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ON ELIÁN AND ALIENS:† A POLITICAL SOLUTION TO THE PLENARY POWER PROBLEM

Victor C. Romero*

INTRODUCTION

ELIÁN, HUMAN RIGHTS, AND IMMIGRATION POLICY

The poignant story of a little boy fished out of the sea after losing his mother to the elements¹ captured the country's imagination and

† Except to make a statement in this title, I prefer the terms "noncitizen" to "alien" and "undocumented immigrant" to "illegal alien" because of the pejorative connotations attached to the word "alien." E.g., Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutterez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 59 n.12 (2000) [hereinafter Romero, *Gutterez*]; Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 n.4 (1997) [hereinafter Romero, *Hostage*]; see also STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 953-54 (2d ed. 1997) (discussing other flaws of phrase "illegal alien," not least of which is its imprecision); Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1996-97) (discussing "how the term alien masks the privilege of citizenship and helps to justify the legal status quo").

* Professor of Law, The Pennsylvania State University, Dickinson School of Law. This article has benefited from ideas I first explored in a talk I gave at the First Annual Latino Symposium at the Columbia Law School in April 1999. The author also has presented portions of this paper in a panel discussing lessons learned from the Elián González case at the National Pacific American Bar Association Conference in Washington, D.C. in October 2000. I would like to thank Bob Ackerman, Jack Chin, Harvey Feldman, Kevin Johnson, Steve Legomsky, Michael Mogill, and Laura Terry for their insightful comments on an earlier draft, Dean Peter Glenn for his financial and moral support of this and many other projects, Raphael A. Sanchez for his excellent research assistance, and most importantly, my wife, Corie, my son, Ryan, and my family in the Philippines for their untiring love and support.

1. See, e.g., Lisa Arthur et al., *5-Year-Old Survivor Clung to Inner Tube: Two More Rafters Rescued, but 11 Other Cubans May Have Died at Sea*, MIAMI HERALD, Nov. 26, 1999, at A1; Mike Clary, *5-Year-Old, Two Adults Rescued off Florida After Cuban Boat Sinks*, OREGONIAN (Portland), Nov. 26, 1999, at A3; Sue Anne Pressley, *Young Refugee at Center of International Dispute: Father, Cuba Want Return of Boy Rescued at Sea*, WASH. POST, Nov. 30, 1999, at A3; *3 Who Survived Sinking Won't Be Deported*, N.Y. TIMES, Nov. 27, 1999, at A11.

ignited a political firestorm.² The Elián González saga drew conflicting opinions from nearly every branch of American local, state, and federal government, from a Florida state court³ and Miami Mayor Alex Penelas,⁴ to the Eleventh Circuit Court of Appeals,⁵ the United States Congress,⁶ and Vice President Al Gore.⁷

Despite the cacophony of voices, two viewpoints surfaced from above the din. The first, held most strongly by Elián's Miami relatives, was that the boy should have been allowed to file an asylum petition to live permanently in Miami, far away from the repressive Castro regime.⁸ The second, proffered by the Immigration and Naturalization Service (INS) and eventually upheld in court, was that Elián should have been returned to the custody of his father, who would then repatriate to Cuba.⁹

Along with these opinions came the underlying theories. The pro-asylum camp asserted the importance of preserving Elián's rights

2. See, e.g., *Young Survivor of Boat Sinking a Pawn in U.S.-Cuba Tug-of-War*, CHI. TRIB., Nov. 30, 1999, § 1, at 22.

3. See *Gonzalez v. Gonzalez-Quintana*, No. 00-00479 FC 29, 2000 WL 419688 (Fla. Cir. Ct. Jan. 10, 2000) (granting temporary protective order to Elián's great-uncle), *vacated*, No. 00-00479 FC 28, 2000 WL 492102 (Fla. Cir. Ct. April 13, 2000) (vacating order and dismissing case because matter is federally pre-empted).

4. See Peter T. Kilborn, *Miami Area's Mayors Ride a Volatile Political Wave*, N.Y. TIMES, Apr. 17, 2000, at A14 ("[At an April 2000 rally,] Mayor Penelas . . . declared that he would not let the Miami police help federal agents move Elián from his temporary home and would blame President Clinton and Attorney General Janet Reno for any violence and civil disorder that might occur.").

5. See *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000) (affirming district court's dismissal of suit); *Gonzalez v. Reno*, No. 00-11424 D, 2000 WL 381901 (11th Cir. Apr. 19, 2000) (granting Elián's motion for injunction not to be removed from United States pending appeal of Immigration and Naturalization Service's refusal to consider his asylum application).

6. See, e.g., Karen DeYoung, *Battle Over Cuban Boy Moves to Hill: Warring Factions of Elian Gonzalez's Family Appeal for Congressional Allies*, WASH. POST, Jan. 28, 2000, at A3; Irvin Molotsky, *2 Officials Urge Congress To Stay Out of Elián Case*, N.Y. TIMES, Jan. 17, 2000, at A12.

7. See Katharine Q. Seelye, *Gore Supporting Residency Status for Cuban Child: Split in Administration*, N.Y. TIMES, Mar. 31, 2000, at A1; Jonathan Weisman, *Let Him Stay, Gore Says of Cuban Boy: Vice President Breaks with Justice Dept., Clinton in Elián Case*, BALTIMORE SUN, Mar. 31, 2000, at 1A.

8. See, e.g., Sue Anne Pressley & Karen DeYoung, *Federal Suit Filed Over Elian: Action Alleges Reno, INS Chief Violated Cuban Boy's Rights*, WASH. POST, Jan. 20, 2000, at A5.

9. See Memorandum from Bo Cooper, INS General Counsel, to Doris Meissner, INS Commissioner 2 (Jan. 3, 2000), available at <http://www.ins.usdoj.gov/graphics/publicaffairs/elian.pdf> [hereinafter Cooper Memo] ("Since there is no objective basis to believe that Elián is at risk of persecution or torture, the INS should not accept his asylum application against the expressed wishes of his father.").

against a cold and arbitrarily-enforced¹⁰ immigration law that does not often consider the humanity of noncitizens of the United States.¹¹ The other side decried the human rights arguments as a smokescreen proffered by anti-Castro forces who would flaunt the rule of law and use a little boy as a pawn in a political chess game.¹²

Despite the author's armchair interest in this case,¹³ this article takes no specific position on Elián's situation.¹⁴ Rather, this article values the González story for putting a human face on often faceless legal issues. More specifically, Elián's saga raises the following important question: When should the right of the human being to be treated as an individual trump the right of government to decide how to effectively manage the influx of groups of people into this country through the immigration laws?

In previous writings, the author has argued that immigration law should be as concerned with individual constitutional rights as other bodies of domestic law.¹⁵ This article builds upon this earlier work, and perhaps deviates slightly¹⁶ by suggesting that, given the forthcoming demographic shift in America's population from white to non-white, many of whom are new citizens, the most effective means of

10. Apparently, the INS has allowed other children in Elián's position to petition for asylum. See *id.* at 8-9 (distinguishing *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985), in which INS accepted asylum claim of 12-year-old).

11. See *infra* Part I for a discussion of the plenary power problem.

12. See, e.g., Editorial, *Elián v. Fidel: A 5-Year-Old Survivor Has Become a Pawn in a Cynical Political Game*, POST-STANDARD (Syracuse), Dec. 2, 1999, at A14.

13. Unlike other commentators, this author can claim no specific expertise in either asylum or family law surrounding custody issues and, indeed, has been interviewed only once by the press on this case. Telephone Interview between Martha Irvine, Associated Press, and Victor Romero (Apr. 21, 2000) (discussing legal aspects of González case).

14. The author sees both sides of the argument. On the one hand, a boy, despite his youth, should be appointed a guardian to pursue his asylum claim on its merits especially where, as here, his Miami relatives have become subjects of persecution by the Castro regime. On the other hand, assuming Elián's father has not been coerced by the Cuban government, his parental rights to raise his child as he sees fit include returning him to live in Cuba, effectively forbidding the filing of Elián's asylum claim.

15. See 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) [hereinafter Romero, *Congruence*]; Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1 (1998) [hereinafter Romero, *Expanding*]; Romero, *Guitierrez*, *supra* note †; Romero, *Hostage*, *supra* note †.

16. Many of the prior pieces advocate changes in the way the judiciary protects immigrants' rights, whereas this article looks to the political branches of government for effective policy reform. See, e.g., Romero, *Congruence*, *supra* note 15; Romero, *Hostage*, *supra* note †; Romero, *Guitierrez*, *supra* note †.

changing immigration policy might be through the political branches of government and not through the judiciary.¹⁷ Because of the federal judiciary's continued reluctance to strictly scrutinize individual rights claims that arise out of the Immigration and Nationality Act (INA),¹⁸

17. Similar arguments were raised in Kevin Johnson's thoughtful symposium contribution to the *La Raza Law Journal* in 1995. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 *LA RAZA L.J.* 42 (1995) [hereinafter Johnson, *Civil Rights*]. However, this article takes a slightly different tack by evaluating the importance of a political strategy for both Latinos and Asians in light of the Supreme Court's most recent pronouncements vis-à-vis the individual rights claims raised in *Miller v. Albright*, 523 U.S. 420 (1998), and *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). See *infra* Part I.B.

18. See Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 *HASTINGS CONST. L.Q.* 925 (1995) [hereinafter Legomsky, *Ten More Years*]. At one level, the Rehnquist Court's continued deference to Congress's plenary power over constitutional immigration matters is notable given its recent championing of states' rights and federalism, especially in its Commerce Clause jurisprudence. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking federal gun control act as exceeding commerce clause power); *United States v. Morrison*, 529 U.S. 598 (2000) (striking civil law provision of Violence Against Women Act); *Jones v. United States*, 529 U.S. 848 (2000) (striking application of federal arson statute to private dwelling). While one might argue that immigration law cannot be the subject of a states' rights approach because of the lack of a state "immigration system," there are at least two responses to such a claim. First, many state laws are passed in an effort to affect immigration into the state, the most notorious of which is perhaps California's Proposition 187, which sought to curtail public benefits to undocumented immigrants. See, e.g., Lolita K. Buckner Inniss, *California's Proposition 187—Does It Mean What It Says? Does It Say What It Means? A Textual and Constitutional Analysis*, 10 *GEO. IMMIGR. L.J.* 577 (1996). When challenged under equal protection, such state acts have typically been subject to strict scrutiny for discriminating against individuals on the basis of their alienage. See *Graham v. Richardson*, 403 U.S. 365 (1971). A states' rights approach might suggest some lesser level of scrutiny for such acts. And, second, a justification for more deference towards the states might be that, as a practical matter, immigrants do not immigrate to the United States generally; rather, groups of immigrants relocate to specific areas of the United States. See, e.g., ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 19 (1990) ("Whereas one generalizes about migration from Europe, from England, and from Italy going to the New World, to the American colonies, and to the cities of the northeastern United States, the fact of the matter is that migration often follows more precise patterns, often from a particular region, city, or village in the sending country to specific regions, cities, or even specific city blocks in the receiving nation."). The first major German migration in 1683, for instance, resulted because villagers from Krefeld decided to move en masse to establish what is now Germantown, Pennsylvania. *Id.* Given that the six states which receive the largest number of immigrants are California, New York, Texas, Florida, New Jersey, and Illinois, it can be argued that the federal government should allow these disproportionately burdened jurisdictions more leeway to pass legislation that affects immigrants short of barring them from migrating to the area. MICHAEL FIX & JEFFREY S. PASSEL, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 29 (1994). The political charge surrounding Proposition 187 reflected that sentiment. See, e.g., Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's*

an effective alternative to litigating such claims would involve seeking change in the nation's immigration policy itself through statutory reform of the INA. Since the Supreme Court will likely defer to Congressional action in this area, new pro-immigrant laws may well withstand constitutional challenge.¹⁹

Part I of this article describes the difficulty in trying to effect substantive constitutional changes in immigration policy through judicial action. From *Chae Chan Ping*²⁰ in 1889 to *Reno v. American-Arab Anti-Discrimination Committee*²¹ (AADC) in 1999, the Supreme Court has typically deferred to Congress in the area of immigration. Despite its unwillingness to defer to Congress in other areas of constitutional law, especially those involving so-called "states' rights,"²² the Rehnquist Court has showed no signs of curbing Congressional power over non-U.S. citizens.²³ Part II presents a political alternative to the judicial solution. By taking advantage of their majority population status, Latino- and Asian-Americans, many of whom were former im-

Proposition 187: The Political Relevance and Legal Irrelevance of Race, 70 WASH. L. REV. 629 (1995); see also *infra* note 119 and accompanying text (describing racial prejudice behind anti-immigrant sentiment). That having been said, the author firmly believes that just as the Rehnquist Court has been incorrect in failing to defer to Congress in the Commerce Clause arena, it would be a mistake to allow more state control over immigrants' rights matters because judicial activism is most appropriate in cases where the Court seeks to protect the rights of discrete and insular minorities. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (1980) ("Malfunction [of our representative democracy] occurs when . . . representatives beholden to an effective majority are systematically disadvantaging some minority . . .").

