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Reaffirming the Role of the Federal Courts: How the Sixties Provide Guidance for Immigration Reform

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Reaffirming the Role of the Federal Courts: How the Sixties Provide Guidance for Immigration Reform

Robbie Clarke*

Immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clean conscience. Such a policy would be but a reaffirmation of old principles.

John F. Kennedy, A Nation of Immigrants (1964)[1]

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Introduction

In 2009, fifty-eight percent of the United States judged immigration to be "a good thing for this country today."[2] At the same time, half of the country believed that immigration rates should decrease.[3] In 2007, seventy-eight percent of the nation would allow for some type of a path to citizenship for undocumented immigrants.[4] The same year, "Americans believe[d] that immigrants have tended to make crime, the economy, social and moral values, and job opportunities worse rather than better."[5] These numbers characterize the classic ambivalence that has long defined U.S. immigration policy and which paralyze efforts at immigration reform today.[6] Caught between being the fabled "nation of immigrants" and a

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2. Lymari Morales, *Americans Return to Tougher Immigration Stance*, GALLUP, Aug. 5, 2009, http://www.gallup.com/poll/122057/Americans-Return-Tougher-Immigration-Stance.aspx (last visited Mar. 17, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. *Id.*

4. Jeffrey M. Jones, *Fewer Americans Favor Cutting Back Immigration*, GALLUP, July 10, 2008, http://www.gallup.com/poll/108748/fewer-americans-favor-cutting-back-immigration.aspx (last visited Mar. 17, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

5. *Id.*

6. *See* MICHAEL C. LEMAY, *U.S. Immigration Policy and Politics*, *in* THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY 1–2 (Michael LeMay ed., 1989) [hereinafter LEMAY, GATEKEEPERS] (portraying U.S. immigration policy as perpetually being caught between the opposing notions of immigrants as refreshing the national

highly developed and established nation, finding the middle ground has long proven challenging.[7]

Yet Congress managed to do so over half a century ago when it unified the immigration system with the Immigration and Nationality Act of 1952 (INA),[8] and then cleansed it of racial prejudice with the Immigration Act of 1965 (1965 Amendments),[9] creating the groundwork for our modern immigration structure.[10] Following decades of racially-based immigration policy, the 1965 Amendments launched a new era of immigration in the United States, imbuing the immigration process with emerging nonracial norms.[11] Coupled with legislation from 1961 that standardized judicial review of immigration hearings, the U.S. adopted a decidedly pro-immigration stance. The social and political transformations of the 1960s served as the backdrop for Congress's actions, and many of these centered on newly-championed individual liberties and the government's role in guaranteeing these rights.[12] In corresponding form, the 1961 and 1965 Amendments brought U.S. immigration policy closer to the traditional values so central to that decade which epitomize the relationship between individuals and government.

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workforce and culture against immigrants as weakening the American economy and set of values).

7. *See* HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 9 (2001) ("More than any other dynamic, the story of immigration policy in the United States is a tale of ambivalence towards new arrivals."). The author credits three factors for the nation's current reservations about immigration: "America's 'exclusionary impulse' towards nonwhite immigrants . . . competing and conflicting claims of capital and labor market interests . . . [and] the paradox embodied in undocumented immigration whereby it is denounced on the one hand as a calamity and on the other hand has been permitted to continue." *Id.*

8. Immigration and Nationality Act, Pub L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

9. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

10. *See* JAMES G. GIMPEL & JAMES R. EDWARDS, JR., THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM 60 (1999) ("The Immigration and Nationality Act . . . remains the foundation of U.S. immigration law, although it has subsequently been amended numerous times. Among the most far-reaching of those amendments, the 1965 Immigration Act, marked a sea change in U.S. immigration policy.").

11. *See* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 2 (2004) [hereinafter JOHNSON, MYTH] (declaring that "Congress eliminated racial exclusions from the U.S. immigration laws in the heyday of the 1960s civil rights movement" and significantly changed the racial makeup of the immigrant population).

12. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 225 (2007) (describing the 1965 Amendments as a "dramatic centerpiece of the civil rights initiatives of the Johnson administration").

