KEYNOTE TO IMMIGRATION IN THE TRUMP ERA SYMPOSIUM: JUDICIAL REVIEW AND THE IMMIGRATION LAWS

By Kevin R. Johnson*

I am privileged and honored to deliver a keynote at a symposium on "Immigration in the Trump Era." Immigration today is headline news and I look forward to sharing some thoughts on the subject. And it is always wonderful to return to my hometown, Los Angeles, where I received my first lessons on immigration, both in life and law.[1]

My remarks will consider the long-term trajectory of the judicial review of the immigration laws. I will sketch some thoughts, not necessarily tied to any particular immigration issue of the day–and there, of course, are many. The Trump administration's regular flurry of immigration initiatives often leave me breathless, if not speechless.[2] I doubt that I am alone. Immigration

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1. *See* KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY 73-88 (1999).

2. For critical analysis of President Trump's early immigration initiatives, see Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243 (2017), available at https://harvardlawreview.org/2017/05/immigration-and-the-bully-pulpit/; Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253 (2018); Kevin R. Johnson *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611 (2017). Many of the Trump administration's immigration enforcement measures target immigrants of color. *See* Rose Cuison-Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575 (2019); Kevin R. Johnson *Trump's Latinx Repatriation*, 66 UCLA L. REV. (forthcoming 2019); *see also* Francis I. Mootz III & Leticia M. Saucedo, *The "Ethical" Surplus of the War on Illegal Immigration*, 15 J. GENDER RACE & JUST. 257, 258 (2012)

law professors have had quite a challenge just keeping up with the many immigration initiatives of the last two years (and sometimes the last two days). And it is hard to believe that it has only been two years.

The overall tone of my message today may surprise some observers. It is optimistic, which does not come naturally these days to many who follow contemporary immigration law and its enforcement. Although not always in agreement with specific decisions, I am content with the general direction of immigration law in the courts. Importantly, three recent Supreme Court decisions reveal much positive about the future direction of the judicial review of immigration matters. The three decisions are:

1. *Sessions v. Dimaya*;[3]

Let me be one of the first of many today to congratulate Professor Andrew Knapp, Southwestern's Appellate Litigation Clinic, and Director Professor Gowri Ramachandan, for prevailing in the U.S. Court of Appeals for the Ninth Circuit and U.S. Supreme Court. That work exemplifies the precise kind of clinical legal education that all law schools should have as part of the curriculum.[4]

2. *Sessions v. Morales-Santana*[5]; and

3. *Trump v. Hawaii*.[6]

In two of the cases, *Sessions v. Dimaya* and *Sessions v. Morales-Santana*, the Supreme Court invalidated on constitutional grounds provisions of the immigration and nationality laws. This is nothing less than an extraordinary development. The third decision probably is the one with which most people in the audience–and the nation as a whole–are most

(contending that "the war on illegal immigration . . . is a war against the perceived threat posed by Mexicans living in the United States").

3. 138 S. Ct. 1204 (2018).

4. *See* Lindsay M. Harris, *"Learning in Baby Jail": Lessons from Law Student Engagement in Family Detention Centers*, 25 CLINICAL L. REV. 155 (2018) (reviewing clinical programs serving family detention centers); Colleen F. Shanahan et al., *Measuring Law School Clinics*, 92 TUL. L. REV. 547 (2018) (evaluating the impact of clinics on training lawyers and serving low-income clients); Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998) (analyzing pedagogical and social justice benefits of clinical legal education by looking at the Immigration Law Clinic at UC Davis School of Law).

5. 137 S. Ct. 1678 (2017).

6. 138 S. Ct. 2392 (2018).

familiar. In *Trump v. Hawaii*,[7] the Court by a 5-4 majority engaged in judicial review–although in a narrow, perhaps grudging fashion–and upheld the ban on the admission of noncitizens from several nations populated predominantly by Muslims; the Trump administration defended the "travel ban" on national security grounds, a rationale for which judicial deference to the Executive is at its zenith. Many, including four Justices, believed that anti-Muslim animus, not security and safety concerns, truly motivated the ban.[8] But the fact that the Court engaged in any judicial review is newsworthy. As students of immigration legal history know, that has not always been the case.

