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Courts vs. the Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law

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Courts vs. The Political Branches: Immigration “Reform” and The Battle for the Future of Immigration Law

BRIAN G. SLOCUM*

When the topic of immigration reform is discussed, the focus is usually on the efforts of the political branches, particularly Congress. The role of the judiciary is typically ignored or mischaracterized. In this Article, Professor Slocum discusses the role of the judiciary with regard to immigration reform and argues that the judiciary’s efforts in one area of immigration law in particular, judicial and administrative review, have been largely underestimated. Through various methods, the judiciary has thwarted many of the efforts of the political branches to reform judicial and administrative review by precluding or diminishing review. While significant, the judiciary’s efforts are not completely satisfying for two reasons. First, the judiciary’s decisions have rested on nonconstitutional grounds, leaving areas of judicial and administrative review in need of further reform. Second, the judiciary’s primary focus on judicial and administrative review has ignored the equally fundamental ways in which immigration law fails to conform to the rule of law.

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INTRODUCTION

The concept of “reform” typically connotes an improvement, or at least an attempted improvement, of a flaw.¹ For some time, immigration law has been deeply flawed due to its harsh provisions, lack of rights afforded aliens, and consequent isolation from other areas of public law.² Unfortunately, over the last couple of decades, the political branches’ efforts at reform in immigration law have not attempted to fix these problems but instead have knowingly made them worse. Congress’s efforts at reform have been mostly anti-immigrant in nature, including particularly troubling attempts to divest courts of jurisdiction to review many challenges to deportation.³ In turn, the executive branch’s reforms have included attempts to undermine the independence of administrative adjudicators and to expedite the administrative review process by providing for less administrative review.⁴ To make matters worse, Congress has recently considered other reforms that would further erode the availability and quality of judicial and administrative review, and any executive branch reforms designed to significantly improve the administrative adjudication process for aliens are unlikely.⁵

In sum, the recent immigration policies promoted by the political branches have privileged harshness and efficiency and subordinated fairness and adequate

1. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1468 (4th ed. 2000) (defining “reform” as “1. A change for the better; an improvement”).

2. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”). This Article uses the term “alien,” which is a legal term under United States immigration laws signifying any individual “not a citizen or national of the United States.” 8 U.S.C. § 1101 (2000 & Supp. IV 2004). The term is considered by many to be pejorative. Case law and scholarly articles refer extensively to “alien” and “alienage,” however. In order to avoid unnecessary confusion, the term will be used in this Article.

3. See *infra* Part I. Although the expulsion of aliens is now referred to as their “removal,” see 8 U.S.C. § 1229(a) (2000 & Supp. IV 2004), this Article will also use the generic term “deportation” to refer to the expulsion of all classes of aliens.

4. See *infra* notes 24-28 and accompanying text.

5. See *infra* notes 87-96 and accompanying text.

process.⁶ Not surprisingly, both Congress's and the executive branch's efforts at reform have drawn considerable criticism from immigration commentators. Commentators have argued that Congress's attempts to preclude judicial review and grant the executive branch unfettered discretion over many immigration matters have undermined the rule of law, and the executive branch's reform efforts have placed the administrative courts in crisis.⁷ The conventional view among immigration commentators is that the judiciary's extreme deference to the political branches in regard to immigration policy has enabled these reforms, thereby contributing to the decline of effective administrative and judicial review.⁸

The conventional view of the role of the judiciary in facilitating political branch reforms is partially accurate. Courts have long maintained that immigration matters, more than most other areas of congressional concern, involve political determinations and have created and maintained doctrines of deference that reflect this philosophy. Under the infamous "plenary power" doctrine, created by the Supreme Court in the late nineteenth century, courts have traditionally considered the power of Congress over immigration to be nearly unlimited and the constitutional rights of immigrants to be almost nonexistent.⁹ With some exceptions, the judiciary has relied on the plenary power doctrine in rejecting most constitutional challenges to immigration decisions made by the political branches.¹⁰

While it is partially correct, the standard theory of extreme judicial deference

6. The pursuit of harsh and unfair immigration policies by the political branches is certainly not a recent development in immigration law. The federal government's early restrictions on immigration were motivated by racial animus, and certain races were denied eligibility for citizenship. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 317-322 (2003). This Article's focus, though, is on the recent reforms of the political branches and the judiciary's response to those reforms.

7. See, e.g., Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); *Recent Case, Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3rd Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596 (2006) [hereinafter *Recent Case*].

8. See, e.g., Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000) (describing the "clear though qualified pattern of genuine discomfort—on the parts of both Congress and the judiciary—with the notion of a significant judicial role in immigration matters"); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 709 (1997) (describing the "fabric of discretion and judicial deference"). To his credit, Professor Legomsky has also recognized that courts frequently interpret immigration statutes in favor of aliens. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* (1987).

9. See, e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (stating that "[i]n an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy").

10. *Id.*; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (describing some of the common exceptions to the plenary power doctrine).

to the political branches in immigration matters is typically overstated. The standard account fails to recognize the judiciary's increasing inclination to promote its own version of desirable public values in limited, but extremely important, areas of immigration law. In contrast to the values promoted by Congress and the executive branch through their reforms, the judiciary has, through various methods, pursued a more pro-immigrant set of values. The judiciary's decisions have, for the most part, been made through the (often aggressive) application of mainstream principles of law and statutory interpretation, although courts are also undoubtedly motivated in part by the view that aliens as a class are vulnerable to adverse legislation.¹¹

The judiciary's efforts have mostly focused on issues relating to judicial and administrative review. These judicial actions are not part of a coordinated effort at preventing ill-conceived political branch reforms of judicial and administrative review, and, to be sure, the judicial reactions to the reforms of the political branches have not been uniformly hostile.¹² Nevertheless, the significant efforts of the judiciary in undermining some of the reforms of the political branches stand in sharp contrast to the prevailing view of the judiciary as meekly deferring to the policy choices of the political branches in immigration matters. In short, the efforts of the judiciary have been largely underappreciated.

