded that "[t]his is the kind of case *Chevron* was built for. . . . Were we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency's role. We decline that path, and defer to the Board."[339]

Chief Justice Roberts, joined by Justice Scalia, unlike the plurality, found no conflict or internal tension in the statutory provision.[340] In the Chief's estimation, the BIA's interpretation was consistent with the plain meaning of the statute.[341]

Finding the BIA's interpretation contrary to the statutory text and thus not entitled to deference, Justice Alito dissented.[342]

Justice Sotomayor, joined by Justices Breyer and Thomas (except as to one footnote), also dissented "[b]ecause the Court and the BIA ignore obvious ways in which [the statutory provision] can operate as a coherent whole and instead choose to construe the statute as a self-contradiction that was broken from the moment Congress wrote it."[343]

The decision in *Scialabba v. Cuellar de Osorio* is the most recent example of the Court's unexceptional approach to immigration law. The Court once again reviewed in conventional fashion a case squarely raising

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335. *See Cuellar de Osorio*, 134 S. Ct. at 2195.

336. *Id.* at 2203 (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)). This last sentence sounds of the plenary power doctrine. *See supra* text accompanying notes 1-11.

337. *See, e.g.*, *Cuellar de Osorio*, 134 S. Ct. at 2203 ("Those hardy readers who have made it this far will surely agree with the 'complexity' [of the statutory scheme] point.").

338. *Id.*

339. *Id.* at 2213.

340. *Id.* at 2214 (Roberts, C.J., concurring).

341. *See id.* at 2215.

342. *Id.* at 2216 (Alito, J., dissenting).

343. *Id.* at 2217 (Sotomayor, J., dissenting).

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the question of the appropriate deference to the BIA's interpretation of the immigration statute.[344] The Court's decision highlights the bread-and-butter immigration cases that the federal courts are reviewing today, with the primary issue being whether to accept the BIA's interpretation of the statute. Although reasonable minds may differ about the propriety of the outcomes of the cases, the Roberts Court is consistently applying generally applicable legal doctrines to immigration law.

B. Certiorari Denials in Federal Preemption Cases

In the 2013 Term, the Supreme Court denied certiorari in four cases in which the court of appeals addressed the question whether federal immigration law preempted state and local immigration enforcement laws. In so doing, the Court more or less followed its standard practice of declining to review cases that raised legal issues similar to those that it had recently decided. In three of the four cases, the lower courts had invalidated the core of the non-federal immigration enforcement laws.

1. City of Hazleton v. Lozano

In 2011, the Court granted certiorari, vacated, and remanded a Third Circuit decision invalidating an aggressive Hazleton, Pennsylvania immigration enforcement ordinance in light of its federal preemption decision in *Chamber of Commerce v. Whiting*.[345] On remand, the court of appeals again concluded that federal immigration law preempted the Hazleton ordinance that, among other things, prohibited the rental of housing to, and barred the employment of, undocumented immigrants.[346] Denying certiorari, the Supreme Court declined to return to the thicket of nonfederal efforts to enforce the U.S. immigration laws.[347]

2. Villas at Parkside Partners v. City of Farmers Branch

Over a number of years, Farmers Branch, Texas, a suburb of Dallas, had enacted several iterations of an immigration enforcement ordinance that had generated considerable controversy.[348] A sharply divided en banc court of

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344. *See supra* Part III.E (analyzing *Holder v. Gutierrez*).

345. *See supra* Part II.C.1.

346. *See* Lozano v. City of Hazleton, 724 F.3d 297, 300 (3d Cir. 2013).

347. City of Hazleton v. Lozano, 134 S. Ct. 1491 (2014).

348. *See* Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 504 (2010) (noting that the Farmers Branch city council had amended its ordinance on three occasions); Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 41-42 (2013) (mentioning that the Farmers Branch ordinance prohibited housing rentals to undocumented immigrants); Daniel

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appeals invalidated the ordinance.[349] Noted conservative jurist Judge Edith Jones dissented; she would have found the ordinance a valid exercise of the "police power" and, thus, not preempted by federal immigration law.[350] The Supreme Court denied certiorari in the case, thereby declining to review the Fifth Circuit decision invalidating much of the Farmers Branch ordinance.[351]

3. Arizona v. Valle del Sol, Inc.

In a piece of litigation involving provisions of Arizona's SB 1070 law not at issue in the Supreme Court's 2012 decision,[352] the Ninth Circuit in *Valle del Sol, Inc. v. Whiting* held that federal immigration law preempted SB 1070's effort to criminalize the harboring and transporting of undocumented immigrants.[353] The Supreme Court declined to review the case.[354]

