RESPONSE

Immigration Law, Contracts, and Due Process: A Response to Professor Won Kidane's Review of *Everyday Law for Immigrants*

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Professor Won Kidane has done me a great honor by reviewing *Everyday Law for Immigrants*.[1] Authors pray their work is not ignored; they can only dream that colleagues will take it seriously. From that viewpoint, Professor Kidane has blessed me twice. The *Seattle University Law Review* has also graciously allowed me an opportunity to respond to his thoughtful critique. That Professor Kidane found seeds for scholarly discourse within a book intended primarily for nonacademics is a testament to his comprehensive understanding of U.S. immigration law and how it functions on the ground.

This brief response will focus on two interrelated themes that arise out of the "immigration as contract" motif. First, I examine Professor Kidane's claim that current U.S. immigration policy operates more like a unilateral or adhesion contract than a bilateral one. Second, I explore the notion that due process is at risk when one views immigration policy through a contract prism.

While acknowledging its usefulness as an explanatory frame for lay readers, Professor Kidane correctly recognizes that my "immigration as contract" analogy lacks nuance. Indeed, Professor Hiroshi Motomura has identified at least two other ways of thinking about U.S. immigration

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1. Won Kidane, *Immigration Law As Contract Law: Review of* Everyday Law for Immigrants *by Victor C. Romero*, 34 SEATTLE U. L. REV. 889 (2011).

policy that find a basis in our history—"immigration as affiliation" and "immigration as transition."[2] Nevertheless, Professor Kidane evaluates the "immigration as contract" analogy on its own terms and questions whether it is an accurate description of U.S. immigration policy.

Professor Kidane and I agree that U.S. immigration policy—the law governing the terms of entry, stay, and expulsion of noncitizens—has a contractual flavor to it. Congress, on behalf of the American people, sets forth contractual terms. Noncitizens, whether coming as immigrants or temporary visitors, must either abide by those terms or leave.

Delving further, Professor Kidane asks whether the reality of how immigration policy operates belies an assumption that the contract was bargained for between parties with roughly equivalent power. Invoking contract language, Professor Kidane asks whether this immigration contract is truly bilateral, or whether in practice, it operates more like a unilateral adhesion contract with Congress taking advantage of a vulnerable group of foreign nationals. Current constitutional jurisprudence supports the latter view in the guise of Congress's plenary power over immigration policy.

Because of the plenary power doctrine, the Supreme Court has largely ceded power to Congress to fashion what amounts to a one-sided contract, imposing upon noncitizens terms that our Constitution would not tolerate if applied to U.S. citizens. One need look no further than the Chinese Exclusion Act case of *Chae Chan Ping v. United States*[3] or the Red Scare narrative behind *Shaughnessy v. United States ex rel. Mezei*[4] before concluding that race and political ideology, while no longer permissible grounds of discrimination in our post-*Brown v. Board of Education*[5] society, remain constitutional bases for exclusion under immigration law. Citing social psychology research, Dean Kevin Johnson has argued that the discrimination against *foreign* minorities tolerated within our immigration law reflects the displacement of U.S. society's bias, whether conscious or unconscious, against *citizen* minorities.[6]

Returning to the "immigration as contract" analogy, Professor Kidane also observes that within contract law, courts may void unfair con-

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2. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 9–11, 13 (2006) (arguing that U.S. immigration policy should treat lawful permanent residents as "Americans in waiting," thus restoring the lost tradition of "immigration as transition"; identifying "immigration as affiliation" as the view that establishing substantial family and community ties in America is a way for noncitizens to "earn[] equality").

3. 130 U.S. 581 (1889).

4. 345 U.S. 206 (1953).

5. 347 U.S. 483 (1954).

6. KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 15–16 (2004) ("Because direct attacks on minorities with respect to their race is today off-limits, discrimination is displaced to foreign minorities.").

tracts, something federal courts rarely do under the plenary power doctrine: "[C]ourts often provide a remedy for grossly unfair terms predicated on principles of law and equity, including reasonable expectations, undue influence, unconscionability, mistake, and impossibility. None of these principles of law or equity apply in immigration law under the plenary power doctrine."[7] Thus, to the extent that the "immigration as contract" analogy holds today, Professor Kidane asserts that this vision of contracts represents the now-abandoned laissez-faire approach taken by the *Lochner* Court,[8] where it was assumed that bakers had the same bargaining power as their employers,[9] where labor unions were unnecessary impediments to the freedom to contract,[10] and where production monopolies were not necessarily threats to interstate commerce.[11]

Lest some be tempted to conclude that noncitizens' rights are always compromised under the plenary power doctrine, it should be noted that both within Congress and within the Court's plenary power regime, there have been occasions for celebration. Even the current Supreme Court has stepped in to temper excessively onerous applications of Congress's immigration contract.

First, while Congress primarily reflects the interests of U.S. citizens, it also recognizes that national interests often coincide nicely with those of noncitizens wishing to immigrate or visit. For instance, our immigration laws reflect a desire to facilitate family unification, enhance domestic industry through the recruitment of highly skilled foreign labor, and protect the most vulnerable through our refugee and asylum laws.[12] While many problem areas still remain—the perennial backlogs, the lack of a robust guest-worker program, and the failure to pass comprehensive immigration reform, to name but a few—the foundation of our core immigration policy demonstrates a celebration of the United States as a nation of immigrants. Indeed, I have argued elsewhere that minorities and others who believe our immigration laws operate unfairly should lobby alongside fellow travelers for legislative change.[13] Once secured, such immigrant-friendly legislation would be protected by the plenary power doctrine from intrusive judicial review.