However, as other legal developments from that era generally settled into familiar positions, immigration policy has remained uncertain.[13] The changes to immigration law that took place during the 1960s, while establishing a basic structure for the immigration system, were followed by decades of subsequent legislation that reworked the components of that structure.[14] From a contemporary perspective, the modifications can largely be described as an emphasis on enforcement measures and a reduction of judicial review.[15] Despite these unending attempts at constructive immigration reform, the public continues its appeals for thorough reform.[16] Nevertheless, such legislation has been elusive.[17] This Note argues that the obstacle to meaningful reform is the narrow focus of Congress. Assessing immigration policy strictly within the confines of the nation's current circumstances will not provide a thorough understanding of our immigration system or how best to reform it.[18] Instead, Congress should

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13. *See* JOHNSON, MYTH, *supra* note 11, at 3 (noting that efforts of racial integration, while not fully completed, became "a legally sanctioned and socially acceptable goal"). More generally, following the progressive era of the 1960s, "not only legal but political constraints moderate the majority's treatment of *domestic* minorities." *Id.* at 5 (emphasis added).

14. *See infra*, note 15 (explaining the types of changes made to the original immigration system).

15. *See* MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 14–27, 51 (1994) [hereinafter LEMAY, ANATOMY] (explaining that the rise of the noncitizen population of the 1970s led to passage of mildly restrictionist legislation in the 1980s); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 48–49 (2007) [hereinafter JOHNSON, FLOODGATES] (describing the increased immigration enforcement efforts of the 1990s through border controls and tighter legislation); KANSTROOM, *supra* note 12, at 229–30 (discussing the legislation of the last twenty years which limits the involvement of federal courts in immigration adjudication).

16. *See* LEMAY, ANATOMY, *supra* note 15, at 25–27 (observing the increased rates of public discontent with immigration policy and ensuing calls for reform during the 1970s and 1980s); ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 220 (2004) (referring to widely publicized events involving noncitizens as well as general economic troubles to explain the reemergence of immigration policy as a target of reform).

17. *See, e.g.*, Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 151, 185 (2005) (claiming that the potential for effective immigration policies existed following the 1965 Amendments but that the opportunity passed due to various shortcomings in subsequent legislation).

18. *See* JOHNSON, FLOODGATES, *supra* note 15, at 54 (explaining that the infrastructure of modern immigration law was created in 1952 with the INA, and "has been amended almost annually since its passage in 1952 . . . "). In addition, the subsequent history of those amendments has hardly been consistent, veering from "humane and generous" to "harsher,

begin with a broader view and then approach reform considering the motivations that originally created the modern immigration system. This method will then be applied specifically to removal hearings in the federal immigration courts and the constitutionally insufficient allowances for habeas corpus review on appeals from those hearings. The benefits of such judicial review will then be evaluated by comparing immigration reform to the criminal procedure revolution that took place in the U.S. court system. The reaffirmation of the role of the federal courts in immigration through a restoration of judicial review should be part of the realignment of the nation's immigration laws. This inclusion of the judiciary would bring the nation's immigration laws closer to their original motivations and would provide stability in immigration.

I. Past Immigration Reforms—Establishment of the Immigration System and Subsequent Changes

Ever since the federal government earnestly began implementing a coherent national immigration policy in the 1880s,[19] the domain has been one of its most volatile areas of law.[20] This constant tendency towards revision stems in large part from the chronic bipolarity of national public opinion towards immigration and from recurring economic and societal concerns.[21] Nevertheless, the United States has a long, if not complicated, relationship with noncitizens, and any evaluation of immigration policy carried out by a reform-minded nation should include not only present

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less forgiving, and more insulated from judicial review." KANSTROOM, *supra* note 12, at 225–26.

19. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 44–51 (1996) (tracking the development of federal immigration regulation during the beginning of the nineteenth century and through to the realization of this authority at the end of that century).

20. *See* LEMAY, GATEKEEPERS, *supra* note 6, at 1–5 (describing the cyclical nature of immigration policy, which reacts to past social, economic, and population concerns while simultaneously affecting these factors so as to set the stage for the next change in immigration policy); JOHNSON, FLOODGATES, *supra* note 15, at 45 ("U.S. immigration law is famous for its cyclical, turbulent, and ambivalent nature.").