4. Keller v. City of Fremont

In *Keller v. City of Fremont,* the Eighth Circuit rejected a federal preemption challenge to much of a Fremont, Nebraska immigration enforcement ordinance similar to the Hazelton, Pennsylvania law.[355] Passed in 2010, the ordinance, among other things provides that landlords are prohibited from renting housing to undocumented immigrants.[356] Even though the court of appeals reached a different federal preemption conclusion than the other three courts did in cases in which the Court denied certiorari in the 2013 Term, the Court declined to review the case.[357]

Eduardo Guzman, Note, *"There Be No Shelter Here": Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399, 409-12 (2010) (same); *see also* Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (analyzing potential violations of federal law due to discriminatory aspects of local immigration ordinances restricting the rental of housing to undocumented immigrants).

349. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (en banc).

350. *See id.* at 561-62 (Jones, J., dissenting).

351. City of Farmers v. Villas at Parkside Partners, 134 S. Ct. 1491 (2014).

352. *See supra* Part III.A (analyzing the Supreme Court's decision in *Arizona v. United States* involving challenges to other sections of SB 1070).

353. 732 F.3d 1006 (9th Cir. 2013).

354. Valle del Sol, Inc. v. Whiting, 134 S. Ct. 1876 (2014).

355. 719 F.3d 931, 951 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014).

356. *See id.* at 938-39.

357. *See supra* Parts V.B.

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Since the Supreme Court in 2012 struck down much of Arizona's SB 1070 in *Arizona v. United States*,[358] it has refused to review a series of cases raising the issue of federal preemption of state and local immigration enforcement laws. For the time being, the Court appears to have said its piece on the subject.

VI. The Roberts Court and the Erosion of Immigration Exceptionalism

A review of the Supreme Court decisions from the 2009 to the 2013 Terms reveals that the Roberts Court has consistently applied conventional methods of statutory interpretation and doctrines of administrative deference in its immigration decisions. Its 2014 immigration decision in *Scialabba v. Cuellar de Osorio*[359] is a clear example, with the Justices interpreting the immigration statute differently and reaching contrasting conclusions about the propriety of deference to the agency interpretation of the statutory provision in question.[360]

The Supreme Court's decision in *Arizona v. United States* also exemplifies immigration unexceptionalism.[361] In an opinion generally lacking ideological flair, the Court invalidated in large part a controversial state immigration enforcement law that had grabbed national attention and provoked considerable debate.[362] Indeed, in somewhat surprisingly striking down the core of SB 1070, the Court applied standard federal preemption principles in generally unremarkable fashion.

Immigration law thus appears to be moving away from anything akin to the immigration exceptionalism for which it is well known[363] and is becoming more consistent with other bodies of American jurisprudence. Although exceptions may arise in the future in the extraordinary case, immigration law in important respects has become what might be characterized as "mainstreamed" in American jurisprudence.

A. The Mainstreaming of Immigration Law

In its recent immigration jurisprudence, the Roberts Court consistently has applied generally applicable principles of statutory interpretation, rules of deference to administrative agencies, and other legal doctrines, such as

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358. *See supra* Part III.A.
359. *See supra* Part V.A.
360. *See id.*
361. *See supra* Part III.A.
362. *See id.*
363. *See supra* text accompanying notes 1-11.

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those involving retroactive application of changes in the law and federal preemption. By so doing, the Court has tended toward doctrinal consistency across substantive areas of the law.

The U.S. government continues to make aggressive arguments for the affirmance of BIA removal orders, only to have the Court frequently reject them.[364] The Court, for example, found unpersuasive the U.S. government's attempts to subject long-term lawful permanent residents to mandatory deportation for what can be reasonably characterized as minor criminal offenses.[365] Similarly, the Court refused to accept arbitrary and capricious limits imposed by the Board on relief from removal for long-term lawful permanent residents.[366] Put simply, the executive branch has invoked zealous litigation positions to defend its aggressive removal efforts, only to have a conservative Supreme Court, which one might assume to be sympathetic, reject those arguments.

Once in the five Terms, a deadlocked Court could not reach a decision in a case involving a challenge to gender distinctions in the nationality laws that squarely implicated the continuing vitality of the plenary power doctrine.[367] The four-four split of the Justices suggests a divide over the constitutionality of the gender distinctions in the immigration laws. That division, in turn, suggests that the Court might in the future revisit the continuing vitality of the plenary power doctrine.[368]

In keeping with its generally unexceptional approach to immigration, the Roberts Court also has adhered to its standard guidelines for selecting

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364. *See, e.g.*, *infra* note 365 (citing authorities).