At the same time, the judiciary's efforts in responding to the reforms of the political branches also contain lessons about the likely de facto limits of judicial reforms of immigration law. The scope of the judiciary's response to the reforms of the political branches has been limited by its traditional reluctance in immigration cases to invalidate political branch actions on constitutional grounds. Even in areas such as judicial and administrative review where the judiciary is most comfortable in thwarting the policy preferences of the political branches, both judicial and administrative review continue to be flawed and in need of reform due to the inherent limitations of the judiciary's non-constitutional decisions. Moreover, the judiciary has focused mainly on judicial and administra-

11. In *INS v. St. Cyr*, for example, the Court noted that concerns about retroactive laws become more acute when they target an "unpopular group" and stated that "because noncitizens cannot vote, they are particularly vulnerable to adverse legislation." 533 U.S. 289, 315 & n.39 (2001) (citing Legomsky, *Fear and Loathing in Congress and the Courts*, *supra* note 8, at 1626). Concern for the vulnerability of aliens and the harshness of deportation influenced the Court to create a rule of statutory interpretation, the immigration rule of lenity, which directs courts to interpret ambiguities in immigration statutes in favor of aliens. See Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L. J. (2003); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 525-26 (9th Cir. 2004) (indicating that it would apply the immigration rule of lenity when determining the scope of provisions that purported to limit judicial review).

12. In fact, in the past some immigration scholars have argued that the Court has often unfairly interpreted statutes against aliens. See, e.g., Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 113 (2002) (claiming that the "Court has consistently used a mechanical approach to interpretation and excluded an exploration of statutory purpose."); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 419 (1993) (arguing that the "Rehnquist Court is willing to invoke the plain meaning doctrine selectively in interpreting the INA to ensure that the courts defer to the executive branch").

tive review and has consequently often ignored the other equally fundamental ways in which immigration law fails to conform to the rule of law.

This Article attempts to shed new light on the role of the judiciary in immigration reform, focusing on the often overlooked and undervalued efforts of the judiciary in thwarting the reforms of the political branches, but at the same time recognizing the limited nature of the judicial role in immigration law. The focus of this Article is not on exhaustively describing the reforms of the political branches and the judiciary's response to them, but rather on providing an accurate depiction of the judiciary's self-appointed role in immigration law.¹³ Part I briefly describes the congressional reforms of judicial review and the executive branch reforms of the administrative adjudication process.¹⁴ Part II explains how the judiciary has undermined some of the reforms of Congress and the executive branch. Part III discusses possible future reforms to judicial and administrative review and argues that while these reforms would be valuable, they are only one aspect of the larger failure of immigration law to conform to the rule of law. Due to the judiciary's conservative approach in immigration matters, however, true reform will have to come from the political branches.

I. CONGRESSIONAL AND EXECUTIVE BRANCH EFFORTS TO REFORM JUDICIAL REVIEW AND THE ADMINISTRATIVE ADJUDICATION PROCESS

Congress has a long history of attempting to eliminate or curtail judicial review of immigration decisions.¹⁵ Perhaps the most notorious congressional efforts came in 1996 when Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁷ These laws attempted to undermine judicial review in several ways.¹⁸ Among other changes, the statutes amended the judicial review provision of the Immigration and Nationality Act

13. Thus, while some of the description of the judiciary's response to the political branches' reforms of judicial and administrative review may seem somewhat like an outline, I believe that it accurately depicts the philosophy of the judiciary with regard to the reforms of the political branches.

14. The discussion is brief because other immigration commentators have comprehensively described the congressional and executive branch reforms. *See, e.g.,* Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 *GEO. IMMIGR. L. J.* 35, 44 (2004) (describing the executive branch reforms); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 *HARV. L. REV.* 1963, 1975-77 (2000) (describing the reforms to judicial review).

15. *See* LEGOMSKY, *IMMIGRATION AND THE JUDICIARY*, *supra* note 8, at 144-51; Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *HARV. L. REV.* 1362, 1389 (1953) (noting that the "structure of review has been developed by the courts in the face of a statutory plan of administrative control which looked neither to their help nor interference").

16. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

17. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

18. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (stating that "protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation").

(INA), 8 U.S.C. § 1252, and purported to withdraw all judicial review from aliens convicted of certain crimes.¹⁹ The statutes also amended § 1252 to preclude judicial review of most discretionary decisions by the Attorney General and, arguably, attempted to deprive courts of jurisdiction over habeas corpus petitions.²⁰

In addition to its jurisdiction stripping provisions, IIRIRA also gave the government the power of “expedited removal,” whereby a person arriving in the United States with improper travel documents can be removed within forty-eight hours and barred from returning for up to five years.²¹ IIRIRA removed most forms of judicial review, as well as administrative review, in cases where expedited removal procedures are used.²² Since the expedited removal provisions of IIRIRA became effective in April 1997, the government has removed tens of thousands of aliens from the United States via the expedited removal process.²³

The executive branch has also recently made several reforms to the immigration courts. The administrative adjudicatory system is housed in the Executive Office for Immigration Review within the Department of Justice. Immigration Judges are the trial courts of the system, and the Board of Immigration Appeals (BIA) hears appeals of the Immigration Judges’ decisions.²⁴ Both Immigration Judges and members of the BIA are appointed by the Attorney General.²⁵ In 2002, faced with a backlog of over 60,000 cases, the BIA began to significantly expand its use of procedures designed to expedite the review process.²⁶ Before

19. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2484 (1998); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1525-34 (1997).

20. See Neuman, *supra* note 14, at 1975-77.

21. See 8 U.S.C. § 1225(b)(1)(A)(i) (2000). The expedited removal process could also be potentially applied to aliens who enter the United States without inspection and cannot establish that they have been physically present in the United States continuously for the two-year period immediately prior to the date of the determination of inadmissibility. See Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 4 (2000). Other abbreviated removal methods include procedures known as administrative removal and judicial removal. See John R.B. Palmer et al., *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 15-17 (2005).

22. 8 U.S.C. § 1225(b)(1)(B)(iii), (b)(1)(C), (b)(1)(D) (2000); see also Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1674-79 (2000) (analyzing jurisdictional and constitutional implications of expedited removal); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1449-52 (1997) (discussing controversy surrounding the lack of administrative and judicial review for persons subject to new expedited removal provisions).

23. See Michele R. Pistone & John J. Hoeffner, *Rules are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 167 (2006).

