

# ESSAY

## Ten More Years of Plenary Power: Immigration, Congress, and the Courts

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For more than a hundred years,<sup>1</sup> the Supreme Court of the United States has been telling us that immigration law<sup>2</sup> is just plain different. In constitutional matters, the Court has translated those

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1. The case usually cited as the first in which the Court treated immigration as a special subspecies is *Chae Chan Ping v. United States* [the Chinese Exclusion Case], 130 U.S. 581 (1889).

2. For present purposes, I am using the term "immigration law" to describe only that body of law that governs the admission and expulsion of aliens. The more general law of aliens' rights and obligations lends itself to fewer generalizations; even there, however, the Supreme Court has invoked theories of special judicial deference when aliens have challenged the constitutionality of federal action. *See, e.g., Mathews v. Diaz*, 426 U.S. 67 (1976); *Flemming v. Nestor*, 363 U.S. 603 (1960); Stephen H. Legomsky, *Suspending the Social Security Benefits of Deported Aliens: The Insult and the Injury*, 13 SUFFOLK U. L. REV. 1235 (1979). For a good discussion of the pertinent distinctions, *see* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995) [in this symposium]. *See also infra* note 43.

differences into an official doctrine of special judicial deference to Congress.

The precise degree of that special deference has varied with both the context and the era. The Court has described the congressional power to regulate immigration as “plenary.”<sup>3</sup> It has said, “Over no conceivable subject is the legislative power of Congress more complete.”<sup>4</sup> In the early years, this principle of plenary congressional authority over immigration was often expressed in absolute terms; the suggestion was that courts had literally *no* power to review the constitutionality of Congress’s actions.<sup>5</sup> In later years the Court began to hedge, leaving open the possibility of *some* judicial role in assessing the constitutionality of federal immigration statutes.<sup>6</sup> In addition, by way of exception, the Court has generally guaranteed one particular constitutional right—procedural due process—in deportation cases.<sup>7</sup>

In the mid-1980’s, I wrote two companion pieces—an article and a book chapter—on this plenary congressional power to regulate immigration.<sup>8</sup> The collective object of the two pieces was to study

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3. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 766, 768, 769 (1972); *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

4. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), *quoted in Fiallo v. Bell*, 430 U.S. 787, 792 (1977), *and in Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

5. See, e.g., *Lees v. United States*, 150 U.S. 476, 480 (1893) (power to exclude aliens is “absolute” and is “not open to challenge in the courts”); *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893) (Congress’s decision is “conclusive upon the Judiciary”); *Chae Chan Ping v. United States [Chinese Exclusion Case]*, 130 U.S. 581, 606 (1889) (same).

6. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (congressional power is “largely immune” from judicial review) (emphasis added), 793 n.5 (positing a judicial power, admittedly “limited”, to review even congressional decisions excluding aliens) (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (immigration legislation “largely immune from judicial interference”).

7. The leading case is *Yamataya v. Fisher [the Japanese Immigrant Case]*, 189 U.S. 86, 100 (1903). *Accord*, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). I use the term “generally” because the leading early case had seemed to hold due process inapplicable even in deportation proceedings. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

More recently, the Court has extended this exception to those exclusion proceedings in which the aliens are lawful permanent residents seeking to return from brief visits abroad. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32-37 (1982). Under those limited circumstances, the individual interests at stake make exclusion the functional equivalent of deportation.

8. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 [hereinafter cited as Legomsky I]; STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY — LAW AND POLITICS IN BRITAIN AND AMERICA*, ch. 3 (entitled *Immigration and the US Constitution*) (1987) [hereinafter cited as Legomsky II].

comprehensively the history, theory, soundness, politics, and likely future course of the plenary power doctrine. Since their publication, roughly ten years have passed and many crucial judicial decisions have been rendered. The present article examines those events, assessing which predictions have come true and which have not. In the process, I offer a set of new, improved predictions that will probably require similar humility and revision ten years hence.