21. *See, e.g.*, Charles J. Ogletree, Jr., Conference Paper, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 758 (2000) ("America's enthusiasm for newcomers has historically been tempered by its skeptical view of outsiders of different race, ethnicity, economic status, religion, or political affiliation.").

circumstances but also a wider fidelity to and understanding of the country's unparalleled immigration history.[22]

A. Congress's Plenary Powers

The history of immigration must begin with Congress, because under the accepted interpretation of Congress's constitutional authority,[23] the legislative branch maintains essentially plenary control over immigration policy choices.[24] This dominion not only includes the ordinary power of Congress to legislate but also considerable autonomy from the Constitution itself in fashioning these laws: "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [immigration policy]."[25] Immigration policy is then principally a creature of politics, and it is this freedom from the sturdier foundations of the Constitution that has given this area such uncertainty.[26] Thus, any consideration of U.S. immigration policy is

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22. *See* ESMOND WRIGHT, THE AMERICAN DREAM: FROM RECONSTRUCTION TO REAGAN 544–48 (1996) (illustrating briefly the history of U.S. immigration before concluding that "[t]he American immigration situation is unprecedented in world history"). The author continues: "To anyone who knows something of the history of nation-states in Europe, it is obviously no more possible to change the ethnic content of a polity without fear of consequence than to replace abruptly all the blood in a human body. Yet this is the experiment upon which America has embarked." *Id.* at 548.

23. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 11–12 (4th ed. 1994) (listing an amalgamation of enumerated constitutional powers and implied rights of sovereignty that together form the federal power over immigration).

24. *See, e.g.*, FRANK L. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 2 (2d ed. 1961) (stating the foundational principle that Congress has the constitutional authority to regulate immigration without judicial oversight into compliance with the Constitution, which has also been consistently recognized by the Supreme Court).

25. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). *See also* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 178–80 (1987) [hereinafter LEGOMSKY, JUDICIARY] (introducing the plenary power over immigration, shared between the Legislative and Executive branches, which "the [Supreme] Court has explicitly treated as an exception to the principle of constitutional review"); *see also* VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 9–23 (2005) (attributing the nominal rights currently held by noncitizens to the growth of the plenary power doctrine). *But see* JOHNSON, MYTH, *supra* note 11, at 14, 17–18 (describing briefly the history of challenges to the plenary power doctrine and contending that it is an anachronistic approach in contemporary jurisprudence).

26. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the

inherently an examination of Congress and the political pressures that have come into play over the decades.[27]

Recent constraints placed by Congress on judicial review also invoke another instance of its plenary authorities: the near-absolute power to control the jurisdiction of the federal courts.[28] "[D]ramatically limiting the scope of the judiciary's guaranteed institutional autonomy,"[29] this capability to alter federal jurisdiction has allowed Congress to reduce the judiciary's role in immigration adjudications.[30] In addition to the judiciary's lack of control, the executive branch has historically deferred to Congressional judgment for the boundaries of its enforcement powers, and for decades Congress has expanded on these powers.[31] The sum total of this authority gives Congress the discretion to greatly empower the executive agencies to carry out immigration policy and simultaneously relegate the judiciary to a minimal level of participation.[32]

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nadir.").

27. *See* LEMAY, GATEKEEPERS, *supra* note 6, at 2–5 (partitioning the evolution of U.S. immigration policy into four general phases, with each new era clearly prompted by economic, social, political, and demographic changes).

28. *See* U.S. CONST. art. III, §§ 1, 2 ("The judicial power of the United States, shall be vested in on Supreme Court, and in such inferior courts as the Congress may . . . ordain and establish."). *See also* Ex parte McCardle, 74 U.S. 506, 514 (1868) (finding that Congress holds the power to control the jurisdiction of the federal judiciary). The Supreme Court recognized this constitutional grant of power when it stated that "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514.

29. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 31 (2006).

30. *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 41–43 (2006–2007) [hereinafter Benson, *Paper Dolls*] (describing the efforts since 1996 to "reduce the quantity and quality of judicial review of administrative removal orders").

31. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 482–83 (2009) (arguing that the Executive branch in theory possesses significant influence over immigration policy-making through selective enforcement but that in practice Congress has exercised control without objection).

32. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1411–19 (1997) (arguing that limits on judicial review over immigration matters will not give finality to Executive decisions but rather will increase the legal confusion as complex constitutional questions become more prevalent).

B. The Beginning of the Modern Structure

Under Congress's direction, immigration policy in the U.S. reflected economic considerations and nativist fears throughout much of its history.[33] During the nation's early decades, the appetite for an abundant labor force was the primary force shaping immigration policy.[34] Nevertheless, there were restrictions on criminals, slaves, the diseased, and the impoverished, thus initially establishing the U.S. as generally receptive towards immigrants though discretely selective.[35] In piecemeal fashion, Congress then began codifying and widening these restrictions, creating blatantly racially discriminatory classifications during the twentieth century as nativist sentiments and post-Industrial Revolution economic concerns turned politically active.[36] The push for racial limits on immigration ultimately produced the Immigration Act of 1924 and the notorious national origins quota system.[37] Structured to favor those ethnicities already present in the country, the system "effectively ended immigration; cheap labor was no longer needed."[38] The national origins quota remained in effect through

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33. *See* NEUMAN, *supra* note 19, at 19–43 (arguing that the state governments regulated discrete categories of immigration since colonial times, labeling the prevailing notion otherwise as an "open-borders myth"); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 322–23 (2003) (explaining that early state prohibitions on allowing any nonwhite person to become a U.S. citizen agreed with the overall harsh treatment of minorities within the nation's borders).

34. *See* Boswell, *supra* note 33, at 324 (presenting the U.S. history leading to stricter immigration controls).

35. *See* VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST 44–69 (2d ed. 1996) (noting that there was no cohesive national immigration policy until the 1920s, before which the country treated immigration as a necessary means towards acquiring a labor force); JOHNSON, FLOODGATES, *supra* note 15, at 52 (suggesting that immigration regulation was primarily a state matter prior to the late 1800s and reasonably balanced, but that the introduction of federal regulation around the turn of the century coincided with new attitudes towards immigrants).

36. *See* DANIELS, *supra* note 16, at 49 ("[F]ears about job-stealing and the lowering of the standard of living by immigrants willing to work cheap were still shaping the national mood. The nation was also gripped by xenophobia and a rejection of [Southern] Europe.").

37. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924). Noticeably absent were Asian immigrants, who had been barred for decades from gaining citizenship, and Central and South American immigrants, who were exempted from the quota system and therefore could migrate northward freely. BRIGGS, *supra* note 35, at 67. In addition, immigration from Africa was essentially ignored. *See* Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L.R. 1927, 1933 (1996) (noting that "the descendents of slave immigrants" were virtually disqualified from participating in the quota system (internal quotations omitted)).

38. BRIGGS, *supra* note 35, at 68. *See also* WRIGHT, supra note 22, at 13 (explaining

the 1960s, amended periodically to reflect unrelated political developments such as the refugee situations and the ideological conflicts following World War II.[39] Prompted by a desire to bring together the scattered immigration laws as well as heightened fears of Communism, Congress then created the first unified system of federal immigration laws with the INA in 1952,[40] strengthening the structure of the executive immigration agencies in the process. This expansive law plainly preserved the national origins quota and further curtailed immigration from Communist countries.[41] As revealed by subsequent legislative evaluations of the INA, deep-seated racial beliefs remained central to the legislation:

> Without giving credence to any theory of Nordic superiority, the [Senate Judiciary] subcommittee believes that the adoption of the national origins formula was a rational and logical method of numerically restricting immigration in such a manner as to best preserve the sociological and cultural balance in the population of the United States . . . [T]he subcommittee holds that the peoples who had made the greatest contribution to the development of this country were fully justified in . . . admit[ting] immigrants considered to be more readily assimilable . . . .[42]

Despite its racial language, the INA nevertheless set the stage for the upcoming changes in immigration law through some decidedly progressive changes: the removal of explicit racial disqualifications, the recognition of skilled immigrants as a priority in immigration selections, and the creation

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that the legislation controlled immigration rates by setting a maximum annual quota and allotting each European country an amount proportionate to its current representation in the U.S.); Boswell, *supra* note 33, at 324 (identifying the rising immigrant population fueling the Industrial Revolution and increased internal migration as potential causes for the tightened immigration legislation of the early 20th century).