24. See Legomsky, *supra* note 7, at 371-72.

25. See *id.*

26. See Burkhardt, *supra* note 14, at 44. The 2002 reforms followed more modest reforms throughout the 1990s. See *id.* at 44-45.

the reforms, the BIA typically sat in three-member panels and issued formal written opinions. In 2002, however, the Attorney General sought to hasten the resolution of immigration cases by eliminating twelve of the twenty three BIA members and providing that many cases would be heard by a single member of the BIA and affirmed without a written opinion.²⁷ In addition, the Attorney General took other actions that reinforced the notion that Immigration Judges and BIA members are employees of the Department of Justice rather than independent adjudicators.²⁸

II. THE JUDICIARY'S RESPONSE TO THE REFORMS OF THE POLITICAL BRANCHES

Contrary to the common view of the judiciary as meekly acquiescing in the policy choices of the political branches, the judicial response to the recent reforms of judicial and administrative review reveals an increasing uneasiness with a limited and deferential judicial role in immigration cases. Section A of this Part describes how the judiciary has impeded congressional reforms of judicial review through narrow statutory interpretations, often applying canons of statutory construction which reflect values far different than the ones reflected in the statutes. Section B describes how the judiciary has responded to the executive branch reforms by harshly criticizing the performance of the administrative courts, reversing cases, showing a greater willingness (some would say eagerness) to remand cases to the BIA for adequate administrative explanation and scaling back deference to agency legal interpretations. Section C.1 explains just how significant the judiciary's efforts have been. Section C.2 describes the limits of the judiciary's efforts and explains that its relatively conservative jurisprudence has resulted in, for example, critical executive branch decisions not being subject to judicial review.

A. *The Judiciary's Efforts to Preserve Judicial Review*

Perhaps the most consistent and aggressive judicial response to the congressional reforms in IIRIRA was the judiciary's insistence on interpreting the jurisdiction stripping provisions narrowly. For example, while IIRIRA amended 8 U.S.C. § 1252(a)(2)(C) to provide that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" various criminal offenses, courts quickly held that they had jurisdiction to determine jurisdiction. Courts thus interpreted the preclusion as not preventing them from determining whether the alien had been convicted of one of the criminal offenses listed in § 1252(a)(2)(C), which was the sole

27. See *id.* at 46-50; see also 8 C.F.R. §§ 1002-1003.11 (2006).

28. See Legomsky, *supra* note 7, at 372-75. There have long been concerns about the independence of Immigration Judges and the BIA. See, e.g., *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1363-66 (1983) (arguing that the "implicit threat of abolition" of the BIA by the Attorney General "undermines the independence of the Board's judgment").

legal claim of many of the aliens covered by the provision.²⁹ Courts also narrowly interpreted IIRIRA's preclusion of judicial review of discretionary determinations in 8 U.S.C. § 1252(a)(2)(B), which provides that "no court shall have jurisdiction to review . . . any judgment regarding the granting of [various types of discretionary relief from deportation]," as only precluding challenges to the Attorney General's exercise of discretion. Thus, review of errors of law was still available.³⁰ In addition, some courts held that the bars to judicial review in 8 U.S.C. § 1252 did not preclude the consideration of constitutional challenges or habeas corpus petitions.³¹

In many of the cases where jurisdictional bars were interpreted narrowly, courts applied "substantive" canons of statutory construction, which are policy based directives about how a lack of statutory clarity should be resolved.³² Courts have frequently applied various substantive canons in immigration cases in recent years in order to protect aliens from such things as the retroactive application of immigration statutes, indefinite detention by the executive branch and, more generally, from having ambiguous immigration statutes interpreted against them.³³ In cases involving the potential preclusion of judicial review, a

29. See, e.g., *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000) (holding that the court had jurisdiction to review whether the alien had committed one of the enumerated crimes in § 1252(a)(2)(C)); *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997) (holding the same); see also David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313, 324 (2002) (stating that "much recent BIA case law has been devoted to deciding whether certain offenses amount to aggravated felonies under the new definitions" in IIRIRA).

30. See, e.g., *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003) ("We retain jurisdiction to review the purely legal and hence non-discretionary question whether [the applicant's] adult daughter qualifies as a 'child' for purposes of the 'exceptional and extremely unusual hardship' requirement.") (quoting *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002)); *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003) (indicating that the court still had jurisdiction to review non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief).

31. See, e.g., *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 680 (7th Cir. 2003) (stating that "this court has continued to assert its jurisdiction to review substantial constitutional questions" even when review is purportedly barred by 8 U.S.C. § 1252); *Garcia v. Att'y Gen. of the United States*, 329 F.3d 1217, 1222 (11th Cir. 2003) (noting that "in construing the bar in the IIRIRA permanent rules, this Court has determined that, if the bar applies, it nonetheless retains jurisdiction to consider constitutional challenges to the INA or any other 'substantial constitutional issues' arising out of the alien's removal proceedings"); *Anwar v. INS*, 107 F.3d 339 (5th Cir. 1997) (determining that court had jurisdiction to review a due process allegation notwithstanding the jurisdictional bar in AEDPA). See *infra* notes 38-41 and accompanying text for discussion of how the Court interpreted IIRIRA as not precluding habeas corpus jurisdiction.

32. See Brian G. Slocum, *Canons, The Plenary Power Doctrine and Immigration Law*, 34 FLA. ST. U. L. REV. (forthcoming 2007).

33. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (utilizing the canon of constitutional avoidance in interpreting 8 U.S.C. § 1231(a)(6) as not allowing the executive branch to indefinitely detain aliens who legally are considered to have entered the country); *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (holding that provisions in AEDPA and IIRIRA that repealed discretionary relief from deportation did not apply retroactively because the provisions lacked a "clearly expressed statement of congressional intent" that they be applied retroactively); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing to the immigration rule of lenity, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

“traditionally sensitive area[],”³⁴ courts have long expressed a policy of interpreting statutes to maintain judicial review if at all possible. For example, the Court applied the presumption in favor of judicial review in *McNary v. Haitian Refugee Center, Inc.*,³⁵ and *Reno v. Catholic Social Services, Inc.*,³⁶ in order to preserve judicial review of challenges to the 1986 legalization program. Not only were the preclusions of judicial review interpreted narrowly, lower courts also issued broad remedial orders to address INS misconduct.³⁷

Recent decisions involving habeas corpus jurisdiction also reflect a judicial desire to interpret statutes to preserve habeas review unless extremely precise and express statutory language precludes them from doing so. In *Demore v. Kim*,³⁸ the Court held that it had jurisdiction to consider Kim’s habeas corpus challenge to his detention pending his removal hearing because the relevant provision, 8 U.S.C. § 1226(e), did not contain the “superclear statement, ‘magic words’ requirement for the congressional expression” of an intent to preclude habeas review.³⁹ In *INS v. St. Cyr*,⁴⁰ the Court, after applying the canon of constitutional avoidance (“avoidance canon”), the presumption in favor of judicial review of administrative action and the “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction,” rejected the government’s argument that Congress in IIRIRA and AEDPA had clearly divested courts of jurisdiction under 28 U.S.C. § 2241 over habeas corpus actions filed by criminal aliens to challenge their removal orders.⁴¹

B. The Judiciary’s Efforts to Undermine the Reforms of the Administrative Adjudication Process

In comparison with its reaction to the reforms of judicial review, the judiciary has not been as directly active in disrupting the executive branch’s efforts at reforming the administrative adjudication process. One reason for this is that the executive branch’s reforms obviously were not implemented in statutes, and the judiciary has thus not been able to undermine the reforms through narrow statutory interpretations. The judiciary has also adhered to its traditional reluctance to strike down the policy choices of the political branches on constitutional grounds and has refused to declare that any of the reforms to the administrative adjudication process are unconstitutional. For example, courts have uniformly held that the expedited removal provisions do not violate due process.⁴² Similarly, courts have rejected arguments that affirmance without

34. *St. Cyr*, 533 U.S. at 298.