365. *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013); Vartelas v. Holder, 132 S. Ct. 1479, 1483 (2012); Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580-81 (2010); *see also supra* Parts I.B, III.D, and IV.A (analyzing these decisions). Similarly, in the 2015 Term, the Court rejected a removal order based on a drug paraphernalia conviction for possession of a sock used to conceal four tablets of a prescription drug. *See* Mellouli v. Lynch, 135 S. Ct. 1980 (2015).

366. *See, e.g.*, Part III.B (analyzing *Judulang v. Holder* and the Court's rejection of a BIA ruling that it found to be arbitrary and capricious).

367. *See supra* Part II.B (discussing *Flores-Villar v. United States*).

368. Similiarly, a splintered Court in 2015 did not invoke the doctrine of consular nonreviewablity, a close cousin of the plenary power doctrine, in reviewing the denial of a visa application by a noncitizen spouse of a U.S. citizen. *See* Kerry v. Din, 135 S. Ct. 2128 (2015). The Court previously rejected claims pressed by the U.S. government that judicial review of the legal challenges of detainees in the "war on terror" were not subject to judicial review. *See* Boumediene v. Bush, 553 U.S. 723, 796-98 (2008) (holding that detainees at Guantánamo Bay had the constitutional right to habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 633-35 (2006) (finding that military tribunals for Guantánamo detainees violated the Geneva Convention).

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which immigration decisions to accept for review. The Court has not stretched the rules to grant certiorari in controversial immigration cases, such as the California Supreme Court decision allowing undocumented immigrants to pay in-state fees at public universities or any of the numerous court of appeals decisions involving the constitutionality of state and local immigration enforcement laws.[369] This caution reflects the work of a Court carefully adhering to its ordinary rules in selecting the immigration cases to review.

All told, the Supreme Court has applied generally applicable legal principles to the immigration cases that it decides to accept for review. It is noteworthy that the Court rejected the U.S. government's arguments in a number of immigration cases.[370] It is difficult to discern significantly different treatment of immigration matters by the Court and any deviation from conventional legal doctrines.

For its part, although taking aggressive positions in the high Court, the executive branch under President Obama does not zealously invoke the plenary power doctrine in an attempt to justify its policies in the way that the Bush administration did with respect to the adoption of the extraordinary "special registration" program directed at Arab and Muslim noncitizens.[371] In fact, the Obama administration took the rare step in *Kucana v. Holder* of refusing to defend a court of appeals ruling *in its favor* that the courts lacked jurisdiction to review the denial of a motion to reopen removal proceedings.[372] Consistent with past precedent, the Court ultimately held that motions to reopen were subject to judicial review (although that review continues to be quite deferential).[373]

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369. *See supra* Parts II.C, IV.C, V.B.

370. *See, e.g.*, *supra* Part III.B (analyzing *Judulang v. Holder*); Part IV.A (analyzing *Moncrieffe v. Holder*).

371. *See supra* text accompanying notes 10-11. One exception to this rule was in the 2014 Term in *Kerry v. Din*, 135 S. Ct. 2128 (2015) in which the U.S. government vigorously defended without reservation the doctrine of consular nonreviewablity, an outgrowth of the plenary power doctrine. *See* Kevin R. Johnson, *Argument Preview: The Doctrine of Consular Non-Reviewability–Historical Relic or Good Law?*, SCOTUSBLOG (Feb. 18, 2015, 9:55 AM), http://www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historical-relic-or-good-law/.

372. *See supra* Part I.C (analyzing *Kucana v. Holder*). The Solicitor General later made a similar decision not to defend another court of appeal's ruling restricting jucidial review in a motion to reopen case. *See* Mata v. Lynch 135 S. Ct. 2154 (2015).

373. *See* Kucana v. Holder, 558 U.S. 233 (2010) (citing, *inter alia*, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995)).

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Students of immigration law who have been well-schooled in the plenary power doctrine may find the unexceptional nature of the Supreme Court's contemporary immigration decisions to be surprising.[374] The truth of the matter is that the impact of that exceptional doctrine on the Roberts Court's immigration jurisprudence appears to be, at most, negligible.

It indeed is most surprising that neither the Court under Chief Justice Roberts nor the U.S. government under the leadership of President Obama, have paid much attention to the plenary power doctrine. Instead of deviating from ordinary judicial review principles, the Court has consistently reviewed the immigration decisions of the executive branch in a manner strikingly similar to its scrutiny of the decisions of other administrative agencies. This pattern suggests that the doctrine fits uncomfortably in modern American jurisprudence.