A bit of background is necessary to understand why these decisions–particularly *Trump v. Hawaii*–lead me to be optimistic. One of the foundations of immigration law has been something called the "plenary power doctrine," which is akin to a constitution-free zone for the immigration laws and, at times, Executive actions. In 1889, the Supreme Court decided *The Chinese Exclusion Case*,[9] which established the rule prohibiting judicial review of the immigration laws, a defining characteristic of what is known as "immigration exceptionalism."[10] According to the Court, Congress has "plenary power" over the immigration laws and the courts should not interfere with congressional immigration judgments. Although starkly incongruent with modern constitutional law,[11] the plenary power doctrine remains, as they say, "good law," never having been overruled by the Supreme Court.[12]

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7. *See id.* at 2419-23. In reviewing the travel ban, the Court acknowledged precedent precluding judicial review of immigration matters. *See id.* at 2407, 2418-20. For criticism of the decision, see Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1187-89, 1209-13 (2018); Jill E. Family, *The Executive Power of the Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 611-27 (2019); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Façade of National Security*, 128 YALE L.J. F. 688 (2019), available at https://www.yalelawjournal.org/pdf/YamamotoOyama_q51woru1.pdf.

8. *See Trump v. Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting) (joined by Justice Kagan); *Trump v. Hawaii*, 138 S. Ct. at 2333 (Sotomayor, J., dissenting) (joined by Justice Ginsburg).

9. 130 U.S. 581 (1889).

10. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392-94 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981-89 (2013).

11. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996).

12. *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (analyzing the modern vitality of the plenary power doctrine).

We have seen changes over time. Leading scholars have thoroughly documented the shift in the law. Steve Legomsky and Cristina Rodriguez's influential immigration casebook details the "cracks" in the plenary power doctrine in modern Supreme Court decisions.[13] In a pair of classic articles, Hiroshi Motomura insightfully identifies techniques frequently employed by the courts to evade the dictates of the plenary power doctrine and its harsh results.[14] Jack Chin in 2000 wrote of the demise of the plenary power doctrine.[15] Although I questioned his argument at the time,[16] he ultimately turned out to be more right than not.

Although the first panel of the symposium will delve into the intricacies of the case, I want to highlight the significance of *Sessions v. Dimaya* to all of immigration law. I understand the decision to be an important step in a series of decisions in which the Supreme Court has slowly brought immigration law more into the constitutional mainstream and steadily moved away from the plenary power doctrine.[17] *Sessions v. Dimaya* was a successful challenge to a grounds for removal enacted by Congress. Importantly, the Court historically has struck down precious few removal grounds or other provisions of the immigration laws.

In recent years, as the U.S. government ramped up crime-based removals,[18] the Supreme Court has decided a steady stream of criminal-

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13. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 152-220 (6th ed. 2015).

14. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 578–80 (1990).

15. *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). The prediction, however, was not immediately realized. Indeed, shortly after publication of Professor Chin's article, the tragic events of September 11 saw the courts pull back from meaningful review of the executive's immigration policies pursued in the name of national security. *See, e.g.*, cases cited *infra* note 46 (citing cases refusing to disturb the "special registration" of certain Arabs and Muslim noncitizens).

16. *See* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000).

17. *See generally* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (analyzing Roberts Court immigration decisions and concluding that Court generally applies standard modes of statutory interpretation and routine administrative deference doctrines); Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215 (2018) (contending that the courts today apply ordinary administrative and constitutional principles to immigration cases).

18. For criticism of the contemporary focus of the U.S. government on crime-based removals, see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614-16 (2012); Angelica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281 (2010); César

removal cases. Most involved routine questions of statutory interpretation and deference to administrative agencies, issues that only law professors could truly love.[19] *Sessions v. Dimaya* is different. It involved a straight-on constitutional challenge to a criminal-removal provision.