19. See, e.g., Romero, *Congruence*, *supra* note 15.

20. 130 U.S. 581 (1889).

21. 525 U.S. 471 (1999).

22. See, e.g., *Morrison*, 529 U.S. at 627 (striking civil law provision of Violence Against Women Act as exceeding Congressional Commerce Clause power); *Jones*, 529 U.S. at 859 (striking application of federal arson statute to private dwelling). See also Steve France, *Laying the Groundwork*, A.B.A. J., May 2000, at 40 (discussing recent cases protecting states' rights).

23. The Ninth Circuit has recently reaffirmed its status as a pro-immigrants' rights appellate court. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (curbing INS race profiling practices); *Ma v. Reno* 208 F.3d 815 (9th Cir. 2000) (deciding INS lacks authority to indefinitely detain alien); *United States v. Pacheco-Medina*, 212 F.3d 1162 (9th Cir. 2000) (holding alien arrested after just crossing border did not enter U.S.). However, the Supreme Court has not looked favorably upon the Ninth Circuit either within or without immigration law. See, e.g., *Marybeth Herald, Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 407 (1998) ("In the 1996-97 Term, the Supreme Court issued opinions in almost ninety cases. During this time, the Supreme Court took twenty-eight cases from the Ninth Circuit Court of Appeals, and reversed twenty-seven."). Indeed, the Supreme Court has recently favored the decisions of the Fourth Circuit, upholding many of the latter's decisions. Perhaps the most popular recent affirmation was the 5-4 vote striking down Congressional action that would have allowed civil lawsuits against women's attackers. *Morrison*, 529 U.S. at 627.

migrants, could effect significant change in immigration policy by exploiting the plenary power doctrine to their own ends. Congressional adoption of immigrant-friendly legislation will survive judicial scrutiny because of the Supreme Court's commitment to Congressional deference in the field. Part II also suggests and rebuts criticisms of this political proposal.

Finally, this article concludes by briefly returning to the Elián González case to put the issues raised in proper perspective. Because the short-term political and litigation strategies adopted by the pro-Elián-in-America forces ultimately failed, perhaps a longer-term political strategy of advocating enhanced asylum rights for all children might prove a more productive course for the pro-immigrants' rights lobby.

I

CONGRESS'S PLENARY POWER AND THE SUPREME COURT'S RESTRAINT

A. *Foundations of Plenary Power: Chae Chan Ping to Mezei*

The difficulty in judicially protecting individual rights of noncitizens in the context of immigration policy stems from the Supreme Court's recognition of the so-called plenary power of Congress over immigration matters. Even though the federal Constitution specifically vests Congress with the power to create a uniform rule of naturalization,²⁴ the document is silent with respect to Congress's role over the admission and expulsion of noncitizens.²⁵ Nonetheless, the Supreme Court has implied Congress's power over immigration by reference to the Naturalization Clause, to other explicit powers over foreign relations and commerce, and to the structure of the Constitution itself.²⁶ Still, that Congress has power over immigration says nothing about its extent, especially when a noncitizen's rights might be at issue. A brief review of the Supreme Court's alienage jurisprudence suggests that, by and large, the Court has deferred to Congress-

24. U.S. CONST. art. I, § 8, cl. 4.

25. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 178 (4th ed. 1998) ("[T]he Constitution of the United States includes no language that expressly grants Congress such authority."); LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY*, *supra* note †, at 8 ("And nowhere does the Constitution expressly authorize the federal government to regulate immigration.").

26. See ALEINIKOFF ET AL., *supra* note 25, at 185-95 (outlining various arguments as to sources of Congress's immigration power); LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY*, *supra* note †, at 8-12.

sional directives in the area of immigration law and policy over the past hundred years.²⁷

The genesis of the plenary power doctrine lies in the infamous 1889 *Chinese Exclusion Case*, or *Chae Chan Ping v. United States*.²⁸ In that case, the Supreme Court upheld Congressional revocation of entry permits to Chae Chan Ping, a Chinese laborer who had temporarily left the United States in reliance on those re-entry documents. After recognizing that the power to exclude noncitizens is incidental to national sovereignty, the Court concluded that “[w]hatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure.”²⁹ The Court further noted that it could not second guess Congress’s decision to enact a race-based exclusionary policy, stating that such “determination is conclusive upon the judiciary.”³⁰

Chae Chan Ping is an especially important case because just three years prior, the Court had recognized that the Chinese could avail themselves of the Constitution’s Equal Protection Clause to protect themselves against invidious racial discrimination. In *Yick Wo v. Hopkins*,³¹ the Court overturned a conviction of a Chinese national for violating a San Francisco safety ordinance regulating the operation of laundries. The evidence clearly showed that variances were granted to all but one of the non-Chinese operators, while all of the Chinese-run laundries had been ordered closed.

27. Because this history is so familiar to most, this discussion will focus primarily on the major cases over the past hundred years. For more on this history, see STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177-222* (1987) [hereinafter LEGOMSKY, *IMMIGRATION AND THE JUDICIARY*] (discussing history of plenary power doctrine); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 *HARV. L. REV.* 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 *SUP. CT. REV.* 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1 (1984). Recently, Jack Chin has argued that the plenary power doctrine is not as exceptional as other scholars have suggested and that the harsh results wrought by its application have parallels in domestic constitutional law. See 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).

28. 130 U.S. 581 (1889).

29. *Id.* at 609.

30. *Id.* at 606.

31. 118 U.S. 356 (1886).

Read together, *Chae Chan Ping* and *Yick Wo* indicate that the Court was willing to defer to legislative and executive action in the realm of immigration policy, but not outside of it. As Alex Aleinikoff, David Martin, and Hiroshi Motomura have noted:

On the one hand, the *Chinese Exclusion Case* is a seminal case for the “plenary power doctrine”—which severely limits [noncitizens’] constitutional rights when it comes to entering and remaining in this country. In contrast, *Yick Wo* suggests that [noncitizens] and citizens receive similar (but not necessarily identical) constitutional treatment in *nonimmigration* matters. Put differently, our constitutional law relating to *immigration* may differ from our constitutional law relating to noncitizen *immigrants*.³²

Because *Yick Wo* focused on nonimmigration issues, the Court was free to develop the plenary power doctrine in immigration law as it saw fit. In its 1893 decision in *Fong Yue Ting v. United States*,³³ the Court built upon the foundation laid in *Chae Chan Ping* by upholding a Congressional statute requiring Chinese nationals (and only Chinese nationals)³⁴ to register with the federal government or face deportation. While recognizing the constitutional limits placed on government conduct by cases such as *Yick Wo*, the Court quickly added that because “they continue to be aliens, . . . [the Chinese respondents] remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.”³⁵

While these race-based exclusionary rules generally abated from the late 1800s through World War II,³⁶ the 1950s saw the return of the plenary power doctrine in three decisions that squarely pitted individual claims to both procedural and substantive constitutional rights against Congress’s plenary power over immigration. This time, racial

32. ALEINIKOFF ET AL., *supra* note 25, at 197 (emphasis in original).

33. 149 U.S. 698 (1893).

34. Indeed, one of the most frustrating and fascinating aspects of the case is that Fong Yue Ting was required to present a non-Chinese witness to attest to his lawful presence in this country for the noncitizen registration certificate to issue. Because Fong Yue Ting presented a Chinese witness, the collector of internal revenue deemed the witness not credible and refused to issue the certificate to him. *Id.* at 703. For more case analysis of the historical “white witness” requirements, see generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

35. *Fong Yue Ting*, 149 U.S. at 724.

36. Unfortunately, the abolition of the National Origins Quota system did not occur until 1965, although there was a steady decline in race-based exclusionary law from about 1934 forward, when the Chinese Exclusion Act was repealed. See generally Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279-97 (1996).

prejudice was not the underlying reason for individual exclusion; instead, the fear of communism drove Congressional action.

In the first case, *United States ex rel. Knauff v. Shaughnessy*,³⁷ the noncitizen wife of a United States citizen was barred entry into the United States based on classified information obtained by the government, which, it was later revealed, suggested that she had Communist affiliations.³⁸ Knauff argued before the Supreme Court that exclusion without a hearing compromised her due process rights. In rejecting this argument and reaffirming Congress's plenary power over immigration matters, the Court issued a chilling pronouncement: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."³⁹ Even considering the country's anti-Communist mood at the time, the extent to which the Court was willing to defer to Congress in *Knauff* was noteworthy, if not surprising. Knauff, after all, wanted only an opportunity to be heard, yet the Court was unwilling to grant even that to the noncitizen spouse of a United States citizen.⁴⁰

Nonetheless, supporters of individual rights could have taken solace in the fact that *Knauff's* impact might arguably be limited in two

37. 338 U.S. 537 (1950).

38. For more on Knauff's story in her own words, see ELLEN RAPHAEL KNAUFF, *THE ELLEN KNAUFF STORY* (1952); see also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955-64 (1995).

39. *Knauff*, 338 U.S. at 544.

40. See generally Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) (discussing constitutionality of Illegal Immigration Reform and Immigrant Responsibility Act of 1996's (IIRAIRA) "court-stripping" provision); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing how these laws are inconsistent with core immigration policies such as the protection of family integrity); Romero, *Expanding*, *supra* note 15 (calling for repeal of court-stripping provisions of IIRAIRA based on review of social psychology research on negative noncitizen stereotypes). It is no small irony that Congress would deny entry to a spouse when one of the underlying policies for the immigration code is to unify families. See, e.g., LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note †, at 131 ("Since [the 1952 Immigration Act], one central value that our immigration laws have long promoted, albeit to varying degrees, is family unity."). Nonetheless, the federal courts' unwillingness to review hearing-stripping decisions of the political branches finds a contemporary parallel in the IIRAIRA, section 1252(g) of which provides:

EXCLUSIVE JURISDICTION. — Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against the alien under [the INA].

8 U.S.C. § 1252(g) (1994).

respects. First, *Knauff* did not involve the abrogation of any *substantive* constitutional rights, only *procedural* ones. If the *Knauff* court had dealt with Knauff's claim that she had been deprived of her First Amendment right to free speech, for example, it would have presumably given greater weight to that substantive claim than to Knauff's procedural assertion that she was not granted an opportunity to be heard. Indeed, after the Supreme Court rendered its decision, administrative hearings were held and eventually the Board of Immigration Appeals found Knauff admissible on the merits.⁴¹

Second, the *Knauff* opinion upholding the denial of a hearing might arguably have applied only to first-time entrants to the United States. For instance, one might argue that a long-time resident of the United States who returns from a temporary trip abroad should be entitled to greater procedural rights than Knauff, a person seeking entry into the country for the first time.

However, in the three years following *Knauff*, the Court expanded Congress's plenary power in two important cases. In *Harisiades v. Shaughnessy*,⁴² the Court filled the *Knauff* gap between procedural and substantive rights by denying noncitizens' claims on substantive constitutional law grounds. A year later, in *Shaughnessy v. U.S. ex rel. Mezei*,⁴³ the Court extended its *Knauff* holding to deny the procedural due process claim of a long-time U.S. resident seeking reentry.

In *Harisiades*, the Court approved the removal⁴⁴ of three former Communist Party members who were rendered deportable under a recently enacted Congressional act. Passed after the petitioners had quit the Communist Party, the statute made deportable any individual who had ever advocated the violent overthrow of the U.S. government. The petitioners did not dispute the government's assertion that the Communist Party adhered to that belief, and they were accordingly adjudged deportable. The petitioners' citations to the Due Process Clause, the First Amendment, and the Ex Post Facto Clause notwithstanding, the Court upheld the law, finding violations of none of these three substantive constitutional provisions.⁴⁵

41. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note †, at 47 n.8.

42. 342 U.S. 580 (1952).

43. 345 U.S. 206 (1953).

44. As in the IIRAIRA, "removal" has replaced "deportation" as the term of art, although "deportation" is more commonly found in the literature. IIRAIRA, Pub. L. 104-208, § 304, 110 Stat. 3009-546, 3009-587-97 (1996) (codified as amended in scattered sections of 8 U.S.C.).

45. *Harisiades*, 342 U.S. at 584.