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7. *See* Kidane, *supra* note 1, at 893.

8. *See id.*

9. Lochner v. New York, 198 U.S. 45, 61 (1905).

10. Coppage v. Kansas, 236 U.S. 1, 19 (1915).

11. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

12. *See, e.g.*, VICTOR C. ROMERO, EVERYDAY LAW FOR IMMIGRANTS 25–58 (2009) (discussing family-based, employment-based, and asylum-based forms of immigration under U.S. law).

13. *See generally* Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343 (2001).

Second, while the plenary power regime within immigration law has seemed a formidable obstacle for immigrant advocates, the Court has used its statutory interpretation power to provide due process protections to noncitizens in exceptional cases. Aside from the Court curtailing the executive's detention powers in *Zadvydas v. Davis*[14] and *Clark v. Martinez*,[15] we have witnessed during this past term alone immigrant rights victories limiting the definition of an aggravated felony[16] and abrogating the Attorney General's power to limit discretionary relief.[17] Occasionally, the Court has even invoked a specific constitutional provision to provide a remedy, as it did in *Padilla v. Kentucky*.[18] There, the Court held that the failure to inform a noncitizen of the possible deportation consequences of a guilty plea violated the Sixth Amendment right to effective assistance of counsel.[19] So, notwithstanding the plenary power doctrine, the Court has sometimes used its power of judicial review to protect noncitizens from the exceptionally harsh effects of U.S. immigration policy.

Relatedly, many remember the *Lochner* era as an antiquated, bygone[20] period of judicial deference to market forces that perpetuated existing inequalities between the employer and the employed; but, even within that framework, the Court occasionally recognized the need to protect particularly vulnerable groups of workers. In *Holden v. Hardy*, for instance, the Court upheld a Utah law limiting the hours of mine workers, recognizing the danger inherent in such labor.[21] And in *Muller v. Oregon*, the Court limited the working hours of women in factories and laundries.[22] While we may question the wisdom of distinguishing bakers' work from that of miners', or stereotyping women as inherently unsuited to work outside the home, the Supreme Court—even during the *Lochner* era—safeguarded its duty as the final arbiter of the Constitution under *Marbury v. Madison*[23] by reviewing the workings of state and federal legislatures to ensure the validity of their policies. Similarly, even

14. 533 U.S. 678, 701 (2001).

15. 543 U.S. 371, 386–87 (2005).

16. Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010).

17. Kucana v. Holder, 130 S. Ct. 827 (2010).

18. Padilla v. Kentucky, 130 S. Ct. 1473, 1486–87 (2010).

19. *Id.*

20. Whether the *Lochner* period has been truly abandoned may be in doubt, at least within the area of state punitive damages rewards, which the Court has chosen to review under a *Lochner*-like substantive due process analysis despite its purported use of a form of rational basis scrutiny. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003); Philip Morris USA v. Williams, 549 U.S. 346, 347–48 (2007).

21. 169 U.S. 366 (1898).

22. 208 U.S. 412 (1908).

23. 5 U.S. (1 Cranch) 137 (1803).

within the Court's plenary power framework, immigration laws are often subject to statutory and constitutional review by the federal courts.

All this is not to say there are no distinctions in the way the United States government treats immigrants and citizens. I fully agree with Professor Kidane's description of the stark differences in how immigration courts administer "due process"—by not mandating counsel, audiotaping proceedings instead of having court reporters, allowing judges to ask questions of the noncitizen, having some hearings in absentia—when compared with, for instance, criminal proceedings.[24] Yet, given the consequences that attend deportation, especially when the noncitizen faces the prospect of persecution abroad,[25] one might suspect more robust due process protections apply in removal proceedings.

Furthermore, there is the problem of public perception. Oftentimes, the public will mistake an immigration law violation for a criminal law one, especially where the undocumented are concerned.[26] For instance, crossing a border is a morally neutral act with no legal significance except that which our society attaches to it. And yet, because our immigration laws treat unauthorized border crossers as federal criminals,[27] the public frequently does so as well, rather than viewing their act as no more morally repugnant than jaywalking. Indeed, one might argue that border crossers often have better moral reasons than jaywalkers to justify their actions. As President Franklin D. Roosevelt's immigration chief Daniel MacCormack once testified before Congress, "[T]he mother who braces the hardship and danger frequently involved in an illegal entry for purpose of rejoining her children cannot be held by that sole act to be a person of bad character."[28]

In sum, I agree with Professor Kidane that much of how our immigration law has functioned smacks of a unilateral adhesion contract that places noncitizens at the mercy of a xenophobic federal Legislature, an aggressive Executive, and a reluctant Judiciary Branch bound by accumulated plenary power precedent. Nonetheless, I remain cautiously optimistic. The advocate in me believes that, even from an "immigration as contract" perspective, there are ways to achieve a fairer balance between

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24. Kidane, *supra* note 1, at 894–95.

25. Professor Kidane has written quite eloquently about this dilemma for asylum applicants accused under an overly broad definition of terrorism. *See* Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669 (2008).

26. *See, e.g.*, Victor Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273 (2010).

27. *See* 8 U.S.C. §§ 1325 (misdemeanor penalty for unauthorized border crossing), 1326 (felony penalty for repeat offense) (1990).

28. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 84 (2004).

national interests and immigrant rights, whether it is through the promotion of immigrant-friendly legislation that would then enjoy protection under the plenary power doctrine, or through challenging the most egregious applications of existing immigration laws, trusting that the Supreme Court will find them as unfair and unworkable as Professor Kidane and I do.