Observers can draw several basic practical lessons of advocacy from the Roberts Court's immigration decisions. One is that the Court in the ordinary immigration case in fact independently reviews the specific rulings of the BIA. At times, the Court has flatly rejected the BIA's positions.[375] Under traditional notions of agency deference, the Roberts Court has not hesitated to reverse removal decisions that it concludes are based on erroneous readings of the immigration statute.[376]

At the same time, the Court is ready and willing, when the immigration provision in question is ambiguous, to apply ordinary administrative law doctrines and defer to what it determines to be reasonable interpretations of statutory ambiguity by the BIA.[377] It, however, has not applied any form of deference to agency immigration decisions even vaguely resembling the blanket deference called for by an unvarnished version of the plenary power doctrine.

Over at least the last decade, the Court has followed a consistent pattern with respect to deference to the BIA, with a rather unextraordinary body of immigration jurisprudence emerging as a result. That is not to suggest that the Court's decisions have gone uncriticized, which is not the case. Commentators regularly question the Court's interpretation of the laws,

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374. *See supra* text accompanying notes 1-11.

375. *See, e.g.*, *supra* Part III.B (analyzing the Court's decision in *Judulang v. Holder*, which found the BIA's ruling to be unreasonable, arbitrary and capricious, and therefore unworthy of deference); *supra* Part IV.A (analyzing Court's decision in *Moncrieffe v. Holder*).

376. *See, e.g.*, *id.*

377. *See supra* Part III.E (discussing the Court's decision in *Holder v. Gutierrez*); *supra* Part V.A (analyzing *Scialabba v. Cuellar de Osorio*).

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deference to the agency, and application of generally applicable legal doctrines.[378] Still, the Court's immigration jurisprudence sits firmly in the jurisprudential mainstream, generally consistent with other bodies of substantive law.

As is common in its approach to other bodies of law, the Roberts Court ordinarily begins by engaging in rigorous analysis of the text of the immigration statute.[379] Immigration attorneys should take note of the Court's careful attention to statutory construction, which is important given the well-known complexities of the Immigration and Nationality Act.[380]

Ultimately, immigration attorneys should expect ordinary—but not in any way extreme—deference by the Supreme Court to BIA interpretations of the immigration laws. As mentioned previously, the classic plenary power doctrine does not appear to meaningfully influence the Court's review of ordinary BIA decisions. Calls for extraordinary deference rarely come up in the run-of-the-mill removal case, in which the Court focuses on parsing the language of the immigration laws and deciding on the appropriate deference to the agency.

The Supreme Court has also embraced a mainstream approach in its decisions involving federal preemption of state and local immigration enforcement laws, which state and local governments have enacted with regularity in recent years.[381] The Court has done so despite the volatile political tensions over immigration enforcement and the heated controversy surrounding state and local immigration enforcement laws. The two merits decisions in the 2009-13 Terms deciding federal preemption of these kinds of laws reach contrary conclusions based on a straightforward interpretation of the statutory text of the immigration laws.[382] Those decisions clarified the appropriate approach to federal preemption of state immigration enforcement laws and left little doubt about, consistent with past precedent,

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378. *See, e.g.*, *supra* text accompanying notes 147-48 (citing authorities criticizing *Chamber of Commerce v. Whiting*); *supra* note 306 (citing authorities criticizing Supreme Court's decision in *Chaidez v. United States*).

379. *See, e.g.*, *supra* Part I.B (analyzing *Carachuri-Rosendo v. Holder*); *supra* Part III.C (analyzing *Kawashima v. Holder*).

380. "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" Castro-O'Ryan v. INS, 821 F.2d 1415, 1419 (9th Cir. 1987) (citation omitted); *see* Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (observing that the Immigration and Nationality Act resembles "King Mino's labyrinth in ancient Crete"); *see, e.g.*, *supra* Part V.A (analyzing *Scialabba v. Cuellar de Osorio* and the complexities of the statutory provision in question).

381. *See supra* Parts II.A, Part III.A.

382. *See supra* Parts II.A, Part III.A.