Harisiades thus appeared to preclude substantive constitutional rights claims left open by the *Knauff* Court's procedural approach. After *Harisiades*, not only could Congress deny an individual noncitizen the right to a hearing, it could retroactively apply a new deportation law to remove a noncitizen whose affiliation with the offending organization had already ended! In language tracking that seen in other plenary power cases, the *Harisiades* Court justified this abrogation of the petitioner's substantive rights by stating that it was not its role, but that of the political branches, to formulate immigration policy and, therefore, any grievances arising out of such policy should be addressed to those bodies:

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable worldwide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. . . . Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.⁴⁶

Just as the Court extended the plenary power doctrine to reach substantive claims in *Harisiades*, it also broadened the *Knauff* holding in *Mezei* by curtailing procedural due process for a long-time United States resident.⁴⁷ *Mezei*, a U.S. resident for 25 years, was denied re-admission into the country after leaving temporarily to visit his ailing mother in Romania. Upon his return, he was detained on Ellis Island as excludable, ostensibly for national security reasons, and therefore sought admission elsewhere. After he was denied entry in over a dozen countries, *Mezei* advised the INS that he would no longer seek to depart. He then challenged his confinement on Ellis Island without a hearing as a denial of due process.⁴⁸

The District Court and Court of Appeals granted *Mezei*'s request for a hearing, perhaps signaling limits on Congress's heretofore plenary power over immigration or, alternatively, the decline of the "red scare."⁴⁹ In addition, these decisions renewed the hope that some constitutional individual rights claims could survive *Knauff* and *Harisiades*.

However, upon appeal to the Supreme Court, *Mezei* followed precedent, and the Court overturned the lower courts' decisions. After

46. *Id.* at 591.

47. 345 U.S. at 215-16.

48. *Id.* at 209.

49. See Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 23-25 (1996).

the Court recited the facts, its first statement was a reaffirmation of the plenary power of Congress followed by a citation to the four cases described above—*Chae Chan Ping*, *Fong Yue Ting*, *Knauff*, and *Harisiades*: “Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”⁵⁰ While acknowledging that departing noncitizens may avail themselves of procedural due process protections, the Court appeared to characterize Mezei not as a returning twenty-five-year resident, but as “an alien on the threshold of initial entry.”⁵¹ As such, *Knauff*’s deferential standard of judicial review applied to the Attorney General’s actions here: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁵² Despite the attempts by Justices Jackson and Black in dissents to distinguish *Knauff* by emphasizing that, unlike *Knauff*, Mezei was actually detained at Ellis Island and therefore deserved at least a hearing on the merits,⁵³ the Court would not be dissuaded. As in the two other “anti-communist” era cases—*Knauff* and *Harisiades*—the stigma attached to suspected Communist affiliations played an apparent role in the Court’s findings. For example, in distinguishing Mezei’s case from *Kwong Hai Chew v. Colding*,⁵⁴ which had recognized that lawful permanent residents deserved due process protection when returning from a temporary sojourn abroad, the Court specifically mentioned Mezei’s nineteen months behind the “Iron Curtain” as cause for suspicion.⁵⁵ Just as *Chae Chan Ping* and *Fong Yue Ting* appeared to have been driven by nativistic sentiments fueled by race prejudice against the Chinese,⁵⁶ *Knauff*, *Harisiades*, and *Mezei* were decided under the specter of the burgeoning Cold War, when allegations of Communist affiliation were, for noncitizens, scarlet letters that could lead to summary exclusions.

50. 345 U.S. at 210 (citing *Chae Chan Ping*, *Fong Yue Ting*, *Knauff*, and *Harisiades*).

51. *Id.* at 212.

52. *Id.* (quoting *Knauff*, 338 U.S. at 544).

53. 345 U.S. at 227 (Jackson, J., dissenting) (“[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them.”); *id.* at 217 (Black, J., dissenting) (“I join Mr. Justice Jackson in the belief that Mezei’s continued imprisonment without a hearing violates due process of law.”).

54. 344 U.S. 590 (1953).

55. *Mezei*, 345 U.S. at 214. For more on *Mezei*, see Weisselberg, *supra* note 38, at 964-84.

56. See, e.g., Chin, *supra* note 27, at 12-13.

Regardless of the infamous historical context in which the Supreme Court operated from the late 1800s through the early 1950s, all five decisions discussed firmly established the plenary power doctrine as part of American law. As the next section demonstrates, recent Supreme Court decisions in the area of constitutional immigration law have not proved particularly promising for immigrants' rights advocates. While the Court's 1998 decision in *Miller v. Albright*⁵⁷ suggests that a slim majority of the Court might be willing to entertain a constitutional equal protection claim within the context of immigration law, it appears that such claims may be brought only by citizens and not by noncitizens. The section concludes that, because of demographic shifts that will establish a non-white, recent immigrant citizen majority, the more promising solution to the plenary power problem might be found in the halls of Congress and the White House rather than in the Supreme Court.

B. *The 1980s, 1990s and Beyond: Continued Judicial Restraint*

Three Supreme Court cases from the 1980s and 1990s demonstrate the resilience of the plenary power doctrine and suggest its continued vitality through the twenty-first century.⁵⁸ These three cases—*Landon v. Plasencia*,⁵⁹ *Miller v. Albright*,⁶⁰ and *Reno v. AADC*⁶¹—

57. 523 U.S. 420 (1998).

58. Of the few Supreme Court cases from the 1960s, 1970s, and 1980s that protect noncitizens' rights, none appears to weaken the plenary power doctrine for two reasons. First, in one group of cases, the Court chose to protect noncitizens' rights through the use of statutory norms, not through the vehicle of constitutional due process, because of the constraints imposed by *Knauff* and its progeny. See, e.g., LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* note 27, at 155-70; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1645 (1992) ("The few judicial decisions [of the 1950s and 1960s] that fostered the expansion of procedural due process review did so primarily through statutory interpretation, not constitutional law."). See also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). And, second, as mentioned in the discussion of *Yick Wo* above, the Supreme Court would not defer to the political branches as readily in areas outside immigration law, especially where the states discriminated against noncitizens qua noncitizens. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971). For a more thorough discussion of the "inside" versus "outside" immigration dichotomy and the federal versus state alienage discrimination divide, see generally Romero, *Congruence*, *supra* note 15. Because these cases do not seriously undermine the plenary power doctrine, and because the focus of this section is to demonstrate the resilience of the doctrine over time, this article will not discuss the aforementioned cases but recommends the citations herein to the reader.

59. 459 U.S. 21 (1982).

60. 523 U.S. 420 (1998). As this article goes to press, the Court will decide *Nguyen v. INS*, which revisits the constitutionality of the same statute that spawned

appear at first blush to distance themselves from the more stringent plenary power decisions of the late nineteenth and mid-twentieth century, yet they reaffirm their central feature by highlighting the deference the judiciary must show to the political branches in immigration matters.

In *Landon*, the Court had an opportunity to revisit its 1950s procedural due process jurisprudence *vis-à-vis* noncitizens, citing *Knauff*, *Kwong Hai Chew*, and *Mezei*. The *Landon* Court remanded for further review the case of a legal permanent resident who was summarily excluded from reentering the U.S. after returning from a two-day visit to Mexico. The government contended that because she had knowingly abetted the undocumented immigration of others, Plasencia could be summarily excluded under the immigration code.⁶² While the Court ruled that Plasencia was not entitled to a full deportation hearing, it held that she was not denied due process.

Citing *Kwong Hai Chew* and distinguishing *Mezei*, the Court held that Plasencia could avail herself of procedural due process protections. As in *Kwong Hai Chew* and *Mezei*, Plasencia was a returning permanent resident; however, the Court distinguished *Mezei* on the ground that Plasencia was out of the United States for a scant two days, while *Mezei* had been away much longer. Nonetheless, the Court took pains to circumscribe its characterization of *Mezei*, stating that it “need not . . . decide the scope of *Mezei*.”⁶³ Finding *Kwong Hai Chew* controlling, the Court held that procedural due process norms protected Plasencia, but remanded the case to the Ninth Circuit instead of deciding whether the process given Plasencia was constitutional.⁶⁴

As intimated earlier, *Landon* appears to be a chink in the plenary power doctrine’s armor, but it might end up being a very small one. By ruling that Plasencia, a longtime permanent resident, was entitled to procedural due process, the Court seemed willing to restore some constitutional due process protection to noncitizen claimants eroded

the multiple opinions in *Miller*. *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 121 S. Ct. 29 (Sept. 26, 2000) (No. 99-2017).

61. 525 U.S. 471 (1999).

62. 459 U.S. at 32-35.

63. *Id.* at 34. In *Rafeedie v. INS.*, 880 F.2d 506, 519-24 (D.C. Cir. 1989), the D.C. Circuit clarified this point by suggesting that the deprivation of procedural due process might be permissible when applied to returning permanent residents whose trips outside the country had been sufficiently lengthy.

64. *Landon*, 459 U.S. at 37 (“We remand to the Court of Appeals to allow the parties to explore whether Plasencia was accorded due process under all of the circumstances.”).

by earlier decisions in *Knauff* and *Mezei*. On the other hand, the Court's refusal to state what process was due Plasencia, its conclusion that she was not entitled to the formal protections of a full deportation hearing, and its remand to the lower courts for further discussion suggest a reluctance to fully protect individual rights even in the face of a rather sympathetic plaintiff.⁶⁵

The Court's 1998 *Miller v. Albright* decision is perhaps more enigmatic than *Landon*. In *Miller*, the Court rendered a fractured six-to-three decision where no opinion mustered more than three votes (indeed, the two *dissenting* opinions were the threesomes).⁶⁶ Lorelyn Penero Miller, the daughter of a Filipina mother and American father who had never married, challenged a provision in the INA that required U.S. citizen fathers, but not mothers, to assert their paternity within 18 years of the child's birth. Miller's primary argument was that this was a form of unconstitutional gender discrimination built into the immigration code, especially given the enhanced scientific methods of proving paternity today that made the INA provision appear to endorse the outmoded stereotype of the uncaring father. The Court upheld the statute with six justices issuing three different opinions to justify the holding.

Justice Stevens, writing for himself and Chief Justice Rehnquist, thought that a rational basis test applied to this equal protection challenge on the theory that immigration policy is subject to the plenary power of Congress.⁶⁷ But even if a heightened form of scrutiny applied, Stevens believed that Congress's concern over fostering a good relationship between father and child while the child is a minor, among other reasons, satisfied this more stringent test.⁶⁸

65. A more recent variant on this issue is the question of whether the temporary sojourn abroad of a legal permanent resident interrupts her immigration status, thereby treating her reentry into the United States as a first time entry rather than as a return. See, e.g., *ALEINIKOFF ET AL.*, *supra* note 25, at 425-29 (describing court split on issue). Compare *In re Collado-Munoz*, I. & N. Dec. 3333 (1998) (interim decision) (stating that statutory provisions limit applicability of *Fleuti* doctrine exempting returning resident from being treated as first-time entrant) with *Richardson v. Reno*, 994 F. Supp. 1466 (S.D. Fla. 1998) (holding that *Fleuti* doctrine as to whether noncitizen's departure was a "brief, casual and innocent departure" may be considered because of ambiguity in statute). See also *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

66. 523 U.S. 420 (1998).

67. *Id.* at 434 n.11. While the "rational basis" standard suggests a more stringent review than the complete deference to Congress reflected in *Chae Chan Ping*, both within and without immigration law, such review has rarely led to the invalidation of Congressional action. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993) (applying rational basis test and noting "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end'") (citation omitted).

68. *Miller*, 523 U.S. at 440.

Justice Scalia, joined by Justice Thomas, asserted that the Court had no power to provide the relief Miller requested. To the extent that Miller sought citizenship as her remedy, Scalia asserted that only Congress could confer this upon her, even if the Court were to agree with her equal protection claim.⁶⁹

Justice O'Connor, joined by Justice Kennedy, seemed to suggest that the viability of the gender-based equal protection claim was governed by who brought the suit. Because Miller was a noncitizen, the challenged statute, as applied to her, would be upheld under the most deferential "rational basis" standard of review. O'Connor therefore concluded that Stevens's analysis of the statute was correct.⁷⁰ However, in an interesting piece of dicta, O'Connor noted that had Miller's father, who had been erroneously dismissed from the case, remained in the suit, the heightened scrutiny befitting a gender-based claim would have applied, and O'Connor would have voted to strike down the INA provision.⁷¹

The O'Connor opinion is particularly intriguing because its gender discrimination analysis tracks that of the dissenters in *Miller*, all three of whom voted to strike down the legislation. Over the course of two opinions, Justices Ginsburg, Breyer, and Souter agreed with the heightened scrutiny standard mentioned in the O'Connor dicta. Unlike O'Connor, however, none of the three justices found standing to be a relevant issue, paving the way for Miller to assert her father's gender-based claim as a third party.⁷²

The *Miller* decision is therefore as frustrating as it is encouraging for individual constitutional rights claims. On the positive side, a solid five-person majority on the current Court believes that gender-based stereotypes cannot survive an equal protection challenge even within the realm of immigration law.⁷³ On the other hand, the thrust of O'Connor's dicta spoke only to the rights of *citizens* in conferring citizenship upon their noncitizen children born out of wedlock, rather than directly affirming the rights of the noncitizen herself. Indeed,

69. *Id.* at 452-59.

70. *Id.* at 445-52.

71. *Id.* at 451-52.

72. *Id.* at 460-90.