39. *See* AUERBACH, *supra* note 24, at 11–16 (listing the more notable amendments to the Immigration Act of 1924, including the War Brides Act in 1945, which assisted soldiers in gaining citizenship for foreign national spouses married abroad, and the Internal Security Act in 1950, which intended to protect the U.S. from immigrating Communists and other criminals).

40. *See* Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). *See also* JOHNSON, FLOODGATES, *supra* note 15, at 54 ("A product of the Cold War, . . . the law is not particularly generous to immigrants."). "The firm presumption under the INA is that noncitizens are not eligible to enter the United States unless they prove that they are admissible under the law." *Id.*

41. *See* Boswell, *supra* note 33, at 325 ("The national origin quota was made permanent in 1924 by enactment of the 1924 National Origins Act which lowered the annual quota of immigrants allowed into the United States . . . .").

42. WHOM SHALL WE WELCOME: REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 89 (1953) [hereinafter WHOM SHALL WE WELCOME]).

of the underlying framework in immigration law generally that persists to this day.[43]

C. The 1961 Amendments

Identifiable immigration adjudications also emerged and developed during the early days of federal immigration policy.[44] Prior to the middle of the twentieth century, these hearings merely served as an extension of executive enforcement and lacked any vestige of judicial impartiality.[45] The long-established availability of the writ of habeas corpus, however, provided some measure of external review from the federal judiciary, and until 1952 was "the sole means by which an alien could test the legality of his or her deportation order . . . [and] challeng[e] Executive interpretations of the immigration laws."[46] The creation of the Board of Immigration Appeals (BIA) in 1941,[47] an executive body which heard appeals from the immigration adjudications, represented the introduction of administrative review as a meaningful component of U.S. immigration policy.[48] Subsequently, under the newly-enacted Administrative Procedures Act

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43. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965 312 (1981) (portraying the INA as a compromise between the various factions in that it eliminated blatant racism but kept the veiled racism of the national origins quota). The INA "embodied the majority opinion in Congress at the time. It also became the focus of persistent efforts at revision and relaxation of the immigration laws over the following years . . . ." *Id.* at 313.

44. *See* Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 658 (2006) ("The structure of adjudication in the immigration context has been in a state of near-constant movement since Congress first attempted to draft comprehensive immigration legislation at the turn of the last century.").

45. *See id.* at 661–64 (explaining that prior to 1952, Congress allowed the federal immigration agencies to dictate adjudication procedures, leading to immigration officers serving as the "judge" with only a basic administrative appeals process available).

46. INS v. St. Cyr, 533 U.S. 289, 305–06 (2001). *See* Sarah A. Moore, Note, *Tearing Down the Fence Around Immigration Law: Examining the Lack of Judicial Review and the Impact of the REAL ID Act While Calling for a Broader Reading of Questions of Law to Encompass "Extreme Cruelty"*, 82 NOTRE DAME L. REV. 2037, 2043 (2007) (observing that "the shortcoming of habeas review was that the noncitizen could not seek this form of relief until he or she was 'in custody'").

47. Creation of a Board of Immigration Appeals, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified as amended at 8 C.F.R. § 1003.1 (2009)).

48. *See* Durham, *supra* note 44, at 665 ("[T]he Board's regulatory creation seems to reflect the belief that the preexisting adjudicatory structures provided too few procedural protections for aliens facing exclusion or deportation from the United States.").

(APA),[49] the Supreme Court in 1950 analyzed immigration hearings and concluded that the executive immigration agencies were required to conduct formal adjudication procedures.[50] The Court observed that a central purpose of the APA, to "curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge," clearly applied to immigration proceedings.[51] Five years later, following the overhaul of the immigration system under the INA, the Supreme Court declared that the APA also provided for review of agency action in federal district court.[52] This decision, repudiating earlier efforts by Congress to exempt immigration proceedings from this provision of the APA,[53] stated that "[t]he legislative history of both the Administrative Procedure Act and the 1952 Immigration Act supports [the noncitizen's] rights to full judicial review of this deportation order."[54] The Court also confirmed in 1953 a noncitizen's constitutional right to petition the federal courts for habeas review, further solidifying the role of courts in immigration policy.[55] Thus,

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49. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). *See also* Durham, *supra* note 44, at 665 (explaining that the transformation of immigration hearings "echoed the revolutions in administrative agency adjudications generally that had been effected by the passage of the APA in 1946").

50. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 51 (1950) (holding that immigration adjudications were required by the INA and Due Process requirements, and therefore the APA's formal adjudication procedures applied). The APA did not universally impose adjudication procedure standards on the agencies but rather interpreted each agency's organic statute to determine which standards were appropriate. *Id.* at 36. Accordingly, the applicability of formal adjudication procedures came down to statutory interpretation and the parsing of Congressional language. *See* Durham, *supra* note 44, at 666 (explaining that "each agency was forced to struggle to define the specific requirements that the APA itself, read together with individual organic statutes, placed upon its day-to-day procedures").

51. *See Wong Yang Sung*, 339 U.S. at 41 (noting that this theme "was reiterated throughout the legislative history of the Act").

52. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 52–53 (1955) (holding that the APA provides another avenue of judicial review for immigration adjudications conducted under the INA, in addition to the existing habeas review).

53. *See Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 771 (1962) [hereinafter *Deportation and Exclusion*] (explaining that Congress's answer to W*ong Yang Sung v. McGrath* was legislation "specifically exempting [the primary enforcement body under the INA] from the hearing requirements of the APA"). The Supreme Court initially agreed that the legislation did indeed create an exemption for the INA and was constitutionally sound. *See* Marcello v. Bonds, 349 U.S. 302 (1955) ("Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.").

54. *Shaughnessy*, 349 U.S. at 51–52.

55. *See* Heikkila v. Barber, 345 U.S. 229, 240 (1953) ("[O]ne against whom a

by the mid-1950s, an immigrant facing deportation received a formal adjudication with the ability to seek review in an administrative body, in federal district court, and in the federal courts of appeal.[56]

In response to this rather sudden expansion of judicial procedures, Congress reclaimed control in 1961 by "prescribing for the first time a statutory scheme for judicial review of deportation and exclusion orders."[57] The 1961 Amendments, located in section 106 of the INA,[58] intended to prevent noncitizens from protracting the enforcement of final deportation decisions[59] and settled on a conventional role for the judiciary in immigration adjudications.[60] Resisting the "consistent congressional desire to limit judicial participation in immigration matters,"[61] Congress recognized that "[a]liens seeking review of administrative orders should be

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deportation order is outstanding but not executed, may at once move, by means of a declaratory judgment, to challenge the administrative process insofar as the substantive law pertaining to deportation permits challenge.").

56. *See generally* Durham, *supra* note 44 and accompanying text (showing the progression of immigrant rights in the court system). *See also Heikkila*, 345 U.S. at 240 (expanding immigrant rights in federal courts).

57. *Deportation and Exclusion*, *supra* note 53, at 760. *But see* Gerald Seipp, *Federal Court Jurisdiction to Review Immigration Decisions: A Tug of War Between the Three Branches*, 07-04 IMMIGR. BRIEFINGS 1 (2007) (noting that the references to deportation orders and exclusion orders are outdated, as Congress "combined deportation [removing the noncitizen from the country] and exclusion hearings [barring the noncitizen from entering the country], as of April 1, 1997, into a unified 'removal' hearing process").

58. Immigration and Nationality Act, Pub. L. No. 87-301, 75 Stat. 650 (1961) (codified as amended in scattered sections of 8 U.S.C.). *See also* Seipp, *supra* note 57 (placing the 1961 Amendment at the beginning of decades of Congressional efforts to clearly define judicial review of immigration proceedings).

59. *See* H.R. Rep 87-1086, pt. 2, at 2967 (1961) (portraying the underlying problem as "the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country"). The Report contends that these manipulative noncitizens are "mostly subversives, gangsters, immoral, or narcotic peddlers, [who] manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process." *Id. See also Deportation and Exclusion*, *supra* note 53, at 760 nn.3–4 (describing the contentious legislative battle in the Senate over constricting judicial review as well as the persistent conviction by some Representatives that noncitizens abused judicial review).