Section I will summarize briefly the conclusions reached in the two prior publications. Section II will synthesize the subsequent judicial trends and reformulate the predictions in the light of those patterns.

### I. The Mid-1980's Analysis<sup>9</sup>

In *Immigration Law and the Principle of Plenary Congressional Power*, my goal was to be comprehensive. I attempted to identify and to evaluate every legal theory that might be gleaned from a century's worth of Supreme Court jurisprudence in support of special judicial restraint in immigration cases.

Several such theories, some interrelated, have emerged over the years. The Court has suggested that the constitutionality of immigration legislation is inherently a political question<sup>10</sup> because immigration is inseparable from foreign affairs;<sup>11</sup> that an alien is merely a "guest" asserting a "privilege" rather than a "member" asserting a "right";<sup>12</sup> that allowing aliens to assert constitutional rights in addition to any remedies they enjoy under international law would give them an un-

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9. In writing the two pieces discussed in this section, I drew liberally from several thoughtful articles that had already examined certain specific aspects of the plenary power doctrine. See, e.g., Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-96 (1953); Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959); Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14-30 (1984).

10. In the immigration context the Court has typically used language functionally equivalent to "political question." For examples, see Legomsky I, *supra* note 8, at 261 n.30; see also *Reno v. Flores*, 113 S. Ct. 1439, 1449 (1993) (describing alien regulation as "committed to the political branches of the Federal Government") (emphasis added). The semantics generate some difficult substantive questions that are thoughtfully examined in Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

11. Legomsky I, *supra* note 8, at 261-69.

12. *Id.* at 269-70.

fair advantage over United States citizens;<sup>13</sup> that aliens' lack of allegiance to the United States should correlate to lessened constitutional protection;<sup>14</sup> that the congressional power to regulate immigration is inherent in national sovereignty and therefore insulated from the usual constitutional constraints;<sup>15</sup> and that the Constitution<sup>16</sup> is inapplicable in exclusion proceedings because in the eyes of the law an excluded alien is outside the United States.<sup>17</sup>

In addition to those substantive rationales, the unrelenting stream of plenary power decisions lent overpowering force to *stare decisis*. In 1954, the Court lamented that "the slate is not clean" and that the principle of plenary congressional power over immigration had become too deeply ingrained to be overruled.<sup>18</sup> I argued that all of those theories—both substantive and procedural—were unconvincing reasons to preserve the plenary power doctrine. My stated aim, presumptuous I admit, was to "clean the slate."<sup>19</sup>

The same article explored some of the external influences on the plenary power decisions. It concluded that the social backgrounds and political attitudes of the Supreme Court Justices did not adequately explain the development of the plenary power doctrine. At the same time, the article suggested that the Justices' general conceptions of their appropriate roles, together with a combination of contemporary social and political forces, account in part for the evolution of plenary congressional power over immigration.<sup>20</sup>

The article then demonstrated that the lower courts, increasingly uneasy about sanctioning a virtually unreviewable congressional power, had begun to forge creative detours around the plenary power doctrine. Three such techniques were identified. One device was to draw esoteric distinctions, including distinctions between distinctions. A second was to carve out an exception for procedural due process in

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13. *Id.* at 270-72.

14. *Id.* at 272-73.

15. *Id.* at 273-75.

16. In *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993), the Court similarly limited the reach of a treaty provision and a corresponding statutory provision that prohibited the forcible return of refugees to countries of persecution.

17. *Legomsky I*, *supra* note 8, at 275-77. A seventh theory, which I entitled the "poetic justice" theory, is more context-specific. It applies only to those aliens who are excluded or deported on the basis of their affiliation with the Communist Party. *Id.* at 277-78.

18. *Galvan v. Press*, 347 U.S. 522, 530-31 (1954), followed in *Fiallo v. Bell*, 430 U.S. 787, 792 n.4 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972).

19. *Legomsky I*, *supra* note 8, at 306.