73. For an illuminating discussion of *Miller*, see 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. See also *The Supreme Court 1997 Term: Gender Discrimination—Immigration and Nationality Act*, 112 HARV. L. REV. 202-12 (1998).

even the Breyer dissent noted that a deferential standard of review applies “in [cases] involving [noncitizens].”⁷⁴

In its latest pronouncement on immigrants’ rights within immigration law—the 1999 decision of *Reno v. AADC*⁷⁵—the Court stated that noncitizens could not assert a First Amendment selective prosecution claim to challenge their otherwise valid deportation order. In a case more popularly known as the “LA 8 case,”⁷⁶ the INS sought to deport eight noncitizens (two of whom were permanent residents) because of their affiliation with the Popular Front for the Liberation of Palestine (“PFLP”), which the U.S. government described as a terrorist organization.

In the convoluted lower court litigation,⁷⁷ the government contended that while the First Amendment would protect the rights of U.S. citizens to affiliate with groups such as the PFLP, the same protection does not extend to noncitizens. As then FBI Director William Webster admitted, “If these individuals had been United States citizens, there would not have been a basis for their arrest.”⁷⁸ Several variations of this argument were presented in the federal district and appeals courts, but they were soundly rejected each time. The lower courts agreed with the noncitizens that the First Amendment required that they not be selectively targeted for deportation solely because of their political affiliations.⁷⁹

The Justice Department pursued an appeal to the Supreme Court, which, though initially declining to address them, resolved the First Amendment issues in its opinion after the parties had left them unbriefed.⁸⁰ Although the case was resolved on statutory grounds, the

74. *Miller*, 523 U.S. at 480 (Breyer, J., dissenting).

75. 525 U.S. 471 (1999).

76. For a thorough discussion of this case and other issues involving the targeting of so-called “terrorists” because of their political affiliations, see JAMES X. DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 33–46 (1999).

77. The full citation to the various trial and appellate court cases speaks for itself. *Reno v. AADC*, 525 U.S. 471 (1999), *vacating and remanding*, 119 F.3d 1367 (9th Cir. 1997); *AADC v. Reno*, 70 F.3d 1045 (9th Cir. 1995); *AADC v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *aff’d in part, rev’d in part*, *AADC v. Thornburgh*, 970 F.2d 501 (9th Cir. 1991).

78. DEMPSEY & COLE, *supra* note 76, at 35.

79. *Id.* at 39–41.

80. *Id.* at 41–42. Indeed, Justice Souter scolded the majority for ruling on the First Amendment issue after the Court specifically told the parties it would not do so. *AADC*, 525 U.S. at 511 (Souter, J., dissenting) (“No doubt more could be said with regard to the theory of selective prosecution in the immigration context, and I do not assume that the Government would lose the argument. That this is so underscores the danger of addressing an unbriefed issue that does not call for resolution even on the

Court nonetheless opined on the selective prosecution argument, siding with the government and noting that the First Amendment typically did not prevent the INS from choosing whom to deport among noncitizens illegally present: “[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”⁸¹ The Court reasoned that allowing such claims would unnecessarily hamper the operations of the executive branch as it seeks to merely enforce the immigration rules set by Congress:

Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.⁸²

Without specifying a concrete example, the Court did note, however, that there may be rare cases in which the alleged basis of discrimination is so outrageous that the balance may be tipped in the noncitizen’s favor.⁸³

While not specifically mentioned, the plenary power doctrine underlies the Court’s argument here as well. Congress has the power to determine the terms and conditions of a noncitizen’s presence in the United States and has vested in the Attorney General the power to enforce such provisions; therefore, it is not for the Court to second-guess the other branches’ actions in the typical deportation case except when their conduct is constitutionally outrageous.

Court’s own logic.”). Not surprisingly, Souter characterizes this part of the opinion as dicta, which technically it is. *Id.* at 510. However, dicta can often be turned into a holding upon application by a lower court. *See, e.g.,* Romero, *Gutierrez, supra* note †, at 66 (describing *Gutierrez* court’s reliance on dicta from Supreme Court’s *Verdugo* opinion to initially rule that undocumented immigrants are not entitled to Fourth Amendment protections); *see also* Justice Ginsburg’s partial concurrence, which Justice Breyer joined: “We thus lack full briefing on respondents’ selective enforcement plea and on the viability of such objections generally. I would therefore leave the question an open one.” *AADC*, 525 U.S. at 497 (Ginsburg, J., concurring in part).

81. *AADC*, 525 U.S. at 488.

82. *Id.* at 491 (emphasis in original).

83. *Id.* At least one clear example comes to mind: under the Fifth Amendment, the Court would probably not tolerate the INS’s physically torturing only Mexican citizens in order to coerce them to confess their undocumented status to facilitate deportation efforts. Indeed, the Fourteenth Amendment analogue to Fifth Amendment due process includes the parallel right to be free from beatings by government agents who seek to coerce confessions. *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

Just as in *Landon* and *Miller*, *Reno v. AADC* has both a positive and negative message for noncitizen constitutional claimants in the immigration context. The good news is that the Court has left open the possibility that the government is precluded from engaging in discriminatory conduct so egregious as to rise to the level of a constitutional offense. The bad news is that the Court views such a possibility as arising in the “rare case,”⁸⁴ and that the Court should otherwise defer to the political branches’ expertise in immigration matters, even if an analogous prosecution of citizens based on their group affiliations would raise a valid constitutional claim.

Further, the Court’s deference to a congressional and executive bent on combating “terrorism” is reminiscent of the prejudice against the Chinese underlying *Chae Chan Ping* and *Fong Yue Ting*, or the “red scare” that likely influenced the *Knauff*, *Harisiades*, and *Mezei* decisions. While race relations have improved in the years since *Chae Chan Ping*, and the end of the Cold War will likely preclude a reprise of *Knauff*, these precedents are still cited to justify the denial of noncitizens’ constitutional claims in the name of Congressional plenary power over immigration.

Unless the Court decides to seriously undermine Congress’s plenary power over immigration by subjecting the INA to heightened scrutiny, as intimated in *Miller*,⁸⁵ meritorious noncitizen constitutional claims will continue to be the “rare case” as far as the Supreme Court is concerned. This will be true even where, as in *Reno v. AADC*, the noncitizens present colorable arguments that would be winning ones for U.S. nationals.⁸⁶ As mentioned earlier, and as Motomura contends, courts are willing to protect noncitizen substantive rights claims

84. *AADC*, 525 U.S. at 491.

85. As Steve Legomsky has noted, the Court in the modern era has applied a rational basis standard of judicial review that appears to be more stringent than deferring to Congress’s plenary power, but has actually become a largely deferential standard in practice. See Legomsky, *Ten More Years*, *supra* note 18, at 930. Except in the Commerce Clause area, see *supra* note 22, and in a few notable cases, the modern Court has typically deferred to Congress under rational basis scrutiny as long as there might be any “plausible reason” for the challenged legislation. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (“Where there are ‘plausible reasons’ for Congress’s] action, ‘our inquiry is at an end.’”) (citation omitted). See also, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis test to strike anti-gay state constitutional amendment); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating city zoning ordinance under rational basis test).

86. For more on the First Amendment rights of noncitizens following *Reno v. AADC*, see, e.g., Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000).

through favorable statutory interpretation.⁸⁷ Ironically, along with its pro-government position on the First Amendment argument, the *Reno v. AADC* Court found that Congress's statutory amendment to the INA stripped the federal courts of jurisdiction to hear the substance of the noncitizens' claims, thereby precluding a discussion of the substantive claim via the closing of a procedural door.⁸⁸

While the author believes that efforts to dismantle the plenary power doctrine should continue to be pursued,⁸⁹ this article asserts that the adage "if you can't beat 'em, join 'em," might prove a useful motto for a more fruitful strategy. Given the proven resilience of the plenary power doctrine from *Chae Chan Ping* to *Reno v. AADC*, together with the coming shift in demographics making the Latino and Asian groups the majority "minorities," the plenary power doctrine could be used to effect positive immigration reform through politics rather than the courts. The following Part will explore the pros and cons of a strategy that entails recent immigrant groups using their projected majority group member status to enact legislative and executive enforcement changes that are more protective of immigrants' rights, knowing that, if challenged, the courts will likely uphold the new immigration policy under the plenary power doctrine.

II

THE POLITICS OF IMMIGRATION: PROMISES AND PITFALLS

A. *The Promise Behind a Pro-Immigrant Political Strategy*

Despite a few recent hints that the Supreme Court might entertain constitutional challenges to immigration laws, Congress's plenary power and the executive branch's delegated authority to enforce these laws remain formidable barriers to advocates of greater protection for noncitizen rights. This section suggests an alternative to the judicial route: New citizens of Latino and Asian background should join forces in anticipation of their ascendancy to demographic majority group member status in the coming years and effect pro-immigration

87. See *supra* note 58.

88. See *AADC*, 525 U.S. at 476-87. For more on this issue, see, for example, Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 *GEO. IMMIGR. L.J.* 385 (2000); Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 *GEO. IMMIGR. L.J.* 463 (2000) (responding to Prof. Motomura); see also LEGOMSKY, *IMMIGRATION AND THE JUDICIARY*, *supra* note 27, at 155-70;

89. Indeed, some of this author's prior work is dedicated to that end. See, e.g., Romero, *Congruence*, *supra* note 15; Romero, *Hostage*, *supra* note †; Romero, *Gutierrez*, *supra* note †.

legislation. Specifically, this section will discuss why Latino- and Asian-Americans have a vested interest in ensuring individual rights protections in the field of immigration law. In so doing, it will examine the intersection of race and alienage in America by identifying the problem, proposing a political solution, applying the solution to two important immigration issues, and describing the advantages of pursuing a political solution over seeking a judicial remedy.

As Kevin Johnson has shown, citizens of color should take note of the anti-immigrant policies currently in place because many of them have a disproportionate impact on racial minorities.⁹⁰ With forecasted changes in demography, however, Latino- and Asian-Americans will be poised to correct these wrongs, provided that they mobilize politically and coalesce around the goal of restoring human dignity to U.S. immigration policy.

1. *The Problematic Intersection of Race and Alienage: Current Attacks on Citizens and Noncitizens of Color*

Despite the anti-Chinese and anti-Communist rhetoric that undergirded the development of the plenary power doctrine, an advantage of having the Court defer to Congress on immigration policy was that as Congress's policy became less discriminatory against certain groups, such legislation could not effectively be challenged in court. Hence, the large number of Americans of Latino and Asian descent is due primarily to the lifting of the National Origins Quota system that had largely barred immigration from Asia and Latin America prior to 1965.⁹¹ Coincidentally, in the 1960s Congress was also involved in enacting historic legislation designed to alleviate domestic discrimination against people of color. Both the Civil Rights Act of 1964 and the Voting Rights Act of 1965 paved the way for the realization of many substantive gains in the area of equal rights for minority citizens.⁹² Congress's largesse with respect to both citizens and noncitizens of color was tacitly supported by a Supreme Court willing to

90. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) [hereinafter Johnson, *Magic Mirror*].

91. For a comprehensive review of the 1965 Act, see Chin, *supra* note 36.

92. Interestingly, the Civil Rights Act of 1964 was upheld against constitutional challenge as having been properly enacted under the Commerce Clause, as opposed to Section 5 of the Fourteenth Amendment. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Since 1995, however, the viability of future civil rights laws being passed under Congress's plenary commerce power has been cast into doubt by the Court's decision in *Lopez v. United States*, 514 U.S. 549 (1995) (striking Gun-Free School Zones Act as exceeding Congress's commerce power). See also recent federalism cases, *supra* note 22.

defer to the duly-elected representatives of the people, just as the Court supported the more restrictive and discriminatory laws of an earlier time.

History reveals an ebb and flow in individual rights' protections. Scholars describe the current backlash against both citizens and noncitizens of color today as being the mirror image of the expansive gains of the 1960s and early 1970s.⁹³ The nation's growing intolerance for protecting the rights of citizens of color is demonstrated by the current assault on affirmative action programs nationwide, and their successful eradication in large immigrant-rich states such as California⁹⁴ and Texas,⁹⁵ despite the recent release of a comprehensive study prepared by two leading academics on the policy's societal benefits.⁹⁶ In addition, the all-too-common law enforcement ploy of pre-textually stopping minority drivers—so-called “Driving While Black”⁹⁷ or “Driving While Mexican”⁹⁸—is another example of the perpetuation of second-class citizenship for people of color even in the post-*Brown*

93. Johnson, *supra* note 90, at 1111.

94. See, e.g., Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997); *Symposium on Race and the Law*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1997); Winkfield F. Twyman, Jr., *A Critique of the California Civil Rights Initiative*, 14 NAT'L BLACK L.J. 181 (1997); L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281 (1997). See also Legomsky, *Ten More Years*, *supra* note 18.

95. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, *Texas v. Hopwood*, 518 U.S. 1033 (1996). After backing more attacks against affirmative action in Washington state and at the University of Michigan, the Center for Individual Rights has set its sights on Florida, where Governor Jeb Bush's relationship to President George W. Bush might catapult the issue into the national spotlight. Janet Marshall, *Governor Defends Stance on Plan*, HERALD-TRIBUNE (Sarasota), Feb. 21, 2000, at 1B.

96. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (arguing for continuation of affirmative action policies). *But see* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 412-22 (1997) (discussing challenges to affirmative action in higher education and arguing for its eradication).

97. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); Jennifer A. Larrabee, “DWB (Driving While Black)” and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & POL'Y 291 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

98. See, e.g., Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); see also Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17 (“‘Why were you stopped?’ asks the local joke. The answer: ‘Driving while Mexican.’”).

v. *Board of Education*⁹⁹ era of *de jure* equality. Indeed, for some, the school segregation of the *Brown* era is too far removed from today's society to have any legal significance,¹⁰⁰ yet an increasing number of public schools in progressive northeastern states such as Connecticut continue to become more and more segregated,¹⁰¹ highlighting the reality that *de facto* equality does not necessarily follow *de jure* equality.¹⁰²

This anti-minority bias is also reflected in this country's current anti-immigrant mood. While some corrections have been made to the welfare laws,¹⁰³ and quotas for skilled foreign workers have increased,¹⁰⁴ the jurisdiction-stripping provisions of the two largest anti-immigrant laws of 1996—the Antiterrorism and Effective Death Penalty Act (“AEDPA”)¹⁰⁵ and the Illegal Immigration Reform and Im-

99. 347 U.S. 483 (1954).

100. See *Freeman v. Pitts*, 503 U.S. 467, 506 (1992) (Scalia, J., concurring) (“At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon the current operation of schools.”).

101. See *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (ruling that resegregation of Connecticut public schools violated state equal protection guarantees); Bradley W. Joondeph, Review Essay, *A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 170 (1999) (noting that court relinquishment of jurisdiction over desegregation has led to “substantial degree of resegregation”).

102. See, e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that courts should seek to remedy *de facto* as well as *de jure* discrimination based on “unconscious racism” historically inherent in American legal system).

103. See generally Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (1996) (explaining that 1996 welfare “reform” act contained several provisions that denied specific benefits to certain lawful permanent residents, among others); see also Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997). During the end of his second term, President Clinton was moving towards restoring many of the benefits to noncitizens abrogated by the welfare “reform” bill. Unfortunately, rather than being a total restoration of benefits to all legal permanent residents, the reform measures simply grandfather certain claims made by limited categories of immigrants, leaving most without recourse. See Michael Janofsky, *Legal Immigrants Would Regain Aid in President’s Plan*, N.Y. TIMES, Jan. 25, 1999, at A1.

104. While the 1998 fiscal year cap on the popular H-1B visas for skilled workers was 65,000, compromise legislation raised this limit to 115,000 in fiscal years 1999 and 2000, receding slightly to 107,500 for fiscal year 2001. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 16 (2d ed. Supp. 1999). After 2001, however, the ceiling reverts to 65,000 permanently. *Id.* Parallel Senate and House bills now pending would raise the limit to 200,000 for fiscal years 2001-2003. See *Rep. Smith’s H-1B Proposal Wins Judiciary Approval; Battle of the Bills Imminent*, 77 INTERPRETER RELEASES 657, 658 (2000).

105. Pub. L. 104-132, § 423, 110 Stat. 1214, 1272 (1996) (codified as amended at 8 U.S.C. § 1225(b)(1) (1994)) (limiting judicial review).

migrant Responsibility Act of 1996 (“IRAIRA”)¹⁰⁶—still remain in force, and most polls reveal that around two-thirds of the populace would favor restrictions on immigration despite their belief that family members should be entitled to bring in their relatives.¹⁰⁷

Johnson asserts that citizens of color should care about these attacks on immigrants because of the parallels between the nation’s current anti-minority and anti-immigrant stance.¹⁰⁸ Specifically, he posits that policy-makers would restrict the rights of minority citizens even more if they could, but they are constrained by the Constitution. In contrast, the federal government is freer to discriminate against noncitizens because of Congress’s plenary power over immigration.¹⁰⁹

The attacks on affirmative action and the prominence of racial profiling in traffic stops clearly illustrate Johnson’s argument. In both cases, the dominant white culture has, consciously or unconsciously, sought to suppress the rights of people of color, many of whom are immigrants. California and Texas, two states with large, but still minority, Latino populations, have both witnessed the demise of affirmative action, which was challenged for the preferences it accorded people of color—predominantly African- and Latino-American—in education and employment contexts. Ron Unz, a California politician, suggests that the white majority’s decision is the act of a group that already believes itself to be a minority. To attack affirmative action implicitly anticipates the whites’ inevitable fall from their majority status, so they seek protection of their soon-to-be minority interests through the initiative process at a point when they still command a majority.¹¹⁰

In the pre-textual traffic stop context, the term “Driving While Mexican” describes the efforts of the border patrol to combat undocumented immigration by often stopping motorists for no other reason than that they look “foreign” or “Mexican.”¹¹¹ While simply looking Hispanic is insufficient as a basis for the INS’s inferring undocumented status, the Supreme Court held in 1975 that it was a factor that could be considered by those patrolling the U.S.-Mexico border.¹¹²

106. 8 U.S.C. § 1252(g) (1994).

107. *New America, Same Old Politics: The United States Survey*, ECONOMIST, Mar. 11, 2000, at 5 [hereinafter *New America*].

108. Johnson, *Magic Mirror*, *supra* note 90, at 1116.

109. *Id.*

110. *New America*, *supra* note 107, at 17.

111. *See supra* note 98.

112. *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). *But see United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (holding that person’s “Latino” appearance should not be relevant factor in border patrol automobile stops).

Just as in affirmative action, Latino appearance and background intersect with perceived foreignness to elicit nativistic reactions from the dominant culture intent on maintaining political power. Thus, in both the affirmative action and the “Driving While Mexican” context, race and alienage intersect sharply, making both citizens and noncitizens of color easy targets for discriminatory policy.

The solution? Latino- and Asian-Americans should begin to flex and develop their political muscle to stem the tide of anti-minority and anti-immigrant sentiment by returning the recognition of human rights to its rightful place within immigration law and policy. Given the U.S. Supreme Court’s reluctance to protect noncitizens’ rights by deferring to the political branches’ plenary power, such reform may be best accomplished through political action, not through court review.

2. *A Political Solution: Latino- and Asian-American Leadership in Immigration Reform—Projected Demographic Shifts, Unique Perspectives, Golden Opportunities*

The predicted demographic diminution of white majority power from 1950 to 2050 is dramatic:

In the 1950 census, America was 89% white and 10% black. Other races hardly got a look-in. Now Latinos account for around 12% of the population. Within the next five years, they will overtake blacks to become the largest minority group. If current trends continue, they will be the majority in Los Angeles County in ten years. In 20 years, they will dominate Texas and California. By 2050, one in four of the 400 [million] people who will then be living in the United States will be Latino—and if you add in Asians, their joint share will be one in three.¹¹³

Meanwhile, in 2050 whites will comprise approximately fifty-three percent, a decline from seventy-two percent in 1999.¹¹⁴ That Latinos will become the majority in Los Angeles County suggests that if immigration rates remain high for both Latinos and Asians¹¹⁵ and if birthrates for U.S. citizen children of these new immigrants also hold steady, America will be predominantly nonwhite some time in the not-

113. *Oh, Say, Can You See?*, in *The New Americans*, THE ECONOMIST, Mar. 11, 2000, at 3 [hereinafter *Oh, Say, Can you See?*].

114. Randolph E. Schmid, *America’s Changing: Census Sees Older, More Diverse U.S. Ahead*, ABCNews.Com, at <http://www.abcnews.go.com/sections/us/DailyNews/census000113.html> (Jan. 13, 2000).

115. See Dorian Friedman & Kenan Pollack, *Ahead: A Very Different Nation*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 16 (“Hispanics and Asians will grow fastest, on average, because of high immigration rates . . .”); *Oh, Say, Can You See?*, *supra* note 113, at 3 (“The rise of these new Americans is being fueled by immigration.”).

too-distant future. At the point when Latinos and Asians achieve majority status, they will be able to effectively change immigration policy through political action if they so choose.

To the extent that many Latinos and Asians will become U.S. nationals through immigration and naturalization, many of these new citizens would have both a unique perspective and a golden opportunity to restore human rights protections currently missing from American immigration law. As descendants of those Asians who suffered under ancient exclusionary laws, such as those upheld in *Chae Chan Ping*,¹¹⁶ and of those Latinos who were repatriated to Mexico during the New Deal,¹¹⁷ these new majority group members will be able to clearly comprehend the injustice wrought by unfair and discriminatory immigration policies. Indeed, they will not have to look too far into the past to recognize that injustices continue against immigrants, many of whom are Asian and Latino. Proposition 187, which in 1994 was passed by a California electorate bent on depriving certain public benefits to undocumented immigrants,¹¹⁸ was spurred by strong nativistic, anti-Mexican rhetoric.¹¹⁹ Because of this unique perspective, many Latino- and Asian-Americans will be well-positioned to assert leadership roles in changing American immigration policy to restore human rights to an immigration code that often in application curtails certain privileges generally available to U.S. citizens.

3. *The Political Solution Applied: Chae Chan Ping and Knauff Revisited – Eliminating Diversity Visas and Restoring Judicial Review*

Two areas for potential immigration reform bear special mention, because they are regarded by some as modern incarnations of past anti-immigration policies that were upheld by the Supreme Court in *Chae Chan Ping* and *Knauff*. The first set of reforms involves eliminating the diversity visa lottery, which allocates immigrant visas for noncitizens from designated “low admission” nations only, and which

116. See *supra* notes 28-30 and accompanying text.

117. Johnson, *Magic Mirror*, *supra* note 90, at 1136 (describing repatriation of Mexican-Americans alongside Mexicans).

118. See Romero, *Congruence*, *supra* note 15, at 448-49, 455.

119. For an example of such rhetoric, see Richard K. Yamauchi, Letter to the Editor, *Illegal Students Given Preferential Coverage*, L.A. TIMES (Valley Ed.), Oct. 30, 1994, at B16, available at 1994 WL 2360440 (“[T]he state of California is not a province of Mexico. The victory of Proposition 187 will be proof that the state of California belongs to the United States of America.”). Proposition 187 was effectively defeated in federal court. See Patrick J. McDonnell, *Davis Won’t Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1.

is analogous, at one level, to the barriers to entry erected by the Chinese Exclusion Laws upheld in *Chae Chan Ping*. The second group of policy changes advocates restoring judicial review of some discriminatory deportation decisions, which harkens back to the procedural due process protections sought in *Knauff*.

First, let us examine the issue of “geographic priorities”¹²⁰—immigration preferences to certain noncitizens based solely on their national origin rather than their personal qualifications. In the late 1880s, the Supreme Court upheld Congressional policies that forbade only Chinese citizens from entering the United States.¹²¹ While those restrictions gave way to less discriminatory policies culminating in the abolition of the National Origins Quota system in 1965,¹²² similar geographic priorities still exist in immigration law.

Specifically, the Immigration Act of 1990¹²³ allotted 55,000 visas per year to be distributed via lottery to would-be immigrants from certain “low admission states.”¹²⁴ Since its debut in 1994, most of the visas have gone to Europeans and Africans,¹²⁵ while, in recent years, “high admission state” citizens from countries like Canada, the Dominican Republic, El Salvador, India, Jamaica, Mexico, the People’s Republic of China, the Philippines, South Korea, Taiwan, the United Kingdom, and Vietnam have been precluded from participating in the lottery.¹²⁶ One could argue that precluding the Chinese from participating in the diversity lottery is but a modern version of the Chinese Exclusion Laws. Just as the Chinese were not allowed to immigrate to the U.S. during the late 1800s, today, the Chinese have been effectively barred from applying for diversity visas because of their “high admission” rate status.

In response, those who favor the diversity lottery argue that aside from fostering cultural unity, geographic priorities provide a valid counterweight against heavy Asian and Latino immigration post-1965,

120. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 323 (1993) [hereinafter Legomsky, *Immigration, Equality*] (“By geographic priorities, I mean those that are assigned on the basis of the country or region from which the person is immigrating, rather than on the basis of personal attributes.”).

121. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *see also supra* notes 28-30 and accompanying text.

122. *See* Chin, *supra* note 36.

123. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

124. Legomsky, *Immigration, Equality, supra* note 120, at 320.

125. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note †, at 206.

126. Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 713 (1997).

thereby correcting what some might contend is *de facto* discrimination against some Europeans and Africans.¹²⁷ However, the elimination of the National Origins Quota system in 1965 is categorically different from the current diversity lottery scheme because the former was meant to bar certain immigrants based on their country of origin; thus, the 1965 abolition was intended to correct then existing immigration inequities between countries, not to deny entry to Europeans.¹²⁸ In contrast, it is difficult to argue that the diversity visa program serves the same purpose when it does little more than perpetuate the racial status quo by adding to the already majority race of white people in this country.