35. 498 U.S. 479 (1991).

36. 509 U.S. 43 (1993).

37. See Martin, *supra* note 29, at 322-23 (describing the “remarkably broad remedial orders” issued by courts).

38. 538 U.S. 510 (2003).

39. *Id.* at 517 (quoting *St. Cyr*, 533 U.S. at 327 (Scalia, J. dissenting)).

40. 533 U.S. 289 (2001).

41. *Id.* at 299.

42. See, e.g., *Flores-Ledeza v. Gonzales*, 415 F.3d 375 (5th Cir. 2005).

opinion decisions violate an alien's right to due process by eliminating individualized, reasoned and meaningful administrative decisions.⁴³

Although they have not struck down any of the reforms to the administrative adjudication system on constitutional grounds, the courts have expressed frustration with the performance of the immigration courts.⁴⁴ Judge Posner, for one, has argued that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."⁴⁵ In January 2006, the Attorney General responded to the criticisms by ordering "a thorough review" of the immigration courts.⁴⁶ Not surprisingly, although the Attorney General touted the twenty-two new measures implemented as a result of the review, the changes were relatively minor, including the hiring of more immigration judges, adding four permanent members to the BIA and encouraging the increased use of one-member written opinions (as opposed to summary affirmances) and "limited use of three-member written opinions (as opposed to one-member written opinions) to provide greater analysis in a small class of particularly complex cases."⁴⁷

The judiciary has also undermined the executive branch reforms in more direct ways. Appeals of administrative decisions have increased significantly since the executive branch reforms, and courts have not hesitated to reverse administrative decisions.⁴⁸ Some courts have also held that due process requires that a case be remanded to the BIA for clarification of the grounds for its decision when the BIA summarily affirms the Immigration Judge's decision, and the Immigration Judge's decision was based on alternative grounds, one of which was not subject to judicial review and one of which was subject to judicial review.⁴⁹ Undoubtedly, this practice of judicial remands (which is a

43. See, e.g., *Yuk v. Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004) ("An alien has no constitutional right to any administrative appeal at all."); *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc).

44. See Recent Case, *supra* note 7, at 2596-97.

45. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005); see also *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006) (discussing the "common failings in recent decisions by immigration judges and the Board" to produce decisions that have a rational basis).

46. See Maria Arhancet, *U.S. Attorney General Orders Review of Immigration Courts*, 20 GEO. IMMIGR. L.J. 333 (2006).

47. See Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

48. See *Benslimane*, 430 F.3d at 829 (comparing the reversal rate in immigration cases of 40% to the 18% reversal rate in other civil cases); Palmer et. al., *supra* note 21, at 6 (concluding that the increased appeal rate is a result, in part, of a "general dissatisfaction with the BIA's review"). But see Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 957-58 (2006) (concluding that the overall rate of reversal has not changed since the executive branch reforms).

49. See *Cueller Lopez v. Gonzales*, 427 F.3d 492, 495-98 (7th Cir. 2005); *Lanza v. Ashcroft*, 389 F.3d 917, 924-32 (9th Cir. 2004). This is hardly the only way for courts to handle the issue. The Tenth Circuit, for example, has held that it will review the Immigration Judge's decision rather than the BIA's unexpressed reasons and will thus not automatically remand in situations where the BIA summarily affirms an Immigration Judge's decision that is based on alternative grounds. See *Ekasinta v. Gonzales*, 415 F.3d 1188, 1193-94 (10th Cir. 2005).

rather aggressive way to handle the problem of summary BIA affirmances) could have a significant effect on the efficacy of the administrative summary procedures.

Although such reluctance is no doubt motivated by more than the executive branch reforms, the judiciary has also increasingly formulated legal rules that illustrate a growing disinclination to defer to agency legal interpretations. In the now-famous case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵⁰ the Supreme Court held that courts must defer to an agency's interpretation when the relevant statute's meaning is ambiguous and the agency's interpretation "is based on a permissible construction of the statute."⁵¹ This deference reached its peak in immigration cases in *INS v. Aguirre-Aguirre*,⁵² when the Court made clear that *Chevron* deference applies to legal interpretations made by the BIA in adjudications.⁵³

The scope of *Chevron* deference in general has been narrowed by the Court in recent years.⁵⁴ Indeed, courts in immigration cases have been particularly eager to limit *Chevron* deference. Several circuits have indicated that no deference is due the BIA when it has no special expertise regarding the particular issue or when it resolves "purely legal questions."⁵⁵ In addition, courts often choose to apply canons of statutory construction instead of *Chevron* deference in cases of statutory ambiguity.⁵⁶ Significantly, considering the Attorney General's efforts to streamline the administrative adjudication process, some courts have held that *Chevron* deference is not appropriate when the BIA summarily affirms an Immigration Judge's decision.⁵⁷

50. 467 U.S. 837 (1984).

51. In the view of some, the Court's decision in *Chevron* represented a departure from the previous standard of review. See, e.g., Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773 (1992) (arguing that prior to *Chevron* agency legal interpretations were reviewed *de novo*).

52. 526 U.S. 415 (1999).

53. *Id.* at 425 (noting that the reasons for giving deference to agency decisions are "especially appropriate in the immigration context" because "officials 'exercise especially sensitive political functions that implicate questions of foreign relations'") (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

54. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (discussing how *Chevron*'s applicability has been limited through the Court's introduction of "*Chevron* Step Zero"—an initial inquiry into whether the *Chevron* framework applies at all).

55. See Slocum, *supra* note 11, at 546-52.

56. See *id.* (explaining how some courts have applied clear statement canons instead of deferring to agency interpretations).