60. *See* H.R. Rep 87-1086, pt. 1, at 2966 (1961) ("The purpose . . . is to create a *single, separate, statutory form of judicial review* of administrative orders for the deportation and exclusion of aliens from the United States . . . ." (emphasis added)). The Report also quoted testimony from a committee hearing: "There are several objections to the divergent methods of review. They lack uniformity . . . . There is need for expedition, orderly venue, and the avoiding of repetitious court proceedings." *Id.* at 2970.

61. *Deportation and Exclusion*, *supra* note 53, at 761.

given full and fair opportunity to do so . . . ."[62] Thus, the 1961 Amendment established that the federal courts of appeals would review all orders of deportation if appealed within six months.[63] However, exclusion orders would remain reviewable solely in the district courts through habeas petitions.[64] This divergent treatment stemmed from the belief that noncitizens should not be granted anything but the most minimal access to the U.S. court system simply by appearing at the border and triggering an exclusion hearing.[65]

Yet, even with the narrower provision for exclusion hearings, the 1961 Amendment stands as a congressional acknowledgement of the federal judiciary's quintessential function as the check on executive enforcement practices.[66] Confronted with the inevitability of judicial involvement through a habeas petition and the courts' oversight of agency action through the APA, Congress simply decided to reassert its role as immigration policy-maker.[67] The sensible achievements of the 1961 Amendment quietly endured for more than three decades,[68] but the looming social revolutions

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62. H.R. Rep. 87-1086, pt. 2, at 2968 (1961). The Report also contained a message from former President Dwight Eisenhower: "Constitutional due process wisely confers upon any alien, whatever the charge, the right to challenge in the courts the Government's finding of deportability." *Id.*

63. *See* H.R. Rep. 87-1086, pt. 2, at 2973 (1961) (concluding that "[i]t is obvious that 6 months is sufficient and far beyond the realms of any claim of unfairness, for an alien to determine whether he really has a case upon which he should seek judicial review and to prepare therefore"). *See also Deportation and Exclusion*, *supra* note 53, at 762 n.18 (suggesting that the law operates under the assumption that all petitions for review are abuses of the system and that the scarcity and complexity of the courts of appeals would discourage petitions for review since most immigrants did not have the necessary resources).

64. *See Deportation and Exclusion*, *supra* note 53, at 762 (commenting on the "ambivalent" nature of the 1961 Amendment, in that it solidifies review of deportation orders while also refusing direct judicial review of exclusion orders).

65. *See* H.R. Rep. 87-1086, pt. 2, at 2977 (1961) (stating that "no sound reason appears to the committee why excluded aliens arriving at the various ports in the United States should be permitted to burden an already overburdened court system"). *But see Deportation and Exclusion*, *supra* note 53, at 786–88 (arguing that judicial review aims to prevent arbitrary enforcement decisions as well as protect individuals, and that the emphasis placed on the noncitizen's location fails to take into account this dual responsibility).

66. *See Deportation and Enforcement*, *supra* note 53, at 761 (referring to the 1961 Amendment as "the most recent episode in a long standing controversy between the courts and Congress in the area of immigration procedures and practices").

67. *See id.* at 761–62 (describing the 1961 Amendment as both an expression of Congressional beliefs regarding immigration as well as a reaction to the Supreme Court's insistence on judicial involvement in immigration matters).

68. *See, e.g.*, Moore, *supra* note 46, at 2044–45 (commenting that congressional attitudes towards judicial review of immigration adjudications soured during the mid-1990s).

and the unprecedented legislation of the 1960s soon captivated the nation and profoundly altered the course of modern immigration.

D. The 1965 Amendments

In the years following the 1952 enactment of the INA, with its perpetuation of the national origins system, politicians had already begun agitating for the "progressive liberalization of immigration policy."[69] As soon as 1953, an immigration commission organized by President Harry Truman summarized public opinion towards the INA as follows:

> The consensus was to the effect that the Immigration and Nationality Act of 1952 injures our people at home, causes much resentment against us abroad, and impairs our position among the free nations, great and small, whose friendships and understanding is necessary if we are to meet and overcome the totalitarian menace.[70]

Although the impending Cold War clearly served as the primary inspiration to seek reform of the INA, the commission also cited considerations of equality and diversity, effectively rejecting the underlying rationale of the quota system.[71] Viewing immigration policy as simply another means to undermine Communist countries,[72] Congress all but ignored the commission's report.[73]

As the post-war 1950s evolved into the turbulent 1960s, an increasingly mobilized constituency was demanding that Congress turn its attention to critical domestic issues.[74] After decades of hard work, the

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69. *See* HUTCHINSON, *supra* note 43, at 314 (outlining the period of relative stability immediately following the creation of the INA and the increasing efforts to modify it with each passing year).