Thus, the elimination of the diversity visa program would be a strong issue around which both Asian- and Latino-Americans could unite. As noted above, Asians and Latinos appear to comprise the majority of people ineligible for the visa lottery and would therefore object to their exclusion. In addition, the groups could unite with Canadian-Americans and other Caucasians precluded from the lottery.

A second fertile ground for immigration policy reform involves the restoration of judicial review. As discussed earlier, the 1950s saw the Supreme Court uphold the denial of hearings to noncitizens seeking to rebut charges of their inadmissibility, the historical context of

127. Legomsky, *Immigration, Equality*, *supra* note 120, at 332:

Probably the most frequent argument is that our current immigration laws, while facially neutral, actually discriminate *against* Europeans; thus, the argument runs, a diversity program is a necessary offset. The thesis is that United States immigration laws assign the highest priority to family unity, thus conferring a disproportionate benefit on the nationals of those countries that have sent the most immigrants to the United States in recent years. Those individuals are the ones most likely to have family members in the United States.

Id. (emphasis in original). In supporting the diversity visa program, Massachusetts Congressman Brian Donnelly argued that "our Nation must reintroduce into the immigrant stream . . . the peoples who have traditionally made up our immigrant stock." *Legal Immigration Legislation: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong. 7 (1988) (testimony of Rep. Brian Donnelly); *see also* Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigration and Diversity: Céad Míle Fáilte (A Thousand Times Welcome)?*, 6 GEO. IMMIGR. L.J. 745 (1992) (arguing fairness of allocation of most diversity visas to Irish).

128. Legomsky, *Immigration, Equality*, *supra* note 120, at 333-34.

The answer, of course, is that the 1965 reforms hardly discriminated against Europeans. Europeans were "adversely affected" only in the sense that Congress was repealing a law that had affirmatively discriminated in their favor. One could as easily argue that our laws should accord special privileges to southern whites because their ancestors were "adversely affected" by the abolition of slavery.

Id. (citation omitted).

which involved the burgeoning Cold War.¹²⁹ The 1996 legislative curtailment of judicial review under both the AEDPA¹³⁰ and IIRAIRA¹³¹ are reminiscent of these earlier denials of due process without the anti-Communist undercurrent.

As recent scholarship demonstrates, the reasons provided for these 1996 laws are no more persuasive than those offered to justify the 1950s decisions. While the primary justification for limiting judicial review in IIRAIRA was to expedite the deportation process, Lenni Benson has persuasively argued that, “[a]s an empirical matter, judicial review of immigration proceedings is not the major, or even a significant, cause of delay in the removal of noncitizens.”¹³² In addition, curtailing judicial review to achieve efficiency often comes at the expense of the noncitizen’s individual rights. For instance, in *Ramallo v. Reno*,¹³³ the INS promised the noncitizen criminal defendant that it would not initiate removal proceedings if he cooperated with the U.S. Attorney’s Office. The INS then reneged and began to deport the noncitizen. While the trial court ruled that the INS could not breach its own promise not to deport the cooperating noncitizen, the D.C. Circuit overturned this decision, holding that the then-recently enacted IIRAIRA¹³⁴ stripped the federal courts of their jurisdiction over removal proceedings initiated by the Attorney General.¹³⁵

129. See *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); see also *supra* Part I.

130. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 423, 110 Stat. 1272 (codified as amended at 8 U.S.C. § 1225(b) (1994)) (limiting judicial review).

131. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252 (1994).

132. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 *CONN. L. REV.* 1411, 1442-43 n.159 (1997); see also Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 *GEO. IMMIGR. L.J.* 233 (1998); Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 *MINN. L. REV.* 1205 (1989) (discussing costs and benefits of judicial review); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 *COLUM. L. REV.* 961 (1998).

133. 931 F. Supp. 884, 886 (D.D.C. 1996).

134. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(g) (1994).

135. For more on “promise enforcement” cases, see Romero, *Expanding, supra* note 15. In January of this year, the Supreme Court decided to review two key provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 regarding the statute’s limits on judicial review and its retroactivity in *Calcano-Martinez v. INS* and *INS v. St. Cyr*, respectively. See *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000), cert. granted, 121 S. Ct. 849 (Jan. 12, 2001) (No. 00-1011); *INS v. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), cert. granted, 121 S. Ct. 848 (Jan. 12, 2001) (No. 00-767).

Because Latinos and Asians comprise the largest immigrant groups, it is reasonable to assume that they are well-represented among those subject to removal, and are therefore likely to be disproportionately disadvantaged by the lack of judicial review.¹³⁶ While perhaps not as politically palatable as the diversity lottery issue, the restoration of judicial review in certain contexts provides the only arguably fair result, as the promise enforcement case of *Ramallo* illustrates.¹³⁷ As mentioned in the prior context, coalition-building is important, and Latino- and Asian-Americans interested in restoring judicial review to certain immigration decisions would find support in the efforts of the non-partisan American Bar Association, which had the item on its list of lobbying priorities for the year 2000.¹³⁸

136. In the three databases of expedited removal cases used by the Center for Human Rights and International Justice, Asian and Latin American countries were well-represented. For example, Cuba and Mexico appeared among the top ten in both attorney databases for the greatest number of cases, while Sri Lanka topped the attorney databases and was ninth in the EOIR database. CTR. FOR HUMAN RIGHTS & INT'L JUSTICE, *THE EXPEDITED REMOVAL STUDY: REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL*, Tables 1-3, 129-30 (1999), available at <http://www.uchastings.edu/ers/reports/1999>.

137. The author realizes, of course, that some may not share his view that citizens of any stripe should show empathy toward criminal noncitizens like *Ramallo*. See, e.g., Anthony Lewis, 'Accent the Positive', N.Y. TIMES, Oct. 10, 1997, at A23 (discussing Senator Spencer Abraham's view that to make case for legal immigration, one must also "make clear that you're going to address the negatives, especially criminal [noncitizens]. There is a public feeling against those who come here and commit crimes"). However, in the "promise enforcement" context, the wrongdoing is committed by the government, not the noncitizen. As the author has previously noted, "[i]t is the government that reneges on its promises in these cases, benefits from the noncitizen's performance, and then acts to deport the noncitizen simply because it can do so under the law." Romero, *Expanding*, *supra* note 15, at 46 n.254.

138. The ABA maintains the following policy on immigration:

The ABA supports legal immigration based on family reunification and employment skills, due process safeguards in immigration and asylum adjudications, and judicial review of such decisions. The ABA also supports restoring benefits to legal immigrants. The ABA opposes denying public education and social services to children on the basis of their own or their parents' immigration status and laws that require employers and providers of education, health care, or other social services to verify citizenship or immigration status.

AM. BAR ASS'N, *2000 Legislative & Governmental Priorities: Immigration*, at <http://www.abanet.org/legadv/priorities/immig.html> (last updated Dec. 31, 2000). Indeed, a visit to the ABA's website confirms that it is closely tracking Congressional action in this area:

In the House, several bills to restore discretionary relief and improve due process were introduced. On April 20, 1999, Reps. Barney Frank (D-MA), Martin Frost (D-TX), Lincoln Diaz-Balart (R-FL), and others introduced H.R. 1485, a measure that would have restored some discretionary authority to immigration judges to halt the deportation of deserving long-term permanent residents on a case-by-case basis and provided judicial

While there are many other areas of immigration policy reform that might be appropriate focuses for the new majority of Latino- and Asian-Americans, the aim of this section has been to provide but a glimpse of the types of immigration issues that might benefit from Latino- and Asian-American leadership given their unique perspective on these matters and the ever-present reality of race and alienage in America.¹³⁹

review of such decisions. H.R. 2999, introduced on October 1, 1999, by Rep. Bill McCollum (R-FL), also would have restored some relief from deportation. On July 25, 2000, Rep. John Conyers (D-MI) introduced H.R. 4966, a comprehensive bill to correct many of the problems caused by the 1996 laws. Reps. McCollum, Frank, and others introduced H.R. 5062 to address the retroactivity of some of the 1996 deportation provisions.

....

In the Senate, Sens. Edward Kennedy (D-MA), Bob Graham (D-FL) and others introduced S. 3120 on September 27, 2000, to correct fundamental due process problems caused by the 1996 laws. Sen. Patrick Moynihan (D-NY) introduced S. 173 on January 19, 1999, to restore judicial review and discretionary deportation relief and to eliminate mandatory detention. Sens. Patrick Leahy (D-VT), Sam Brownback (R-KS), Jim Jeffords (R-VT), and others introduced S. 1940 on November 17, 1999. The legislation would have limited expedited removal to emergency migration situations and make procedural reforms to protect asylum seekers.

....

Several bills to restore access to public benefits also were introduced. On April 14, 1999, Sen. Moynihan and Rep. Sander Levin (D-MI) introduced companion bills, S. 792 and H.R. 1399. Both bills would have restored health and nutritional benefits to certain legal immigrant pregnant women, children, and blind or disabled medically needy individuals who were denied coverage under the 1996 federal welfare reform law.

Id. Concern over the ill-effects of the 1996 laws described above have prompted Representative John Conyers of Michigan to introduce immigration reform bill H.R. 4966 on July 25, 2000, which, according to the American Civil Liberties Union, has the following attributes:

The Conyers measure would enhance judicial review of immigration decisions on such matters as deportation, asylum eligibility and detention. It would restore the pre-1996 law granting immigration officials authority to release immigrants who do not pose a danger to society and who are likely to appear for future proceedings. The bill would also prevent indefinite detention of non-citizens whom the Immigration and Naturalization Service is unable to remove. Currently, the government claims the authority to detain non-citizens indefinitely, after they have already served criminal sentences. Finally, the bill would help correct a number of other problems, including retroactive and discriminatory use of immigration laws.

ACLU, *ACLU Enthusiastically Endorses Measure to Restore Fairness to Immigration Laws* (July 25, 2000), available at <http://www.aclu.org/news/2000/n072500b.html>.

139. Of course, the author might be completely wrong in his predictions about the political viability of either diversity visa reform or the restoration of judicial review. In his Immigration Law class, for instance, the author floated the idea that Article II,

4. *The Advantages of Pursuing a Political Over a Judicial Solution*

There are at least four distinct advantages to pursuing a political rather than judicial solution to the problems outlined above as well as other immigration-related quandaries.

First, if Latino- and Asian-Americans become the majority of the electorate, changes in Congressional and executive immigration policy will largely become issues of self-help. In his article on racial jury nullification, Paul Butler cites the fact that black juries hold the power to nullify verdicts in specific instances without having to seek the majority's approval of such acts as the primary benefit of his race-based scheme.¹⁴⁰ This article's proposal is even more attractive because it assumes that, unlike the black jurors who are currently racial and political minorities, Latino- and Asian-American citizens will comprise the voting majority and will therefore be able to effect widespread reform in immigration policy rather than more limited change through individual jury verdicts. To the extent that Latino- and Asian-Americans can muster the support of other groups—Canadian-Americans whose relatives are barred from the diversity lottery, for instance—their power will be further consolidated.

Second, restoring humanity to immigration law will simultaneously restore confidence in an immigration system that is eyed with suspicion by most who come in contact with it. For example, in a recent study by Syracuse University's Government Performance Project, the INS was adjudged the least reliable among the twenty government agencies surveyed, with a rating of "C-."¹⁴¹ Restoring judicial review to deportation decisions and eliminating geographic priorities in issuing immigrant visas would be concrete ways of engendering confidence in the immigration system, prompting perhaps more immigrants to naturalize, thereby creating a cadre of productive, patriotic U.S. citizens.

Section 1, Clause 5 of the Constitution should be amended to eliminate the requirement that the President be a natural born citizen (or a naturalized citizen at the time of the adoption of the Constitution, an impossibility and therefore irrelevant today) because it discriminated against naturalized citizens. While the class unanimously thought the requirement antiquated, no one expressed a strong belief that such a constitutional amendment would pass.

140. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 712 (1995) ("African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.").

141. *All Things Considered: Immigration and Naturalization Service Is Under Fierce Criticism for Poor Leadership, Accountability and Management* (NPR radio broadcast, Apr. 6, 2000), available at 2000 WL 21470322.

Third, positive changes in immigration law led by reform-minded Latino- and Asian-Americans may lead to similar reforms in domestic laws adversely affecting citizens of color. To the extent that race and alienage intersect so closely, perhaps the concurrent liberal reforms in immigration law and domestic civil rights laws of the 1960s and early 1970s¹⁴² might experience a renaissance in the 2100s when Latino- and Asian-Americans join forces with like-minded African- and European-Americans to reverse the backlash of the 1980s and 1990s.

And fourth, because the plenary power doctrine will likely persist, a political agenda of immigration reform will likewise thrive as the federal courts maintain their deference towards Congressional and executive action. Despite its anti-Chinese and anti-Communist roots,¹⁴³ the plenary power doctrine's emphasis on judicial deference to political reforms in immigration policy bodes well for Latino- and Asian-American leaders who would seek to fortify noncitizens' rights within the body of immigration law.