57. See, e.g., *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1013-14 (9th Cir. 2006); *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 189-90 (2d Cir. 2005). The Ninth Circuit in *Garcia-Quintero* refused to afford *Chevron* deference even though the Supreme Court in *Aguirre-Aguirre* had granted *Chevron* deference in a case involving an unpublished BIA decision. Even more dramatically, the Ninth Circuit has made statements suggesting that the Attorney General's interpretations of the INA may no longer be entitled to *Chevron* deference because the Department of Homeland Security now has responsibility for immigration enforcement. See *Lagandon v. Ashcroft*, 383 F.3d 983, 987 n.3 (9th Cir. 2004) ("The Supreme Court has indicated that courts may not owe full *Chevron* deference to an agency charged with adjudicating issues under a statute when a different agency is charged with enforcement of the statute.").

C. *The Significance of the Judiciary's Efforts to Undermine the Reforms of the Political Branches*

1. Aggressive Statutory Interpretations and the Canon of Constitutional Avoidance

It is undeniable that the judiciary has given itself, through statutory interpretations favorable to aliens, a considerable role in determining the existence and scope of judicial review of final orders of deportation.⁵⁸ In response to Congress's anti-immigrant, anti-judicial review reforms of the INA in IIRIRA, courts interpreted the provisions narrowly, often relying on pro-immigrant canons of statutory construction that reflect policies likely at odds with Congress's intent in enacting IIRIRA.⁵⁹ In addition, while courts have responded to the executive branch reforms in more indirect ways, the increased remands, reversals and reduced *Chevron* deference to agency interpretations may also be an effective method of forcing more positive reforms of the administrative adjudication process.⁶⁰

The decisions concerning judicial review, although not the product of a coordinated effort at reform, reflect a judicial eagerness to interpret statutes in light of the important public policy of adequate judicial review. The judicial reluctance, typically expressed through the application of canons of statutory construction, to find a preclusion of judicial review makes it more difficult than normal for Congress to enact its legislative preferences.⁶¹ Unless Congress has spoken with extraordinarily clear language indicating a specific desire to limit judicial review, courts will interpret the statutory language to retain judicial review.⁶²

The avoidance canon has been particularly important in ensuring judicial review of immigration decisions. Although decisions invoking the avoidance canon ultimately rest on statutory interpretations, they employ constitutional reasoning that often functions as precedent.⁶³ In *INS v. St. Cyr*,⁶⁴ for example, the Court, through the avoidance canon and the Suspension Clause, has ensured

58. This Article addresses only the availability, at any point, of judicial review of final orders of deportation. There are, however, many issues regarding when courts should consider challenges to the government's immigration decisions, as well as the availability of class action relief. See generally Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L. J. 385 (2000).

59. See Slocum, *supra* note 32, at 64 (describing how courts often apply canons of statutory construction that reflect public values that are likely at odds with Congress's legislative intent regarding the statute at issue).

60. See *supra* Part II.B. (describing the judicial reaction to the executive branch reforms).

61. See Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 746-47 (1992).

62. See *supra* Part II.A.

63. See Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2585 (1998) (arguing that a "court's pronouncement that a particular reading of a statute would raise serious constitutional questions is likely to have the same effect as a pronouncement that the statute, read that way, is in fact unconstitutional").

64. 533 U.S. 289 (2001).

a significant level of judicial review via habeas corpus or an “adequate substitute through the courts of appeals.”⁶⁵ Following the Court’s decision in *St. Cyr* preserving habeas corpus jurisdiction, Congress enacted the REAL ID Act of 2005, which generally eliminated from courts habeas corpus jurisdiction to review final orders of removal.⁶⁶ Significantly, however, Congress removed many of the bars to judicial review in the federal courts of appeals that caused criminal aliens to file habeas corpus petitions in district courts in order to challenge their removal orders.⁶⁷ As a result of *St. Cyr*, courts have jurisdiction to review constitutional challenges and other questions of law, including those related to criminal aliens and to discretionary relief from deportation.⁶⁸

The judicial decisions preserving judicial review and habeas corpus have been based on statutory rather than constitutional interpretations and are thus subject to reversal by Congress. They can thus be viewed as a relatively restrained method of blocking congressional reforms. A remarkable aspect of the Supreme Court’s statutory interpretation decisions involving the avoidance canon, however, is that such decisions can give aliens as a whole greater rights, at least temporarily, than would decisions that rested on constitutional grounds. In a recent immigration decision, *Clark v. Martinez*,⁶⁹ the Court held that a statutory interpretation made by invoking the avoidance canon must be uniformly applied in subsequent cases even when the later cases do not raise any constitutional issues.⁷⁰ Using similar reasoning to that of *Martinez*, some lower courts held that the Court’s statutory decision in *St. Cyr* compelled a finding that non-criminal aliens could challenge their removal orders through habeas corpus in district courts even though they, unlike criminal aliens, were able to obtain judicial review through the review provisions set forth in the INA.⁷¹ Considering that habeas corpus jurisdiction could have been constitutionally repealed with respect to the non-criminal aliens who had an adequate forum for judicial review in the court of appeals, the statutory decision in *St. Cyr* was actually more favorable to the non-criminal aliens than a constitutional decision would

65. See *id.* at 314 n.38; see also *supra* notes 38-41 and accompanying text (describing how the Court has required Congress to be incredibly precise if it intends to preclude habeas review).

66. See *Ishak v. Gonzales*, 422 F.3d 22, 28 (1st Cir. 2005) (describing how the “Real ID Act amended section 242 of the INA, 8 U.S.C. § 1252, to place review of all final removal orders, for both criminal and non-criminal aliens, in the courts of appeals”).

67. See Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 487 (2006).

68. See *id.* at 463.

69. 543 U.S. 371 (2005).

70. The Court extended the *Zadvydas v. Davis*, 533 U.S. 678 (2001), statutory holding, which was that aliens who have entered the country cannot be detained indefinitely, to include inadmissible aliens (aliens who have not entered the country) without determining whether indefinite detention of inadmissible aliens would raise a serious constitutional question. The Court reasoned that “[it] is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation.” See *Martinez*, 543 U.S. at 380.