20. *Id.* § II.

deportation cases.<sup>21</sup> A third was to acknowledge the plenary power doctrine but to read it as if the word "plenary" were meaningless. I argued that all of these techniques, while well intentioned, were at least unsatisfying and in most cases logically indefensible.<sup>22</sup>

Finally, the article attempted to forecast the future of the plenary power doctrine. Analogizing to familiar legal traditions, the article predicted, first, that the various devices by which the lower courts have partially circumvented the doctrine would keep expanding. Second, the article said, once the exceptions are on the verge of swallowing the rule, the Supreme Court would candidly clean the slate. I thought the Court would

describe the historical evolution of the rule, identify the exceptions, expose the analytical inadequacies of the exceptions, observe the inevitable direction of the tide, and conclude that the time has come to lay the general principle to rest.<sup>23</sup>

The second piece, written at the same time but published three years later as a book chapter, detailed the historical development of the plenary power doctrine.<sup>24</sup> It focused solely on the Supreme Court's use of precedent in creating, developing, and solidifying, but ultimately qualifying, this selective form of judicial restraint. My general thesis in that chapter was that the doctrine had unfolded inadvertently, through misplaced reliance on holdings far more modest than the existence of unreviewable congressional power. More specifically, I argued that the Court had unwittingly relied on federalism cases to reach conclusions about individual constitutional rights.<sup>25</sup>

In the past ten years, an army of commentators has sustained the shelling. Several have elaborated thoughtfully on specific aspects of the plenary power doctrine. Some have argued for First Amendment exceptions or qualifications.<sup>26</sup> Some have emphasized the international law constraints.<sup>27</sup> One writer has examined in detail the extent

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21. A fine article by Professor Motomura later elaborated on the procedural due process exception. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

22. Legomsky I, *supra* note 8, § III.

23. *Id.* at 305.

24. Legomsky II, *supra* note 8.

25. *Id.* In the present article I spare the reader the tedious case-by-case details of that argument. For anyone who would like to experience that sort of tedium and monotony, however, I highly recommend the original source.

26. See, e.g., John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989).

27. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 863-85 (1987); Michael A. Scaper-

to which the United States Constitution applies outside United States territory.<sup>28</sup> Another has offered a well constructed elaboration of the "alien as guest, citizen as member" theory.<sup>29</sup> Another suggestion has been that the Court has used the plenary power doctrine to deter, and to dispose of, judicial challenges.<sup>30</sup> Finally, it has been argued that the existence of the plenary power doctrine makes it difficult to defend certain statutory interpretations ostensibly predicated on a desire to avoid constitutional barriers.<sup>31</sup>

## II. Old Predictions and New Reality Checks

### A. The Lower Courts

At the lower court level, the life of the plenary power doctrine has been one of fits and starts. On the one hand, many lower courts continue to apply the doctrine in its more rigid form, typically in the context of exclusion proceedings. Emphasizing the extraterritorial positions of excluded aliens, these courts have followed the script of *United States ex rel. Knauff v. Shaughnessy*:<sup>32</sup> "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>33</sup> On that theory, these courts have held that excluded aliens detained on Guantanamo or elsewhere have *no* due process or equal protection rights to challenge either their exclusion or their prolonged detention.<sup>34</sup>

On the other hand, as predicted, many other lower courts have reinforced and expanded the devices for circumventing at least the traditional version of the plenary power doctrine. Several judges have become overtly inventive. The discussion that follows will identify some of these trends.

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landa, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (emergence of modern human rights law, which explicitly recognizes individual rights rooted in international law, renders classical international law's emphasis on sovereignty obsolete).

28. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

29. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (special deference in immigration stems from belief that aliens are not full members of society; at least lawful permanent resident aliens *should* be treated as full members for purposes of constitutional review).

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

31. Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

32. 338 U.S. 537 (1950).

33. *Id.* at 544.

34. See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995); *Cuban American Bar Association v. Christopher*, 43 F.3d 1412 (11th Cir. 1995); *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985).