An immigrant convicted of an "aggravated felony" under 8 U.S.C. § 1101(a)(43) is subject to removal and is ineligible for most forms of relief from removal.[20] Surprisingly enough, the expansive aggravated felony definition includes crimes that are not felonies or aggravated.[21] The definition incorporates by reference 18 U.S.C. § 16(b), which defines a "crime of violence" to encompass "any . . . *offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*" (emphasis added).

A lawful permanent resident from the Philippines, James Garcia Dimaya has lived in the United States since 1992. He had two residential burglary convictions; *neither crime involved violence*. Nevertheless, the immigration court and the Board of Immigration Appeals (BIA) ordered Dimaya removed from the United States on the grounds that he was convicted of "crimes of violence." The Ninth Circuit, in an opinion by Judge Stephen Reinhardt–I will return to him later–overturned the BIA, finding that Section 16(b) was unconstitutionally vague.[22] To reach that conclusion, the court relied on the

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Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197 (2018); Yolanda Vásquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015).

19. *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (holding that statutory rape conviction was not an "aggravated felony"); Torres v. Lynch, 136 S. Ct. 1619 (2017) (finding that a state criminal offense constituted an "aggravated felony" under the immigration laws); Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (concluding that a single possession of drug paraphernalia conviction did not trigger removal); Moncrieffe v. Holder, 559 U.S. 184 (2013) (vacating removal order based on a single conviction for possession of a small amount of marijuana); *see also* Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014) (deferring to agency interpretation of the immigration statute); Holder v. Gutierrez, 566 U.S. 583 (2012) (to the same effect); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (same).

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

21. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-40 (2000) (criticizing the "Alice-in-Wonderland-like definition of the term 'aggravated felony'" and observing that an aggravated felony need not be "aggravated" or even a felony, with some misdemeanors defined to be aggravated felonies for immigration purposes).

22. *See* Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *aff'd sub nom.*, Sessions v. Dimaya, 138 S. Ct. 1204 (2018). For incisive analysis of the void for vagueness doctrine in immigration law, see Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127 (2016).

Supreme Court's 2015 decision in *Johnson v. United States*.[23] In that case, the Court, in an opinion by Justice Antonin Scalia, found that the Armed Career Criminal Act's definition of "violent felony" was so vague as to violate the due process clause.

After the death of Justice Scalia, the justices ordered re-argument in the *Dimaya* case, a move suggesting that the Justices were closely divided on the merits.[24] With Senate confirmation of Justice Neil Gorsuch, the Court held re-argument. Justice Gorsuch ultimately was the fifth and deciding vote in favor of Dimaya.[25]

The Court, in an opinion by Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and, in large part, Gorsuch, affirmed the Ninth Circuit's ruling.[26] Applying the void-for-vagueness doctrine to the removal ground, the Court concluded that the "crime of violence" provision in the aggravated felony definition poses the same vagueness and due process problems, including unpredictability and arbitrariness, as those identified by the Court in the statute at issue in *Johnson v. United States*. The Court concluded that *Johnson* dictated the result in the case because "none of the minor linguistic disparities in the statutes [made] any real difference."[27]

Justice Gorsuch concurred in part and concurred in the judgment.[28] Emphasizing at the outset that "[v]ague laws invite arbitrary power,"[29] he laid out the constitutional foundations for vagueness challenges that Justice Thomas questioned at length in his dissent. Justice Gorsuch traced the history of invalidating vague laws back to the veritable fount of legitimacy–Blackstone–and the long "tradition of courts refusing to apply vague statutes."[30]

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23. 135 S. Ct. 2551 (2015).

24. *See* Kevin R. Johnson, *No Decision in Two Immigration Enforcement Cases*, SCOTUSBLOG (June 26, 2017, 4:02 p.m.), available at http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases/.

25. *See* Kevin R. Johnson, *Opinion Analysis: Crime-Base Removal Provision is Unconstitutionally Vague*, SCOTUSBLOG (Apr. 17, 2018, 2:32 p.m.), available at http://www.scotusblog.com/2018/04/opinion-analysis-crime-based-removal-provision-is-unconstitutionally-vague/.