71. See Slocum, *supra* note 32, at 44-46.

have been.⁷²

2. The Limits of a Judicial Approach that Focuses on Non-constitutional Decisions

The judiciary's efforts in undermining the reforms of the political branches have been more successful than many commentators have recognized. Nevertheless, the judiciary's efforts have been limited by its relatively conservative jurisprudential approach to the reforms. The administrative adjudication process designed by the executive branch remains in place because the judiciary has not invalidated any aspect of it on constitutional grounds.⁷³ Similarly, the judiciary's approach to the reforms of judicial review has been subject to the inherent limitations of undermining reform through non-constitutional decisions. A narrow statutory interpretation, even one produced by applying a canon of statutory interpretation, is only permissible if the narrow interpretation is at least plausible.⁷⁴

Because the judiciary has limited itself to statutory, rather than constitutional holdings, there is no right to judicial review in many important immigration cases. Often, for example, the contested issue will not be whether the alien is removable (on the basis of a criminal conviction, for example) but whether the alien should be granted a waiver or relief from removal, which almost always requires a favorable exercise of discretion by the Attorney General.⁷⁵ In order to receive the relief termed "cancellation of removal," for example, the alien must establish both that she is eligible for the relief and that she merits a favorable exercise of discretion.⁷⁶ Under the REAL ID Act, a question of whether the Attorney General correctly interpreted a statutory requirement for relief is reviewable by courts as a legal question.⁷⁷ As courts have correctly recognized, however, the current judicial review provision, 8 U.S.C. § 1252(a)(2)(B), provides that the ultimate discretionary decision whether to grant relief from

72. *See id.*

73. *See supra* notes 38-39 and accompanying text.

74. The trigger for any substantive canon is something less than statutory clarity, but not all canons are triggered by the same level of uncertainty. Clear statement canons, for example, are triggered by less statutory ambiguity than are tie-breaker canons. *See Slocum, supra* note 11, at 544-46. In any case, even the strongest canons are not applied when the statutory language clearly reflects congressional intent.

75. *See* Lenni Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 240 (1998) ("Although no formal statistics are available, my own calculations establish that the vast majority of immigration cases involved review of a discretionary form of relief.")

76. 8 U.S.C. § 1229b (2000) (providing that the "Attorney General *may* cancel removal" if the alien is statutorily eligible for relief) (emphasis added). The statutory provision gives the Attorney General unconstrained discretion to grant relief from removal. Congress has provided no criteria that the Attorney General must consider or factors for the Attorney General to weigh in deciding whether to grant relief.

77. 8 U.S.C.S. § 1252(a)(2)(D) (LexisNexis 2006) (providing that the preclusion of judicial review of discretionary determinations involving relief from deportation in 8 U.S.C. § 1252(a)(2)(B) does not preclude review of "questions of law").

deportation is not reviewable.⁷⁸ Considering the lack of independence in the administrative adjudication process, the vesting of complete and unreviewable discretion in the Attorney General regarding whether an alien should be allowed to reside in this country has understandably troubled immigration scholars.⁷⁹

III. THE FUTURE OF IMMIGRATION REFORM

Despite the obvious deficiencies that still afflict judicial and administrative review, relatively bold constitutional decisions are needed from the Supreme Court in order to fix the remaining problems. Section A of this Part discusses the likelihood of such decisions and the possibility that Congress itself will enact beneficial reforms to judicial and administrative review. Unfortunately, although they are needed, reforms of judicial and administrative review would not resolve the more problematic ways in which immigration law fails to conform to the rule of law. Section B takes a broader look at the state of immigration law and argues that the political branches, rather than the judiciary, will have to fix these rule of law deficiencies.

A. *The Possibility that the Judiciary or Congress will Reform Judicial Review and the Administrative Adjudication Process*

If the Court desired to reform the administrative adjudication system, it could focus on the administrative process and hold, for example, that some, or all, of the executive branch's reforms are a denial of due process.⁸⁰ At the same time, the Court could hold that the constitutionally required habeas corpus review includes claims that the Attorney General failed to exercise, or abused, his discretion.⁸¹ The abuse of discretion standard would allow courts to overturn decisions not to grant relief from removal where the Attorney General failed to

78. *See, e.g.,* *Ekasinta v. Gonzales*, 415 F.3d 1188 (10th Cir. 2005) (dismissing for lack of jurisdiction in a case where the alien's application for cancellation of removal was denied on discretionary grounds). Other important jurisdictional issues are still unresolved. For example, courts must decide whether mixed questions of law and fact are reviewable. *See* Note, Aaron G. Leiderman, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions the Real ID Act*, 106 COLUM. L. REV. 1367 (2006).

79. *See, e.g.,* Legomsky, *supra* note 7.

80. Thus far, courts have been unwilling to make such rulings. *See supra* notes 42-43 and accompanying text. The Court could hold that the independence of the BIA and Immigration Judges from the Attorney General is required as a matter of Due Process, but such a decision would be quite bold. The closest the Court has come to such a decision was in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), when the Court held that once the Attorney General had by regulation delegated his authority over deportation cases to the BIA, he was prohibited from exercising that authority himself by dictating the outcome of a particular case. It would be a dramatic extension of the case for the Court to hold that the Attorney General is constitutionally prohibited from exercising control over the hiring or firing of Immigration Judges and members of the BIA.

81. *See* Cole, *supra* note 19, at 2505 (arguing that the "denial of discretionary relief . . . can be reviewed on habeas corpus because it necessarily leads to the individual's detention, and therefore must be subject to judicial review to determine whether the detention is in accordance with law"). *But see* Meltzer, *supra* note 63, at 2584 (stating that "the argument that the Constitution requires such review in each and every case is . . . problematic"). Another option would be for the Court to hold that habeas

exercise discretion that was given or failed to give a reasoned explanation for a decision.⁸²

Both a decision striking down aspects of the administrative adjudication process on due process grounds and a decision requiring habeas corpus review of discretionary determinations would be consistent with the plenary power doctrine. The government does not receive the benefit of the doctrine in cases involving due process or a claim that a statute violates a structural provision of the Constitution rather than an amendment to the Constitution.⁸³ In addition, such decisions would be relatively modest because they would allow Congress to decide substantive immigration issues, and would thus not interfere with the foreign affairs concerns underlying the plenary power doctrine.⁸⁴

Of course, the judiciary would not need to make bold constitutional decisions if the political branches enacted reforms that were designed to improve the immigration system.⁸⁵ As other immigration commentators have argued, Congress *should* reform judicial review and provide for judicial review of all aspects of a final order of deportation.⁸⁶ Unfortunately, if recent history is any indication, Congress's efforts at reform of judicial review are not likely to involve attempts to improve the judicial review process for aliens. Indeed, recent legislative proposals have included provisions that would consolidate immigration appeals in the U.S. Court of Appeals for the Federal Circuit or would provide for a screening process under which a single federal appellate judge could deny a petition for review.⁸⁷

Like the case with judicial review, Congress or the executive branch *should* reform the administrative adjudication process to provide for adequate adminis-

corpus is required under the Suspension Clause in all cases where judicial review is statutorily precluded. See Legomsky, *supra* note 7, at 407.