### 1. *Liberalizing the Rhetoric*

Even by the mid-1980's, when aliens invoked either equal protection or substantive due process, courts in deportation cases would occasionally soften the plenary power doctrine by interpreting it as a mild rational basis test.<sup>35</sup> In the past ten years, that occasional liberalization has grown into a virtually settled practice. It is now routine for lower courts to state the test in rational basis terms, with varying degrees of actual bite.<sup>36</sup> The Supreme Court in *Reno v. Flores* recently followed suit.<sup>37</sup> Some courts have even extended the rational basis test to exclusion proceedings.<sup>38</sup>

### 2. *Expanding the Procedural Due Process Exception*

One clear exception to the principle of plenary congressional power had emerged early on: the applicability of procedural due process in deportation cases.<sup>39</sup> Noticeable in the past ten years, however, are at least two devices by which lower courts have expanded that exception.

One such device has enabled the courts to extend the exception to certain categories of exclusion cases. The Supreme Court has held that excluded aliens may not challenge the constitutionality of Congress's decision to exclude or even to detain.<sup>40</sup> But lower courts have recently relaxed that constraint by allowing excluded aliens to challenge the *conditions* of their confinement on due process grounds. The Fifth Circuit has held that even excluded aliens have due process rights to be free of "gross physical abuse" by state and federal officials

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35. For a list of examples, see Legomsky I, *supra* note 8, at 296 n.215.

36. See, e.g., *Raya-Ledesma v. INS*, 42 F.3d 1263, 1265 (9th Cir. 1994); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990); *Tran v. Caplinger*, 847 F. Supp. 469, 478-79 (W.D. La. 1993); *Gomez-Arauz v. McNary*, 746 F. Supp. 1071, 1075 (W.D. Ok. 1990).

37. 113 S. Ct. 1439, 1449 (1993) (holding that INS regulation must "rationally advance[] some legitimate governmental purpose" but concluding ultimately that the challenged regulation met that test). See generally Comment, *Constitutional Law — Immigration — Due Process Does Not Compel Pre-Hearing Release of Alien Juveniles to Adults Other than Parents or Legal Guardians*, *Reno v. Flores*, 113 S. Ct. 1439 (1993), 18 SUFFOLK TRANSNAT'L L.J. 359 (1995).

38. See, e.g., *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987). Cf. *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990) (translating "facially legitimate and bona fide reason" test, articulated in the exclusion context by *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), into a standard rational basis test).

39. See Legomsky I, *supra* note 8, at 298.

40. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The Court reached that result even with respect to a returning resident, but that feature of the decision might no longer be good law. See *Landon v. Plasencia*, 459 U.S. 21 (1982).

as long as the aliens are physically on United States soil.<sup>41</sup> The Ninth Circuit reached a similar result by declaring that either irrational or excessive detention can amount to punishment even without an intent to punish, and that such punishment cannot be imposed without due process.<sup>42</sup>

Welcome as such decisions are, they are hard to square with the long line of Supreme Court decisions holding due process inapplicable to excluded aliens.<sup>43</sup> The issues raised in these modern cases seem relevant only to the content of due process. Yet content becomes irrelevant if, as the Supreme Court has said, an excluded alien may not challenge the procedures authorized by Congress at all.

A second expansion of the procedural due process exception has occurred through broad characterizations of the word "procedural." In at least two lines of cases—one involving marriage fraud<sup>44</sup> and the other involving mandatory detention of certain criminal aliens<sup>45</sup>—some lower courts have managed to strike down congressional action that would probably have survived "substantive" constitutional attacks. In each of these lines of cases, courts that have characterized the constitutional challenges as procedural have done so by employing irrebuttable presumption reasoning. They have suggested, in effect, that the pertinent statutory distinctions reflected empirical assumptions that the aliens should have the opportunity to refute. Applying *Mathews v. Eldridge*,<sup>46</sup> these courts then invoked the same procedural due process standards that apply in other areas of administrative law.<sup>47</sup>

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41. See *Medina v. O'Neill*, 838 F.2d 800, 803 (5th Cir. 1988) (but finding no gross physical abuse on the facts), *rev'g* *Medina v. O'Neill*, 589 F. Supp. 1028, 1032-33 (S.D. Tex. 1984) (holding due process constraints applicable to excluded aliens and ultimately finding gross physical abuse); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (holding due process violated). For a thorough discussion of this line of cases, see Taylor, *supra* note 2, at 1143-51.

42. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991).

43. In addition to *Mezei*, see, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892). Margaret Taylor argues that the "gross physical abuse" cases are not true "immigration" cases and thus not subject to the plenary power doctrine at all. Taylor, *supra* note 2. As she acknowledges, however, *id.* at 1153-56, federal statutes that regulate aliens but not immigration have similarly received judicial deference.

44. STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 94-95, 165-68 (1992); Motomura, *supra* note 21, at 1659-65.

45. Legomsky, *supra* note 43, at 95-96; Motomura, *supra* note 21, at 1669-73.

46. 424 U.S. 319 (1976).

47. I do not mean to imply that findings of due process violations have been the norm even in these cases. As the cited pages illustrate, the decisions have gone both ways.



### 3. Carving out New Exceptions or Near-Exceptions

Just as the courts have developed a procedural due process exception to the plenary power doctrine, so too there are signs—admittedly mixed<sup>48</sup>—of an emerging First Amendment exception. In *American-Arab Anti-Discrimination Committee v. Meese (ADC)*,<sup>49</sup> a district court held that the usual First Amendment standards apply in deportation cases. The district court based its conclusion on *Harisiades v. Shaughnessy*,<sup>50</sup> where the Supreme Court had rejected the First Amendment challenges of several deported aliens. In *Harisiades* the Court had summarily cited *Dennis v. United States*,<sup>51</sup> which at the time had defined the First Amendment limitations on the government's authority to curtail political speech. Because the Court in *Harisiades* had cited *Dennis* and had not mentioned the plenary power doctrine, the district court in *ADC* read *Harisiades* as an application of traditional First Amendment standards to deportation cases.

In *Rafeedie v. INS*,<sup>52</sup> another district court went a step further, applying customary First Amendment standards to aliens challenging their *exclusion* from the United States. The court held that aliens enjoy as much First Amendment protection as citizens do, and it saw no difficulty in applying that philosophy to exclusion cases.

Elsewhere I have questioned the assumption that the Supreme Court in *Harisiades* meant to apply the usual First Amendment standards in deportation cases.<sup>53</sup> My skepticism is, of course, even stronger with respect to exclusion. The *Dennis* case that the Court in *Harisiades* suggested it was applying had held that restrictions on political speech would be valid only when there was a "clear and present danger" of a sufficiently important evil.<sup>54</sup> Yet in *Harisiades* the Court neither stated nor applied the *Dennis* test. At no point did the Court in *Harisiades* consider whether the advocacy or associations that rendered the aliens deportable posed the required clear and present danger. Under those circumstances, while again I applaud the result, the district court's assumption about *Harisiades* might well have been wishful thinking.

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48. See *Price v. INS*, 962 F.2d 836 (9th Cir. 1992) (according special judicial deference in naturalization cases).

49. 714 F. Supp. 1060 (C.D. Cal. 1989), *rev'd on other grounds*, 940 F.2d 445 (9th Cir. 1991).

50. 342 U.S. 580 (1952).

51. 341 U.S. 494 (1951), cited in *Harisiades*, 342 U.S. at 592 nn.18-19.

52. 795 F. Supp. 13 (D.D.C. 1992).

53. LEGOMSKY, IMMIGRATION LAW AND POLICY, *supra* note 44, at 87.

54. *Dennis v. United States*, 341 U.S. 494, 515 (1951).