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the primacy of federal power over immigration. Following its standard review practice, the Court also declined to review lower court decisions invalidating the core of the Alabama, Hazleton, Pennsylvania, and Farmers Branch, Texas (and upholding much of the Fremont, Nebraska) immigration enforcement laws.[383]

Beyond the fact that the decisions fit comfortably into the mainstream, the Supreme Court's body of immigration decisions is difficult to categorize. The Court generally approaches each case on a factually and legally specific basis and applies conventional legal norms of statutory construction, agency deference, retroactivity analysis, and federal preemption doctrine. The Court's approach generally lacks ideological heavy-handedness, with a few isolated exceptions in opinions by individual Justices. Justice Scalia's high-pitched dissent in *Arizona v. United States* arguably represents the exception that proves the general rule.[384]

Immigrants generally have won more than they have lost in the Supreme Court in the 2009-13 Terms. Such an outcome is not what one might predict from a Court led by a conservative Chief Justice, laws that have grown increasingly tough on immigrants[385] and the considerable deference generally accorded to administrative agencies.[386] That immigrants prevailed so frequently might be the most surprising—and telling—characteristic of the Roberts Court's immigration decisions.

B. Rejection of a More Protective Immigration Jurisprudence

More than twenty years ago,[387] I criticized a series of Supreme Court decisions that employed generally applicable principles of statutory construction and administrative law in the review of agency immigration decisions and found against the noncitizens.[388] The thrust of the argument was that, given the weighty life and liberty issues at stake in immigration cases, including possible removal from the United States, the lack of direct political accountability of administrative agencies to noncitizens who

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383. *See supra* Parts II.C, IV.C, V.B.

384. *See supra* text accompanying notes 188-92.

385. *See, e.g.*, *supra* text accompanying notes 67-77 (discussing the focus of contemporary removal efforts on immigrants convicted of crimes).

386. *See, e.g.*, *supra* text accompanying notes 336-40 (discussing the plurality's reliance on *Chevron* deference in *Scialabba v. Cuellar de Osorio*).

387. *See* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993).

388. The four decisions were INS v. Elias-Zacarias, 502 U.S. 478 (1992); INS v. Doherty, 502 U.S. 314 (1992); INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183 (1991); Ardestani v. INS, 502 U.S. 129 (1991).

cannot vote, and evidence of a consistently high incidence of error and possible bias in the immigration bureaucracy,[389] courts should engage in more exacting judicial review of agency immigration decisions to ensure compliance with the law, fundamental fairness, and due consideration of the life and liberty interests at stake.

The Supreme Court, generally speaking, has not embraced anything resembling "hard look" review of the immigration decisions of the executive branch.[390] Rather, it instead has consistently opted for standard judicial review of immigration decisions similar to that generally accorded administrative agencies. Even if disappointed by the Court's rejection of more exacting judicial review, scholars should view positively the consistent individualized review of agency immigration decisions and the application of ordinary, not exceptional, deference principles to the rulings of the BIA.

Conclusion

A review of the Supreme Court's immigration decisions in the 2009-13 Terms reveals that, as a practical matter, the Roberts Court's conservative judicial philosophy has meant review of immigration cases through application of mainstream transsubstantive legal principles. That form of review contrasts sharply with the judicial hands-off approach popular on the Supreme Court in the heyday of the plenary power doctrine.[391]

Nor is there reason to believe that, absent unforeseeable developments, the Court's approach to immigration cases will change much in the near future. The Justices seem firmly wedded to a mainstream interpretation and application of the U.S. immigration laws.

Indeed, there is every reason to believe that the Supreme Court will continue to review immigration cases in a similar fashion. This is true even if the Court's ideological composition changes. More liberal appointments might be predicted to lead to somewhat less deference to the BIA and a further move away from immigration exceptionalism. However, increased deference, or a revival of the plenary power doctrine, would appear much less likely with a more liberal Court and its likely predisposition to

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389. *See* Johnson, *supra* note 387, at 442-54; *see also* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279 (arguing for "hard look" judicial review of asylum decisions because of the life and death issues at stake).

390. One might argue that the Court's decision in *Judulang v. Holder*, *see supra* Part III.B, represents more scrutinizing, or "hard look," review of the BIA ruling than ordinarily given Board decisions.

391. *See supra* text accompanying notes 1-11.

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meaningful constitutional review of the immigration laws to ensure that agency decisions are consistent with the immigration statute.

Conversely, it seems unlikely that the addition of more conservative Justices to the Court would result in a return to a full-fledged plenary power regime, or anything resembling immigration exceptionalism. Additional conservative Justices would likely result in reinforcing the current trend of the Court's unexceptional and unremarkable immigration jurisprudence. However, greater deference to the immigration bureaucracy under generally applicable administrative law doctrines might be expected.

In sum, the current trajectory of this Court's immigration cases suggests that, absent unexpected developments, the trend toward a normalized and unexceptional immigration jurisprudence is likely to continue. Immigration exceptionalism—and, with it, the *Chinese Exclusion Case*—after 125 years appears to slowly but surely be on its way out.

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