82. See Meltzer, *supra* note 63, at 2584.

83. See Slocum, *supra* note 32, at 33 (explaining how the Court has limited the reach of the plenary power doctrine in cases involving due process challenges or allegations that a structural provision of the Constitution has been violated). Such decisions would also reflect the Court's bias for procedural over substantive values. See William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1085-86 (1989).

84. See T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 863 (1989) (stating that the Court has "approached the question of congressional power from the perspective of the conduct of foreign affairs").

85. To date, the only recent immigration reform that Congress has enacted is the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (codified at 8 U.S.C. § 1103), which addresses the security of the border between Mexico and the United States.

86. See Medina, *supra* note 19, at 1562.

87. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 805 (unenacted) (as passed by House, Dec. 16, 2005) (providing for certificate of reviewability by single federal circuit judge); Securing America's Borders Act, S. 2454, 109th Cong. § 501 (providing for review in the U.S. Court of Appeals for the Federal Circuit); see also ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE (CRS), REPORT FOR CONGRESS: ENFORCING IMMIGRATION LAW: IMMIGRATION LEGISLATION AND ISSUES IN THE 109TH CONGRESS, at 18 (2006) (stating that "[i]t seems likely that, even if these consolidation and other proposals are not ultimately included in any immigration legislation enacted this Congress, they would be reintroduced in the future").

trative review for all aliens.⁸⁸ In contrast perhaps with judicial review, the political branches do have incentives to reform the administrative adjudication process in a manner that makes the system fairer for aliens.⁸⁹ The recent reforms made by the executive branch have led to widespread dissatisfaction with the administrative adjudication process among aliens and their attorneys. This dissatisfaction has resulted in a dramatic increase in not only the number of cases that are appealed to federal circuit courts but also in an increase in the percentage of appeals from BIA decisions, which has placed a greater burden on federal courts.⁹⁰ At least some reforms are thus not inconceivable. Indeed, one congressional proposal, for example, would attempt to ensure the independence of the BIA and Immigration Judges from the Attorney General.⁹¹

Some of Congress's attempts at immigration reform, even those that are well-intentioned, may make the administrative adjudication process worse, instead of better, however. For example, with millions of undocumented immigrants in this country, and a need for their services, some type of legalization program is likely, if not inevitable.⁹² As recent history illustrates, such a program may well be desirable for both aliens and the country as a whole, but it would likely exacerbate the already existing backlog of cases in the administrative system.⁹³ In 1986, Congress passed the Immigration Reform and Control Act⁹⁴ and while millions of undocumented immigrants were legalized, the INS did not have the capacity to properly investigate the applications that were filed.⁹⁵ Any legalization program enacted by Congress would likely create similar problems.⁹⁶

88. See, e.g., Legomsky, *supra* note 7. Criticism of the administrative adjudication process is not new. See, e.g., Peter H. Schuck & Theodore H. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 177 (1992) (indicating that successful impact lawsuits, "coupled with Congress's failure to overturn their results, provide a clear signal that some important aspects of the INS' administrative performance are deeply and systematically flawed").

89. Indeed, the Attorney General has indicated a willingness to study the administrative adjudication system, although his commitment to truly reforming the system in a positive manner is questionable. See *supra* notes 46-47 and accompanying text.

90. See Palmer et al., *supra* note 21, at 94.

91. See Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 229 (as passed by Senate, May 25, 2006).

92. See Cassie Coppage, *Developments in the Legislative Branch*, 20 GEO. IMMIGR. L.J. 545 (2006) (describing current proposals for legalizing undocumented aliens).

93. See RUTH E. WASEM, CONGRESSIONAL RESEARCH SERVICE (CRS), REPORT FOR CONGRESS: TOWARD MORE EFFECTIVE IMMIGRATION POLICIES: SELECTED ORGANIZATIONAL ISSUES I (2006) (stating that there are concerns whether the Department of Homeland Security can handle the increased immigration workload that would come from a legalization program).

94. Pub. L. 99-603, 100 Stat. 3359 (1986).

95. See Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 463 & n.259 (2000).

96. Thus, even Congress' well-intentioned immigration reforms could lead to greater burdens on the administrative adjudication system, and, consequently, greater judicial frustration with the system.

B. The Rule of Law and the Necessity of Broad Reform of Immigration Law

Reforming judicial and administrative review would be a positive development in immigration law. The availability of adequate administrative and judicial review is an important component of the rule of law.⁹⁷ Nevertheless, the benefits of such limited reform should not be overstated. The most pressing injustices in immigration law stem from the extremely harsh substantive laws passed by Congress, and the reforms of judicial and administrative review described above would not necessarily resolve the many other ways in which immigration law fails to conform to rule of law requirements.

There is disagreement amongst scholars about the definition and requirements of the rule of law. Most definitions look to the presence of specific criteria in the law or the legal system.⁹⁸ Although there is no definitive list of formal criteria, and different definitions may use different standards, typical rule of law definitions require many things which immigration law lacks, such as laws that are obeyed, equally enforced, independently adjudicated, clear and determinate, and prospectively applied.

One of the most controversial aspects of the rule of law definition is whether it requires a substantive test of moral correctness or at least acceptability.⁹⁹ To the extent that the rule of law requires substantive acceptability, immigration law would fail the requirement in many respects, however it is defined. The harshness and unfairness of immigration laws is legendary. For example, aliens can be separated from their families and deported, without any weighing of the equities of their cases, for having committed minor crimes (including misdemeanors) many years after their entry into the United States.¹⁰⁰ In addition, the available grounds for relief from deportation are so narrow that some have argued that they likely violate international law.¹⁰¹

97. See Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1694 (1999); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 9, 18 (1997).

98. See David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 31 (2006); Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT'L L. 353, 359 (2006) (noting the "often unhelpfully conclusory and imprecise" definitions of the rule of law).

99. See Fallon, *supra* note 97, at 1, 21-22; Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 SYRACUSE J. INT'L L. & COM. 131, 131-32 (2005) (describing the "substantive version of the rule of law" which "ensures the 'rightness' of law in accordance with a preexisting higher standard").

100. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

101. See, e.g., *Beharry v. Reno*, 183 F. Supp. 2d 584, 595-96 (E.D.N.Y. 2002), *rev'd on jurisdictional grounds sub nom.*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (holding that the current relief grounds violate international norms against arbitrary interference with one's family and a right to be allowed to submit the reasons against his expulsion); Bobbie Marie Guerra, Comment, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L.J. 941, 975-84 (1997) (identifying inconsistencies between United States law and international agreements).