It perhaps goes without saying that the proposed political solution is not without its disadvantages. The next section identifies possible drawbacks of the proposed theory and seeks to address them.

B. The Disadvantages of a Political Strategy: Possible Pitfalls

Perhaps the biggest criticism of any race-based political strategy is that there is no guarantee that a sizeable enough number of the group will agree to the suggested immigration reforms. Because the terms "Latino" and "Asian" purport to include so many different ethnic groups, it is difficult to assume that these disparate subgroups will subscribe to one platform. For many Latinos, national origin alliances, say, to the Dominican Republic or Cuba, resonate more than the generic term Latino or Hispanic.¹⁴⁴ Requiring a certain level of

142. See *supra* notes 91-91 and accompanying text.

143. See *supra* Part I.A.

144. Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197, 198 n.8 (1998) (citing RODOLFO O. DE LA GARZA ET AL., *LATINO VOICES: MEXICAN, PUERTO RICAN, AND CUBAN PERSPECTIVES ON AMERICAN POLITICS* 39 (1992) (reporting that Latinos are more likely to self-identify in national origin terms — Mexican-American, say — than to use pan-ethnic designations such as Latino, Hispanic or Spanish-American)); see also Max J. Castro, *Making Pan Latino: Latino Pan-Ethnicity and the Controversial Case of the Cubans*, 2 HARV. LATINO L. REV. 179 (1997); Laura E. Gómez, *Constructing Latina/o Identities*, 19 CHICANO-LATINO L. REV. 187, 190 (1998).

At the same time, LatCrit scholars are wary of homogenizing varied experiences under a single "Latino" or "Hispanic" rubric. Even as we embrace an expansive Latino political coalition and recognize points of shared history and contemporary experience, LatCrit scholars should seek

pan-Latino unity is further complicated when Latinos try to join their disparate group with yet another multiethnic group—Asians.¹⁴⁵ Further, disputes as to who is the authentic “Asian” or “Latino” mar political unity, with membership in the pan-Latino/Asian group possibly becoming a litmus test for authenticity. Put another way, those who choose to disagree with the immigration reforms advocated by the coalition risk being labeled not authentically Latino or Asian.¹⁴⁶ Yet another variant on this problem arises when one Asian or Latino is asked to speak for the rest of his or her group. Frank Wu believes he is asked to speak publicly about immigration, affirmative action, and other topics to provide the “Asian-American perspective,” and yet he “confesses”:

But I am a fraud. I am simply unqualified, because I cannot speak for all Asian Americans. I doubt that anybody else could do any better either, or that anybody else would wish to try that impossible task of representing a race. I suspect, though, that at every appearance after I give my usual disclaimer, my audience continues to see and hear me as a spokesperson on behalf of Asian Americans.¹⁴⁷

These four issues—assuming pan-Asian and Latino identity, cross-cultural coalition building, authentic identities, and the race spokesperson phenomenon—are both practical and daunting problems.¹⁴⁸ However, they are not insurmountable. To the extent

to problematize pan-Latino identity. Specifically, we must continue to engage in unpacking differences among those we label “Latinos” in the United States.

Id.; see also Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience, 10 LA RAZA L.J. 173, 207 (1998) (“Latinos in the United States can trace their ancestry throughout Latin America. Despite this fact, political efforts in recent years have tended to homogenize the Latino experience. Pan-Latino coalition building, however, often confronts national origin allegiances that trump any collective ‘Latino’ identity.”) (citation omitted).

145. See, e.g., Rachel F. Moran, *What If Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1320 (1997) (“The distinctions between Latinos and Asian Americans are significant enough to merit careful consideration before assuming that each group has similar policy needs.”). As Bernice Johnson Reagon has written: “Coalition work is not work done in your home. Coalition work has to be done in the streets. And it is some of the most dangerous work you can do. And you shouldn’t look for comfort.” Bernice Johnson Reagon, *Coalition Politics: Turning the Century in Home Girls: A Black Feminist Anthology*, in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1104, 1106 (Juan F. Perea et al. eds., 2000).

146. See, e.g., Margaret (H. R.) Chon, *On the Need For Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 28-31 (1995) (noting impossibility of representing “authentic” Asian).

147. Frank Wu, *Providing Some Perspective: On Being a Professional Asian American*, ASIANWEEK, Feb. 27, 1997, at 9, available at 1997 WL 11561869.

148. For an analysis of other particular challenges for the Latino community, see Johnson, *Civil Rights*, *supra* note 17.

that the new majority group members will be composed mostly of new immigrants, it is likely that these Latino- and Asian-Americans will have had a shared immigrant experience at some level. These shared experiences will go a long way toward helping identify specific human rights issues that need to be addressed in immigration policy. Taking an earlier example, many Latino- and Asian-Americans, who as immigrants could not participate in the diversity lottery, might support an initiative to abolish such visas. After identifying the issue, the core group need only muster the support of most Latino- or Asian-Americans, and need not have every member of those groups agree with the proposed reform. Further, as suggested above, the core group should also reach out to like-minded European and African-Americans who either share the immigrant experience of the core group or agree with the proposal. Finally, there are numerous examples of effective coalition building, from the multiracial forces that supported the civil rights movement of the 1960s,¹⁴⁹ to a more recent lawsuit filed against the University of California at Berkeley, alleging that its admissions policies were discriminatory.¹⁵⁰

Of course, there are other examples of people of color fighting amongst themselves rather than building coalitions. Eric Yamamoto recounts litigation involving a group of Chinese-Americans who sued the San Francisco Unified School District challenging the constitutionality of a desegregation plan that placed a forty percent cap on Chinese admissions while allowing admission to allegedly less qualified blacks and Latinos.¹⁵¹ But beyond group dynamics, each individ-

149. For two excellent histories of this important period, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988) and TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1998). Indeed, the civil rights boycotts led by Dr. Martin Luther King were not simply a multiethnic coalition, but a multigenerational one as well. For a wonderful discussion of the role that the younger members of that movement played, see generally DAVID HALBERSTAM, *THE CHILDREN* (1998).

150. The NAACP Legal Defense and Educational Fund, the Mexican American Legal Defense and Education Fund and the Asian Pacific American Legal Center of Southern California jointly filed the suit on behalf of several minority students. See, e.g., Evelyn Nieves, *Civil Rights Groups Suing Berkeley Over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A9; Kenneth R. Weiss, *UC Berkeley Sued Over Admissions Policies*, L.A. TIMES, Feb. 3, 1999, at A3; see also Mirya Navarro, *Bricks, Mortar and Coalition Building*, N.Y. TIMES, July 13, 2000, at A1 (describing coalition-building efforts among black, Latino, and white contractors in Houston).

151. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 822-27 (1997).

ual can make efforts to cross racial lines and build relationships with others.¹⁵²

Related to this concern about the “spokesperson phenomenon” is the problem of stereotyping. Might a Latino-/Asian-American coalition that seeks immigration reform simply perpetuate the stereotype of the Latino and Asian as the perpetual foreigner? Neil Gotanda¹⁵³ and Natsu Taylor Saito¹⁵⁴ describe the racial structure of America as being one in which European- and African-Americans are presumed to be U.S. citizens, while Latino- and Asian-Americans are not. Arguably, just as the average audience member assumes that Frank Wu speaks for all Asians when he talks about issues of concern to the Asian community,¹⁵⁵ a Latino-/Asian-American coalition advocating immigration reform might reinforce the belief that Latinos and Asians will always be foreigners—unassimilable, disloyal, and clannish. Such stereotypes of the perpetual foreigner pervaded the Court’s justification for Congressional plenary power over immigration in *Chae Chan Ping*:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, *who will not assimilate with us*, to be dangerous to its peace and security, their exclusion is not to be

152. As a Filipino with a Latino surname and an Asian appearance, the author has found that he is able to find commonalities with both groups, leading to coalition formations beyond his own ethnic group. See Victor C. Romero, “Aren’t You Latino?”: *Building Bridges Upon Common Misperceptions*, 33 U.C. DAVIS L. REV. 837 (2000).

153. Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087 (Hyung-Chan Kim ed., 1992).

[W]ithin the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S. citizen and socially an American . . . [but] these presumptions are *not* present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners . . .

Id. at 1096 (emphasis in original). See also Robert S. Chang, *A Meditation on Borders*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 244, 249 (Juan Perea ed., 1997) (concluding that Asian-Americans are “perpetual foreigners” whose “[f]oreign-ness is inscribed upon our bodies in such a way that Asian Americans carry a figurative border with us.”).

154. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (arguing that concept of Asian-Americans as foreigners reinforces American racial hierarchy). See also Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347 (1997) [hereinafter Johnson, *Racial Hierarchy*] (discussing Saito’s article).

155. See *supra* text accompanying note 147.

stayed because at the same time there are no actual hostilities with the nation of which the foreigners are subjects.¹⁵⁶

Latino- and Asian-Americans seeking immigration reform will undoubtedly confront this issue, but it is a reality of life in America that would probably persist whether or not these groups sought to reform the nation's immigration policy. To the extent that anti-Asian sentiment has persisted over time from the 1880s in *Chae Chan Ping*, to the wartime 1940s and *Korematsu v. United States*,¹⁵⁷ to the author's own harassment in 1996 for having married a European-American,¹⁵⁸ it is doubtful that such prejudice will abate in the foreseeable future.¹⁵⁹ Thus, the spectre of perpetuating the perceived foreignness of Latino- and Asian-Americans should not be enough to deter the new majority group members from seeking effective immigration reform. Indeed, such reform, especially if enacted with the support of "presumptive" citizens of European and African descent, might have the salutary effect of actually breaking down the foreignness presumption by restoring the image of America as an immigrant nation for all colors.

Finally, a third major criticism of this proposal is that it may take more time to pass legislation than to win a lawsuit and, unlike in litigation, general political reform (as opposed to private bills) will not address the specific problems facing persons today. Despite the fact that a large number of bills are introduced before Congress each year,

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

157. 323 U.S. 214 (1944) (holding Japanese internment during WWII constitutional); see also Gotanda, *supra* note 153, at 1098 ("The evacuated Japanese Americans, including U.S. citizens, were presumed to be sufficiently foreign for an inference by the military that such racial-foreigners must be disloyal. Japanese Americans were therefore characterized as different from the African American racial minority. With the presence of racial foreignness, a presumption of disloyalty was reasonable and natural."); Neil Gotanda, "Other Non-Whites" in *American Legal History*, 85 COLUM. L. REV. 1186, 1190-92 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983), and discussing *Korematsu* and other wartime "camp cases"); Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395 (1999) (reviewing WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998), and describing judges who fought to uphold civil liberties, of, among others, Japanese internment camp victims).

158. Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 30-32 (1998) (describing harassment of author and his wife). Interestingly, the author, who is Filipino, was labeled a "Japanese sonofabitch," which harkens back to the wartime prejudice that produced such decisions as *Korematsu*. *Id.* at 31.

159. A report by the National Asian Pacific American Legal Consortium revealed that there was a thirty-seven percent increase in suspected and proven anti-Asian incidents between 1993 and 1995. See NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS: THE CONSEQUENCES OF INTOLERANCE IN AMERICA I (1995).

very few bills are eventually enacted into law.¹⁶⁰ In addition, while private bills for relief from deportation were common during the early years of immigration to restore humanity to the stringent application of some laws,¹⁶¹ the prospect of having a private immigration bill approved today is quite poor. For instance, during the first session of the 105th Congress, 35 private immigration bills were introduced, but none were enacted; in the 104th Congress, only 2 of the 59 private bills introduced passed both houses.¹⁶²

However, if the primary obstacle to judicial protection of immigrants' rights within the immigration code has been and continues to be the plenary power doctrine, the earlier discussion in Part I suggests that immigration reform advocates would be in for a much longer wait should they choose only to litigate against the doctrine in court.¹⁶³ From *Chae Chan Ping* in 1883 to *Reno v. AADC* in 1999, the plenary power doctrine has shown no real signs of weakening.¹⁶⁴ Moreover, just as litigation strategies should be used to supplement political efforts in seeking social change,¹⁶⁵ a political agenda focusing on immigration reform should complement further efforts to challenge the plenary power doctrine in the courts.¹⁶⁶

160. For the first session of the 105th Congress, for example, 1,568 bills were introduced in the Senate and 3,088 bills were introduced in the House of Representatives. Of those, only 153 were enacted into law. 145 CONG. REC. D29-D31 (daily ed. Jan. 20, 1999). For more statistics on Congress, see generally NORMAN J. ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS 1995-1996* (1996).

161. ALEINKOFF ET AL., *supra* note 25, at 787-88; see also LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY*, *supra* note 104, at 41-42 (discussing use of private bills).

162. U.S. DEP'T OF JUSTICE, INS, 1997 STATISTICAL YEARBOOK OF THE INS 197, Table 74 (Oct. 1999), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1997YB.pdf>.