26. *See Dimaya*, 138 S. Ct. at 1210. The Court previously had held that the removal grounds are subject to void-for-vagueness review. *See* Jordan v. De George, 341 U.S. 223, 229 (1951). The Court in *Dimaya* adhered to that precedent. *See Dimaya*, 138 S. Ct. at 1213 ("[W]e long ago held that the most exacting vagueness standard should apply in removal cases.").

27. *See id.* at 1223.

28. *See id.* (Gorsuch, J., concurring in part, concurring in the judgment).

29. *Id.*

30. *Id.* at 1225.

Chief Justice Roberts, joined by Justices Kennedy, Thomas, and Alito, dissented.[31] The Chief distinguished *Johnson v. United States* on the basis of the different language in the two statutory provisions at issue.[32]

Justice Thomas dissented separately.[33] Throwing the equivalent of a constitutional hand grenade into the works, he expressed "doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause."[34] No other Justice joined Justice Thomas's dissent.

The Court in *Sessions v. Dimaya* ultimately accomplished two critically important things. It (1) applies ordinary vagueness doctrine to a removal ground in the U.S. immigration laws; and (2) strikes down that removal ground on constitutional grounds. No Justice attempted to deny judicial review of the statute because it was an immigration law.

The Court's holding is consistent with its recent decisions applying routine approaches of judicial review to the immigration laws.[35] Put simply, not a single Justice mentioned the plenary power doctrine.[36] What is remarkable about *Sessions v. Dimaya* is that it applies the Constitution to invalidate a removal grounds of the immigration laws.

Other decisions offer further support for the observation that the Supreme Court is bringing immigration law into the constitutional mainstream. The decision in *Trump v. Hawaii*, which I previously discussed,[37] is one example. Although the majority's decision has been criticized,[38] the Court at least engaged in rationality review of the travel ban. Another example is the 2017 decision of the Court in *Sessions v. Morales-Santana*.[39] In an opinion by Justice Ruth Bader Ginsburg, the Court held that gender distinctions favoring women over men in the derivative citizenship

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31. *See id.* at 1234 (Roberts, C.J., dissenting).

32. *See id.* at 1235-40.

33. *See id.* at 1242 (Thomas, J., dissenting).

34. *Id.* (citation omitted).

35. *See* supra note 17 (citing authorities). Dimaya has been analyzed more for its void-for-vagueness doctrine holding than its immigration consequences. *See, e.g.*, *The Supreme Court 2017 Term: Fifth Amendment Due Process Void-for-Vagueness Doctrine* Sessions v. Dimaya, 132 HARV. L. REV. 367 (2018).

36. *See* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 83 IND. L.J. 653, 670 (2018) ("In *Sessions v. Dimaya*, the [Supreme] Court acted consistently with the view that plenary power is on the wane by striking down a substantive deportation ground as void for vagueness, with no reference to a diminished standard of constitutional review in immigration cases.") (footnote omitted).

37. *See supra* text accompanying notes 7-8.

38. *See* supra note 7 (citing authorities).

39. 137 S. Ct. 1678 (2017). At various times in the recent past, the Court had been willing to more or less rubber stamp BIA rulings. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 111 (1988); INS v. Rios-Pineda, 471 U.S. 444, 450-52 (1985); INS v. Wang, 450 U.S. 139, 144-46 (1981).

provisions of the immigration laws violated the Constitution's equal protection guarantee. Justice Ginsburg definitively wrote for the Court that the distinction "cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and status of its male and female citizens."[40] This unequivocal holding came after several relatively recent decisions in which a splintered Court had struggled with similar challenges to gender discrimination in the immigration laws.[41]

The Supreme Court's decisions in *Sessions v. Dimaya*, *Sessions v. Morales-Santana*, and *Trump v. Hawaii* are a positive development in the judicial review of the immigration laws. They are part of a slow process in which the Court now rather consistently:

1. interprets the immigration laws using traditional modes of statutory construction;

2. applies standard administrative law doctrines, including *Chevron* deference,[42] to Board of Immigration Appeals' rulings;

3. does not invoke the plenary power doctrine to dismiss out of hand constitutional challenges to the immigration laws; and

4. ensures compliance with due process in the treatment of noncitizens.[43]

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40. *Sessions v. Morales-Santana*, 137 S. Ct. at 1698; *see* Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170 (2017); Martha F. Davis, *Sex-Based Citizenship Classifications and the "New Rationality"*, 80 ALB. L. REV. 851, 863-64 (2017); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1, 22-25.