As the cases discussed in this subsection demonstrate, the prediction that the courts would become increasingly inventive in their quests to avoid the principle of plenary congressional power has been borne out. Unfortunately, as the next subsection will show, my prophetic powers seem to end there.

## B. The Supreme Court

As noted earlier, I also predicted that lower courts' expansion of the exceptions to the plenary power doctrine would eventually lead the Supreme Court to clean the slate in one fell swoop. I expected the dam to burst with a sudden, dramatic announcement that, henceforth, immigration cases would be treated just like any other cases. Whether involving exclusion or deportation,<sup>55</sup> the immigration-related subject matter would no longer affect either the formulation or the application of the pertinent constitutional standard.

Obviously, that has not happened. Since the making of those predictions, the Supreme Court has decided no cases in which the constitutionality of congressional<sup>56</sup> action in the field of immigration has been at issue. Perhaps the bursting of the dam is still on the horizon, waiting for the exceptions to grow fatter. But I now think the dismantling of the plenary power doctrine is unlikely to follow that script. For one thing, the composition of the Supreme Court has changed substantially; its members are more conservative, both politically and judicially. For another, a different scenario seems to be in progress already.

Under this revised scenario, the lower courts and the Supreme Court allow the plenary power doctrine to wear away by attrition. Little by little, exceptions and qualifications will reduce the doctrine to a shadow of its former self without an express overruling of contrary precedent. At the lower court level, this pattern is already evident in the cases that apply the rational basis test to substantive due process and equal protection challenges in the deportation setting; in the cases that apply the traditional *Mathews v. Eldridge* factors to procedural due process challenges; and in the cases that apply the then

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55. My previous writings on the plenary power doctrine did not address those cases that involved aliens' rights outside the contexts of exclusion and deportation. Decisions like *Diaz* and *Nestor*, which involved federal restrictions on aliens' eligibility for welfare and social security, respectively, spoke in traditional rational basis terms but in the end accorded exceptional deference to Congress. See *supra* note 2. I would have expected the overruling of the plenary power doctrine to influence those cases as well.

56. The closest the Court has come to such a case is *Reno v. Flores*, 113 S. Ct. 1439 (1993), where the Court upheld the constitutionality of an INS regulation.

prevailing First Amendment standards to restrictions on political speech and associations.<sup>57</sup> Some sleight of hand might be necessary, but perhaps the Supreme Court will say something like this:

As we have consistently observed, Congress has the plenary power to decide which classes of aliens will be excluded and which ones will be deported. The breadth of that power is considerable, and the courts may not disturb Congress's decision simply because they would have preferred a different resolution.

But that is not to say the congressional power is unlimited. As when it legislates in any other area, Congress is constrained by the Constitution. And ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), we have recognized that, with some exceptions, the interpretation of those constitutional constraints is a judicial responsibility.

We have never held otherwise. To be sure, some of our early opinions in this area contain broad language designed to emphasize the importance of appropriate judicial deference. But whenever we have found congressional decisions "conclusive upon the judiciary" or have otherwise suggested the absence of judicial power, the assumption was always that the particular congressional action was within the applicable constitutional constraints. The reason we could not intervene in those cases was simply that Congress had done nothing unconstitutional. That explanation especially fits our seminal decision in *Chae Chan Ping v. United States [Chinese Exclusion Case]*, 130 U.S. 581 (1889), as Professor Legomsky has convincingly demonstrated. See Stephen H. Legomsky, *Immigration and the Judiciary — Law and Politics in Britain and America 192-94* (1987).<sup>58</sup>

Our decision in *Fiallo v. Bell*, 430 U.S. 787 (1977), is illustrative. While upholding the particular statutory provision in question, we expressly acknowledged "a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Id.* at 793 n.5. We proceeded to examine the substantive rationality of the challenged statutory distinction. At least one lower court has correctly read *Fiallo* as embodying the functional equivalent of the rational basis test — the same test that more generally governs substantive due process and equal protection challenges. *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

Our other immigration decisions follow the same pattern. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), we looked to *Dennis v. United States*, 341 U.S. 494 (1951), a non-immigration

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57. See *supra* § II.A.