163. As Peter Schuck has noted, "[c]lassical immigration law proved to be remarkably durable." Schuck, *supra* note 27, at 3. Compare Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 303-05 (predicting eventual demise of plenary power doctrine), with Legomsky, *Ten More Years*, *supra* note 18 (lamenting resilience of plenary power doctrine).

164. See *supra* Part I.

165. "[Lawyers who advocate social change] . . . should consider how traditional legal action might complement and encourage—not replace—community activism and political involvement. Put simply, an exclusive focus on litigation will not accomplish fully the desired objective." Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 205 (1999); see also Johnson, *Racial Hierarchy*, *supra* note 154, at 362-67 (asking whether law is the ideal vehicle for social change for American people of color); Johnson, *Civil Rights*, *supra* note 17, 45-56 (questioning whether law is viable method for improving condition of Latinos).

166. Indeed, Thurgood Marshall's litigation efforts on behalf of the NAACP were but part of a larger civil rights movement to achieve equal rights for blacks. See

By using a two-pronged immigration reform strategy of politics and litigation, Latino- and Asian-Americans should have the best shot at achieving meaningful change for those currently aggrieved by existing law (through litigation) and for future generations to come (through political reform). While some might characterize this immigration reform platform as divisive because it pits racial groups against each other, the thrust of the movement is not to create special privileges for Latino- and Asian-Americans, but rather to eliminate all vestiges of discrimination aimed, whether consciously or not, at those of Latino and Asian descent.

The final section of this paper concludes with a return to the Elián González case to illustrate how those favoring expanding the ability of noncitizen children to petition for asylum as individuals should petition their Congressional leaders to change the immigration code to allow for such an event, in addition to engaging in arguably less effective street demonstrations and, as the Eleventh Circuit recently ruled, litigation.

CONCLUSION ELIÁN AND "ALIENS" REVISITED

While the particular protagonists in the Elián dispute had no practical choice but to seek judicial intervention, the hundreds of Cuban-American supporters who engaged in protest marches and vigils could have more constructively used their time by also working toward a long-term political strategy of reforming asylum law to expand the rights of children to apply for refugee status on their own.¹⁶⁷

As discussed briefly in the introduction, Elián's saga boiled down to the desires of his Miami relatives to keep him in the United States by having him seek political asylum against the wish of his father that the boy be returned to Cuba to live with him.¹⁶⁸ Because the INS decided that Elián had no standing to file an asylum claim over the express wishes of his father,¹⁶⁹ the Miami relatives, not surprisingly,

MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961* (1994).

167. One might argue that children as young as Elián should not be allowed to apply for asylum on their own because they could not possibly understand the process. However, that determination could be made on a case-by-case basis, rather than presumptively precluding children because of their young age. In tort law, for example, most jurisdictions hold children liable for their intentional or negligence torts as long as the requisite mental state can be proven. *See, e.g., DAN B. DOBBS, THE LAW OF TORTS* 50 (2000) (describing child tort liability).

168. *See supra* notes 8-8 and accompanying text.

169. Cooper Memo, *supra* note 8, at 2, 10-11.

resorted to the courts for relief, filing claims in both state¹⁷⁰ and federal¹⁷¹ courts. Meanwhile, persons and groups sympathetic to keeping Elián in America mobilized politically, from members of Congress exploring the idea of passing a private bill granting Elián automatic legal permanent resident status,¹⁷² to a grassroots vigil of Cuban-Miamians bent on defying the INS's decision to expel the child.¹⁷³ However, there appears to have been no unified, long-term political strategy on the part of those supporting Elián's asylum claim to work toward a permanent revision of the immigration code to allow future children greater rights to petition for asylum over their parents' objections.

And how did the Elián supporters fare? The Eleventh Circuit ruled on June 1, 2000, that the INS fairly exercised its discretion in deciding to return the child to his father.¹⁷⁴ The panel's reasoning evinced an implicit endorsement of the plenary power doctrine by deferring to the agency's discretion. Because Congress had not specified how the words "[a]ny alien . . . may apply for asylum"¹⁷⁵ would apply to a six-year-old child whose father did not want him to apply for asylum, it was within the INS's power, as the agency responsible for enforcing U.S. asylum law, to interpret this language. While the court stated that it would not approve arbitrary INS actions or those inconsistent with the agency's own decisions, it could not substitute its judgment for the agency's. Without specifically mentioning the plenary power doctrine but relying instead on its analogue, the *Chevron* doctrine,¹⁷⁶ the court unequivocally demonstrated a deference to the

170. *Gonzalez v. Gonzalez-Quintana*, No. 00-00479 FC 29, 2000 WL 419688 (Fla. Cir. Ct. Jan. 10, 2000) (granting temporary protective order to Elián's great-uncle), *vacated*, No. 00-00479 FC 28, 2000 WL 492102 (Fla. Cir. Ct. Apr. 13, 2000) (vacating order and dismissing case because matter is federally preempted).

171. *Gonzalez v. Reno*, 212 F. 3d 1338 (11th Cir. 2000).

172. *See DeYoung, supra* note 6, at A3.

173. *See, e.g., Rick Bragg, Cuban's Family Defies Reno; Court Issues a Stay*, N.Y. TIMES, Apr. 14, 2000, at A1.

174. *Reno*, 212 F.3d at 1338.

175. 8 U.S.C. § 1158(a)(1) (1994).

176. *See Reno*, 212 F.3d at 1348-49. Court deference to agency decisionmaking stems from the Supreme Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), holding that reviewing courts must give greater deference to an agency's interpretation of its own statutes. Such deference parallels the judiciary's acceptance of the plenary power doctrine and its minimal scrutiny of Congressional enactments. Put simply, just as the plenary power doctrine compels the courts to defer to Congress, the *Chevron* doctrine requires the judiciary to generally defer to executive agency actions. *See* Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990). For an empirical analysis of the impact of the *Chevron* doctrine in immigration cases, see Peter H. Schuck &

political branches of government and their power over immigration policy:

Because the statute is silent . . . , Congress has left a gap in the statutory scheme. From that gap springs executive discretion. As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to fill such gaps. Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited.¹⁷⁷

Further evidence of the court's deference comes from the panel's summary dismissal of Elián's constitutional due process claim: "We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion."¹⁷⁸ It followed this single sentence with a citation to language from *Jean v. Nelson*, an Eleventh Circuit precedent upheld by the Supreme Court on other grounds: "Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . ." ¹⁷⁹

After the decision, lawyers for the Miami relatives sought both an emergency stay from Justice Kennedy and a formal appeal to the Supreme Court, but to no avail.¹⁸⁰ Given the Supreme Court's deference to the political powers on immigration policy,¹⁸¹ it was highly unlikely that either the appeal or the stay would have been issued.

The short-term political strategy to keep Elián in the U.S. likewise did not bear fruit. While Congress did conduct hearings to examine Attorney General Reno's handling of the case,¹⁸² Elián returned to Cuba with his father following the INS's decision and Congress's reluctance to pass a private bill to override the agency's ruling. The

Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 170-72 (1992).

177. *Reno*, 212 F.3d at 1348-49 (citations omitted).

178. *Id.* at 1346.

179. See *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985). It should come as no surprise by now that the en banc panel in *Jean* cited a long line of Supreme Court precedent—including *Fong Yue Ting*, *Mezei*, and *Landon*—in support of this "plenary power" statement. *Id.* at 967-68.

180. Christopher Marquis, *Relatives of Boy Ask Justices to Block His Return to Cuba*, N.Y. TIMES, June 27, 2000, at A14; *Elián Goes Home*, N.Y. TIMES, June 29, 2000, at A30.

181. See *supra* Part I.

182. See Press Release, Representative Bob Barr, Barr Calls for Congressional Hearings on the Seizure of Elián Gonzalez (Apr. 24, 2000), available at 2000 WL 7979457; David E. Rosenbaum, *Congressional Republicans to Investigate Taking of Boy: Reno is Called to Appear at Capitol Today*, N.Y. TIMES, Apr. 25, 2000, at A20.

demonstrations and vigils, rather than eliciting support for their cause, triggered a backlash, prompting the observation that some in Miami's "Cuban-American community overplayed their hand."¹⁸³

Given the short-term litigation and political losses sustained by the pro-Elián-in-America forces, perhaps their best bet would be a long-term political strategy to expand the asylum rights of children through the political process. Now that the Eleventh Circuit has identified that the applicable statutory language "[a]ny alien . . . may apply for asylum" does not specify how it applies to children, those in the Cuban-American community and others who believe in expanded rights for children in this area should petition Congress to fill the gap instead of leaving it to the discretion of the INS.¹⁸⁴ Indeed, exceptions abound in the immigration code, particularly for those groups of individuals whom Congress has decided deserve special protection. For example, battered spouses and children of U.S. citizens are allowed to file immigrant visa petitions independently, contrary to the usual procedure that requires the citizen to file a petition on the relative's behalf.¹⁸⁵

Taking this article's prescription, a coalition of like-minded individuals led by Latino- and Asian-American advocates for immigration reform could put forth an analogous exception that would allow children from Cuba and other Communist regimes the ability to file for asylum over their parents' objections when there is some evidence that the parents are under the influence of the Communist regime and, therefore, may not be acting in the child's best interest.¹⁸⁶ If the federal courts continue to uphold the plenary power doctrine and its ana-

183. William Safire, *Human Interest Rules*, N.Y. TIMES, Apr. 10, 2000, at A19. Indeed, Safire described Miami-Dade mayor Penelas's defiance of federal authority as a "foolish threat." *Id.*

184. The Miami-based Florida Immigrant Advocacy Center is concerned that the Eleventh Circuit's decision in the Elián case might have the effect of granting the INS more discretion than Congress intended. In an amicus brief filed in the case, the Center joined with two other human rights organizations in arguing that Congress had never denied children the right to seek asylum, something that the INS denied Elián in this case. See Siobhan Morrissey, *The Next Gideon? Elián Rulings Could Usher in Free Legal Aid for Juvenile Asylum Seekers*, A.B.A. J., Aug. 2000, at 26.

185. Compare 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (1994) (outlining battered spouse or child exception), with 8 U.S.C. § 1154(a)(1)(A)(i) (1994) (permitting U.S. citizen to file immigrant petition for noncitizen spouse). See also CHARLES GORDON ET AL., 1 IMMIGRATION LAW AND PROCEDURE § 1.03[4][D](2000) (noting battered spouse or child exception).

186. This was one of the arguments the Miami relatives made to the INS in this case, which the INS rejected as not substantiated by the weight of the evidence. See Cooper Memo, *supra* note 8, at 6. The proposal here would allow the child to file for asylum as long as there is some evidence of possible Communist government coercion, which there was here, through the testimony of the Miami relatives. *Id.* at 5.

logue, the *Chevron* doctrine, such a statutory exception would likely survive judicial scrutiny, just as the INS's policy was upheld by the Eleventh Circuit here. As stated in the introduction,¹⁸⁷ this article takes no position on the Elián case, but hypothesizes this "child's rights" exception to asylum law to illustrate the viability of a long-term political strategy that could be more effective than the short-term political solutions and emergency litigation tactics, which, while understandable in Elián's particular case, do nothing for similarly-situated children in the future.

Perhaps American society has had enough of the Elián story that it is unreasonable to expect even the most ardent supporters to devise and execute a long-term political strategy for expanding children's asylum rights.¹⁸⁸ This author's hope, however, is that those who believe in the importance of human rights in the immigration context will look beyond the specifics of the Elián saga and learn from the Eleventh Circuit's decision and the Supreme Court's pronouncements that, while litigation may be a necessary strategy in some instances, the more promising avenue for true immigration reform lies in the halls of Congress and the INS, especially if those who have the most at stake, new citizens from Latin America and Asia, translate their future demographic strength into focused political power at the ballot box.

It is no small irony that the noncitizen's name in this story—"Elián"—is an anagram for the term "alien"; "Elián" refers to the cherub-faced little boy, an individual whose asylum rights were allegedly compromised, while the term "aliens" refers to the undifferentiated mass of people who enter and leave this country and around whom the immigration law has built a labyrinthine federal code. It is this irony that makes the problem of immigration law such a perplexing one. How does a country regulate the flow of a large number of noncitizens across its borders while simultaneously ensuring that each visitor is treated with fairness? With the forecasted changes in

187. See *supra* notes 13-14 and accompanying text.

188. America's fleeting tolerance for any cause may be summed up by Elián's cousin's inclusion in the pejorative column of *Time* magazine's "Winners & Losers" section, which identifies the people of the week whom the magazine believes deserve recognition or reprimand. See *Winners and Losers*, *TIME*, June 12, 2000, at 21. The write-up for Marisleyxis González, an ardent advocate for Elián's staying in the U.S., scathingly reads, "Loses latest and (almost) last appeal to keep Elián. Get a life, girl; your 15 minutes are up[.]" *Id.*

America's demography driven largely by immigration, it will be particularly important for future U.S. policy-makers to be ever mindful of the "Elián" among the "aliens" as the country navigates the murky shoals of race and alienage in the twenty-first century.