Even if one disagrees with the notion that the rule of law requires substantive moral acceptability, many other areas of immigration law fail to comply with the basic, and less controversial, requirements of the rule of law. The rule of law requires that the law be clear and determinate in meaning, which is understandably more difficult in the administrative state because Congress often enacts broad, and vague, legislative schemes for agencies to administer.¹⁰² Nevertheless, immigration law is notorious for the amount and scope of discretion afforded the executive branch. Congress typically enacts immigration statutes which leave the executive branch with an enormous amount of discretion to define statutory terms and apply the laws in whatever ways the executive branch sees fit.¹⁰³ The broad discretion granted the executive branch can be difficult to overcome for aliens, even with judicial review.¹⁰⁴

Making matters worse, the extreme discretion granted the executive branch in immigration matters allows the executive branch to easily violate the rule of law requirement that laws be applied in a nondiscriminatory manner.¹⁰⁵ The broad power that the executive branch possesses to apply immigration laws in a discriminatory manner is illustrated in its use of immigration laws in the War on Terrorism. The executive branch has used immigration laws in objectionable and discriminatory, but apparently unreviewable, ways in allegedly protecting national security, such as targeting Muslims and Arabs for surveillance, detention and deportation.¹⁰⁶

Immigration law fails to comply with the rule of law in a myriad of ways, in addition to those already described. A few more examples should suffice to prove the point. The rule of law requires that changes in the law have prospec-

102. See Fallon, *supra* note 97, at 48-49 (describing the rule of law requirement of determinate laws); Summers, *supra* note 97, at 1693 (same).

103. See Kanstroom, *supra* note 8 (explaining the broad-ranging discretion granted the executive branch in immigration matters).

104. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 428, 431 (1999) (holding that a statute making an alien ineligible for withholding of deportation if the alien had committed a serious nonpolitical crime did not require the balancing of the alien's criminal acts against the risk of persecution if returned to his home country or require a consideration of the atrociousness of the alien's acts); *INS v. Yang*, 519 U.S. 26, 31-32 (1997) (holding that Attorney General could consider acts of fraud committed by alien in deciding whether to grant discretionary waiver of deportation because the statute did not impose any limitations on the factors that the Attorney General could consider in determining who should be granted relief); *INS v. Wang*, 450 U.S. 139, 145 (1981) (holding, in a case involving an application for suspension of deportation, that the Attorney General had the authority to construe the "extreme hardship" requirement narrowly if he so desired). Even if statutory eligibility has been established, and the Attorney General's discretionary determination of whether relief should be granted is reviewable, the Supreme Court has in the past emphasized that judicial review should be extremely narrow. See *Yang*, 519 U.S. at 30 (indicating that the authority of the executive to suspend deportation is an "act of grace," exercised according to the Attorney General's "unfettered discretion").

105. See Fallon, *supra* note 97, at 9 (discussing the requirement of "instrumentalities of impartial justice").

106. See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United State: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 621 (2005) (describing the massive arrests that occurred after the attacks of 9/11).

tive rather than retroactive effect.¹⁰⁷ Congress frequently passes immigration laws with retroactive effect, however, and the Court has consistently held that such statutes are constitutional because deportation is not punishment.¹⁰⁸ The rule of law requires that people be ruled by the law and obey it, but as many as twelve million workers are without legal authority to be in the United States, making immigration law appear as though it is unenforceable.¹⁰⁹ Immigration law is also notoriously confusing and complex, which makes the immigration system difficult for aliens to navigate, especially considering that they have no constitutional or statutory rights to government provided legal representation.¹¹⁰

Without reform of the rule of law deficiencies described above, immigration law will remain unfair and unjust, regardless of whether there are adequate judicial review and administrative adjudication procedures. It is true that, similar to judicial interpretations of judicial review provisions, the harshness of substantive immigration laws is sometimes mitigated by aggressive statutory interpretations by the judiciary.¹¹¹ While laudable, such statutory decisions, like the decisions interpreting judicial review provisions, are subject to the inherent limits of interpretation.¹¹² Unfortunately, the judiciary has not shown any indication that it is likely to radically undermine the plenary power doctrine, and help bring the rule of law to immigration law, through aggressive constitutional decisions.¹¹³ The sobering reality is that the only hope for true reform of immigration law is through congressional reforms that aim to improve immigration law, rather than respond to political expediency.

CONCLUSION

As this Article has illustrated, contrary to the common perception of a passive

107. See Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 765 (2005).

108. See Slocum, *supra* note 11, at 527-28. For an example of a recent case, see *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2429-30 (2006) (holding that Congress was sufficiently clear in expressing its intent that a provision of IIRIRA governing the reinstatement of prior removal orders be applied to conduct that occurred before the effective date of IIRIRA).

109. See Fallon, *supra* note 97, at 8. I am not advocating the deportation of undocumented immigrants but merely pointing out yet another way in which our immigration system does not conform to rule of law ideals.

110. See, e.g., *Drax v. Reno* 338 F. 3d 98, 99-100 (2d Cir. 2003) ("This case vividly illustrates the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations that engender waste, delay and confusion for the Government and petitioners alike."); *Alanis-Bustamante v. Reno* 201 F.3d 1303, 1308 (11th Cir. 2000) ("It would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.").

111. See generally Slocum, *supra* note 32.

112. See *supra* Part II.C.2. (discussing the inherent limitations of non-constitutional decisions).

113. See *supra* note 7 and accompanying text (describing the long-standing plenary power doctrine and how the doctrine shields political branch decisions from judicial invalidation on constitutional grounds); see also Slocum, *supra* note 32, at 50 n.222 (arguing that even if the plenary power doctrine were ended, as many immigration scholars desire, it is not clear how many more constitutional challenges to immigration statutes would be successful).

and deferential judiciary in immigration cases, courts have made significant efforts to undermine the reforms of the political branches. Nevertheless, the relatively conservative nature of the judiciary's jurisprudential approach has left various pernicious elements of the judicial review and administrative adjudication process reforms intact. It is no doubt true that adequate judicial review and a properly functioning administrative adjudication process are indispensable to the successful operation of the administrative state. Further reforms of judicial review and the administrative adjudication process, while welcomed, would not address the most pressing problems of immigration law, however. Until its harsh and unfair substantive laws are changed, and immigration law is otherwise brought into conformity with the rule of law, immigration law will continue to remain isolated from other areas of public law.