58. This last sentence is wishful thinking, but I have never been cited in a real Supreme Court opinion and will settle for being cited in a fictional one.

case, for the applicable First Amendment standard. In another deportation case, *Kaoru Yamataya v. Fisher*, 189 U.S. 86 (1903), we approved and applied traditional notions of procedural due process.

Thus, what some commentators have called the plenary power doctrine is in truth not a special “doctrine” at all. It is simply a convenient shorthand label for the common sense proposition that in immigration, as in most other areas of federal law, Congress has broad leeway to make sensitive policy decisions. Courts are ill equipped to second-guess those judgments. We will review federal immigration statutes for compliance with the Constitution, but, as in any other field, our role ends there.

If that form of denial strategy comes across as unlikely, there is a more plausible modified version. The Court could deny that special judicial deference is due in deportation cases (and possibly in other alien regulation cases when the aliens are formally within the United States) but adhere to either the existing plenary power doctrine or a scaled-down version of it in exclusion cases. If so inclined, the Court has many ways in which to distinguish deportation from exclusion.<sup>59</sup> Moreover, whatever difficulty the Court might face in trying to suggest that there has never been a plenary power doctrine for deportation cases, the barriers to credible denial would be even higher in exclusion cases, where both the rhetoric and the results of earlier opinions were often quite absolute.

Even with respect to exclusion, however, the modified approach would leave room for the Court to soften the plenary power doctrine. It could cite the *Fiallo* footnote and go from there. It could interpret *Kleindienst v. Mandel*, in which it applied a “facially legitimate and bona fide reason” test to the First Amendment rights of United States citizens to receive the ideas of excluded aliens,<sup>60</sup> as an all-purpose rational basis test for the constitutionality of speech-related exclusion grounds. Perhaps that kind of restricted plenary power doctrine—a new “PPD-lite”—is in the offing.

Thus, I still predict continued weakening of the special judicial deference to Congress in immigration (and other federal alien regulation) cases. But I now believe that the transformation will proceed

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59. For a summary, see LEGOMSKY, IMMIGRATION LAW AND POLICY, *supra* note 44, at 44-47. The most compelling distinctions are those that rest on the presumed extraterritorial nature of exclusion proceedings or on assumptions about the differing magnitudes of the individual interests at stake, although even those distinctions are not free from doubt. *Id.*

60. 408 U.S. 753, 770 (1972).

only by steady erosion, rather than by a sequence of erosion followed by express overruling. Moreover, I no longer believe that in the foreseeable future the end result will be the complete abolition of this special deference. An emasculated version of the plenary power doctrine now seems more likely. Possible attributes of PPD-lite include (a) specific exceptions to the principle of special judicial deference; (b) justiciability of other constitutional challenges to immigration legislation but under narrower-than-usual standards of review; and (c) occasional references to the "plenary" nature of Congress's power or to the "special" deference owed in immigration cases, as makeweights to support independently reached decisions upholding congressional action.

### III. Conclusion

Immigration commentators are well aware that our field has long been a constitutional oddity. For the most part, the Supreme Court has not applied to immigration cases the constitutional norms familiar in other areas of public law. That special judicial deference, known in immigration circles as the plenary power doctrine, has never been adequately explained on grounds of either policy or precedent. It is not enough to lament that "the slate is not clean."

In the mid-1980's, I argued that it was time to clean the slate and predicted with some confidence that the Court would do so. To be sure, there have been continued inroads. At this juncture, however, I must concede with regret that the slate is still dirty.

But the dirt has become no more encrusted, and the lower courts in fact have continued to chisel away at some of the more unsightly deposits. I believe that the Supreme Court will soon start to help out with the chiseling. Unlikely as the Court is to abolish the plenary power doctrine outright, it can, and probably will, give us PPD-lite.