41. *See* Nguyen v. INS, 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998); *see also* Flores-Villar v. United States, 564 U.S. 210 (2011) (affirming by an equally divided 4-4 Court a court of appeals' ruling rejecting a constitutional challenge to an immigration provision establishing different standards for children born outside of marriage and outside of the United States to obtain U.S. citizenship, depending on whether the child's mother or father was a U.S. citizen).

42. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (deferring to an agency's interpretation of an ambiguous statute).

43. *See* Johnson, *supra* note 17, at 111-18; Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 884-911 (2015); Mac LeBuhn, *The Normalization of Immigration Law*, 15 NW. J. HUM. RTS. 91, 117 (2017); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4-5 (1984); *see also* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018) (calling on the executive branch to enforce constitutional norms in the application and enforcement of the immigration laws); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017) (noting that courts "have largely . . . declin[ed] to exempt immigration law from generally applicable standards of judicial review"). *But see* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015) (questioning the

These developments should allow for optimism among immigration law professors, optimism that is much needed in these times. I readily admit that it remains to be seen whether and how far the Court will proceed along the path of meaningful constitutional review of the immigration laws. As I mentioned, *Morales-Santana*, for example, was the culmination of a number of closely contested cases over a number of years. The Court's future constitutional immigration decisions likely will follow a similarly contested and, at times, jagged path. At the same time, we can all see how the courts repeatedly have halted the excesses of the Trump administration's aggressive immigration initiatives.[44]

Although recent Supreme Court decisions move the law toward normalizing judicial review of the immigration laws, the courts may make exceptions in cases implicating national security, foreign policy, and the specter of mass migration. Examples include Haitian interdiction and repatriation[45] and the measures taken by the U.S. government after the tragic events of September 11, 2001.[46] Similarly, the courts, like the nation, also have been deeply ambivalent about the legal protections for undocumented workers.[47]

The result in *Sessions v. Dimaya* surprised some people. For example, Judge Stephen Reinhardt who wrote the Ninth Circuit's opinion in *Dimaya* was not optimistic about how the Court would rule in the case. A dedicated

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alleged normalization of immigration law); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U.L. REV. 583, 584-92 (2017) (to the same effect).

44. *See, e.g.*, United States v. California, 921 F.3d 865 (9th Cir. 2019) (affirming in large part the denial of the administration's request to enjoin several California "sanctuary" laws); Regents v. Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (affirming preliminary injunction barring rescission of the Deferred Action for Childhood Arrivals (DACA) policy), *cert. granted*, 2019 U.S. LEXIS 4407 (June 28, 2019); City and Cty. of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (holding that Trump administration lacked congressional authorization to strip federal funding from "sanctuary cities"); *see also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539 (2017) (analyzing critically the Trump administration's efforts to de-fund "sanctuary" cities).

45. *See, e.g.*, Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) (upholding order to interdict Haitian asylum seekers on the high seas and return them to Haiti).

46. *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006) (refusing to suppress evidence obtained through the "special registration" program directed at Arab and Muslim noncitizens); Ali v. Gonzales, 440 F.3d 678, 681–82 (5th Cir. 2006) (holding that the special registration did not violate Equal Protection); Roudnahal v. Ridge, 310 F. Supp. 2d 884, 892 (E.D. Ohio 2003) (to the same effect).

47. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that undocumented immigrants were not eligible to receive backpay as a remedy for an employer's violation of federal labor law). For criticism of *Hoffman Plastic*, see Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds, *the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003).

and respected jurist committed to constitutional rights and the rights of immigrants,[48] he wrote some important immigration decisions. Judge Reinhardt, for example, authored the lower court decision that the Supreme Court affirmed in 1987, *INS v. Cardoza-Fonseca*,[49] which clarified the evidentiary burden for prevailing on an asylum claim.

I had the honor and privilege of clerking for Judge Reinhardt in 1983-84. We happened to talk after the Supreme Court ordered re-argument in *Dimaya*. He suggested that Dimaya would lose and bluntly said something like "nothing good will come of this." I disagreed. He told me that I was not simply wrong but was no less than "dead wrong." The Judge sadly passed away before the Supreme Court decided *Sessions v. Dimaya*. I am confident that Judge Reinhardt would have been pleased–quite pleased, in fact–that his prediction, not mine, proved dead wrong. Judge Reinhardt would have especially appreciated the delicious irony that in ruling for *Dimaya* he relied on an opinion by Justice Scalia (*Johnson v. United States*) and that the Supreme Court agreed with him.

As an aside, I must express gratitude to Judge Reinhardt for sparking my interest in immigration law. As a young and inexperienced law clerk, I had little interest in immigration cases. Judge Reinhardt pushed back. What I really mean to say is that he yelled at me. He was determined not to have our laws grudgingly interpreted against people in need. Judge Reinhardt once told me that the nation had turned its back on Jewish people fleeing Nazi Germany during World War II. It was wrong then and it was wrong now for the nation to turn its back on immigrants.[50] His strongly held views on

48. *See* Lara Bazelon, *Stephen Reinhardt: The Liberal Judge with a Fighting Spirit,* POLITICO, Dec. 20, 2018, available at https://www.politico.com/magazine/story/2018/12/30/stephen-reinhardt-obituary-federal-judge-2018-223311; Maura Dolan, *Stephen Reinhardt, "Liberal Lion" of the 9th Circuit, Dies at 87*, L.A. TIMES, Mar. 29, 2018, available at http://www.latimes.com/local/lanow/la-me-ln-reinhardt-obit-20180329-story.html.

49. *See* Cardoza-Fonseca v. INS, 767 F.3d 1448 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); *see also* Karen Musalo, *Irreconcilable Difference? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1184-86 (1994) (discussing evidentiary standard for asylum established by *Cardoza-Fonesca*). Other notable immigration opinions by Judge Reinhardt include Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996) (granting asylum to a Cuban applicant); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1996) (holding that neutrality could constitute a political opinion warranting the grant of asylum).

50. In his inimitable way, Judge Reinhardt succinctly attacked President Trump's immigration enforcement agenda: "President Trump has claimed that his immigration policies would target the 'bad hombres.' The government's decision to remove Magana Ortiz shows that even the 'good hombres' are not safe." Magana Ortiz v. Sessions, 857 F.3d 966, 968 (9th Cir. 2017) (Reinhardt, J., concurring) (footnote omitted). Judge Reinhardt further observed that "[w]e are compelled to deny Mr. Magana Ortiz's request for a stay of removal because we do not have the authority to grant it. We are not, however, compelled to find the government's action in this case fair or just." *Id.* at 966-67.

immigration in many ways influenced my entire academic career, for which I am forever indebted.

The Supreme Court's recent immigration decisions unquestionably reflect the continuation of the move of immigration law toward the legal mainstream and away from "immigration exceptionalism."[51] That does not, of course, mean that immigrants will always win. What it does mean is that we generally will see the Supreme Court in immigration cases:

1. Apply ordinary modes of statutory interpretation;

2. Follow routine modes of review of agency of agency action; and

3. Review the constitutionality of the immigration laws.

We are witnessing part of a process of legal change through a common law kind of process. I have offered some recent examples. In essence, immigration law is experiencing a slow-paced evolution, albeit not a revolution demanded by some commentators. The trajectory of judicial review in immigration cases should be good news to many of us who worry about the immigration initiatives of the current administration and are concerned with undue deference by the courts to Congress and the Executive Branch in immigration matters.

There are other positive developments in the immigration world that justify optimism. Clinical legal education has changed lives and made a difference in the education of law students and the evolution of immigration law.[52] Southwestern Law School, in *Dimaya* and other cases, has played an important role in that development. Immigration clinics today are standard fare at law schools, teaching students fundamental lawyering skills and raising their consciousness about the basic humanity of immigrants.

Renewed political activism, which also makes me optimistic about the future, has made a difference as well. Far from living in the shadows, immigrants today actively participate in political movements for change.[53]

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51. *See supra* text accompanying note 10.

52. *See supra* note 4 (citing authorities).

53. *See* Kathryn Abrams, *Contentious Citizenship: Undocumented Activism in the Not1More Deportation Campaign*, 26 BERKELEY LA RAZA L.J. 46 (2016); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1468-90 (2017); Laura Corrunker, *"Coming out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEG. STUD. 143 (2012); Karen J. Pita Loor, *A Study on Immigrant Activism, Secure Communities, and Rawlsian Civil Disobedience*, 100 MARQ. L. REV. 565 (2016); Vasanthi Venkatesh, *Mobilizing Under "Illegality": The Arizona Immigrant Rights Movement's Engagement with the Law*, 19 HARV. LATINO L. REV. 165 (2016); Enid Trucios-Haynes & Marianna Michael, *Mobilizing a Community: The Effect of President Trump's Executive*

We see that on college campuses and states and cities from coast to coast. "Sanctuary" jurisdictions limiting state and local involvement in immigration enforcement, have multiplied.[54] There now is even a call to "Abolish ICE," Immigration and Customs Enforcement.[55] Activism is especially important because the courts can only do so much when it comes to ensuring the fair treatment of immigrants. To move that task forward, Congress must reform the immigration laws, which critics from both major political parties claim are "broken."[56] Only political activism and engagement will spur that much-needed reform.

Thank you for allowing me to share my thoughts. I look forward to the incredible lineup of panels in this symposium. The Southwestern Law Review should be proud in having organized a wonderful and memorable event.

Orders on the Country's Interior, 22 LEWIS & CLARK L. REV. 578 (2018); *see also* Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 51-55 (2013) (noting the significance of the emergence of the political movement of undocumented immigrants focused on reform of the immigration laws and their enforcement). *See generally* WALTER J. NICHOLLS, THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE (2013) (analyzing the growth of the powerful grassroots political movement of young undocumented immigrants); EILEEN TRUAX, DREAMERS: AN IMMIGRANT GENERATION'S FIGHT FOR THEIR AMERICAN DREAM (2015) (to the same effect); LAURA WIDES-MUÑOZ, THE MAKING OF A DREAM: HOW A GROUP OF YOUNG UNDOCUMENTED IMMIGRANTS HELPED CHANGE WHAT IT MEANS TO BE AMERICAN (2018) (same).

54. *See* Christopher Lasch et al., *Understanding "Sanctuary Cities"*, 59 B. C. L. REV. 1703 (2018); Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1210 (2019).

55. *See* Matt Ford, *OK, Abolish ICE. What Then?*, NEW REPUBLIC, July 18, 2018, available at https://newrepublic.com/article/149945/ok-abolish-ice-then.

56. *See, e.g.*, Huma Khan & Devin Dwyer, *Broken Borders: Will Immigration Reform Be Next?*, ABC NEWS (Mar. 19, 2010, 6:05 a.m.), available at https://abcnews.go.com/Politics/immigration-reform-obama-democrats-tackle-hot-button-issue/story?id=10146578 ("[B]oth Republicans and Democrats [consider the current immigration system to be] broken."); Editorial, *An Incremental Change*, N.Y. TIMES, Nov. 18, 2011, available at https://www.nytimes.com/2011/11/19/opinion/an-incremental-change-in-immigration-policy.html (recognizing "our national failure to fix a broken immigration system"); Barack Obama, President, Immigration Address at American University (July 1, 2010) (proclaiming that, because the immigration "system is broken," reform is necessary), available at https://www.nytimes.com/2010/07/02/us/politics/02obama-text.html.