70. WHOM SHALL WE WELCOME, *supra* note 42, at 19.

71. *See id.* at xii–xv (listing "truths" about the United States related to immigration policy, including the belief that "American national unity has been achieved without national uniformity").

72. *See* DANIELS, *supra* note 16, at 125–26 (describing refugee legislation during the 1950s as intended primarily for immigrants from Communist or formerly Fascist nations).

73. *See id.* at 122–23 (observing that Congress declined to hold hearings on the report). "The commission's work was not entirely futile, however, and *Whom Shall We Welcome* did become a liberal icon. The Truman commission's report provided a national agenda largely realized in 1965, with a final element accepted in 1980 . . . ." *Id.* at 123.

74. *See* David Farber & Beth Bailey, Introduction, THE COLUMBIA GUIDE TO AMERICA IN THE 1960S 1, 1–12 (David Farber & Beth Bailey eds., Columbia Univ. Press 2001) (describing the political obsession with international military concerns following World War II until "an unexpected revolution" broke out at home).

African-American civil rights movement had reached a critical stage.[75] The escalating war in Vietnam was steadily eroding the relationship between segments of the nation and the federal government.[76] Additionally, countercultural and egalitarian sentiments were on the rise,[77] feminism was experiencing a resurgence,[78] and progressive developments were altering the legal landscape, including the criminal justice system.[79] These expanding campaigns for equality, culminating in "[t]he equal-rights revolution that ended legally sanctioned racism and sexism,"[80] also inspired Congress to consolidate behind the enduring drive to end the national origins quota system and enact the unparalleled Immigration Act of 1965.[81]

The legislative history of the 1965 Amendments reflects this momentum, and champions "a new system of selection designed to be fair, rational, humane, and in the national interest."[82] In practice the national origins system had not fared well,[83] though Congress itself was partially

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75. *See id.* at 13–19 (reviewing the sequence of events during the first few years of the 1960s that drove the civil rights movement into the national spotlight). "The civil rights movement did not start in the 1960s. . . . In the 1960s, however, for the first time, black Americans in large numbers . . . demanded their rights as citizens under the United States Constitution." *Id.* at 13.

76. *See* WRIGHT, *supra* note 22, at 387 ("Vietnam . . . destroyed credibility within the American political process [because] [t]he public came to distrust its leaders, and many officials distrusted the public.").

77. *See* Farber & Bailey, *supra* note 74, at 55–63 (juxtaposing the various sectors of 1960s culture, including consumerist, youth, black, and nonconformist subcultures, and asserting that "[a]ll expressed a growing acceptance of cultural pluralism"). This approval of "greater cultural diversity and social experimentation" was also indicative of the majority support for "the idea that personal expression and individual freedom were a critical aspect of the American way of life." *Id.* at 62–63.

78. *See* WRIGHT, *supra* note 22, at 439–40 (outlining the causes for the revival of the feminism movement, including the variety of intellectual, economic, medical, and political factors).

79. *See* Rusty L. Monhollon, *Law and Justice*, *in* THE COLUMBIA GUIDE TO THE 1960S 281, 281–87 (David Farber & Beth Bailey eds., Columbia Univ. Press 2001) (commenting on the liberal advances made by the federal government, especially the Supreme Court, in areas such as civil liberties, education, and privacy).

80. Farber & Bailey, *supra* note 74, at 76.

81. *See* BRIGGS, *supra* note 35, at 106 (contending that "there was a direct link between [immigration reform in 1965] and the success of civil rights legislation"); Boswell, *supra* note 33, at 326–28 (arguing that the 1965 Amendments to the INA formed part of a larger political collaboration to improve the civil rights reputation of the U.S. abroad).

82. S. REP. NO. 89-748, at 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332. *See generally* JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964) (presenting the important role that immigration has played in the development of the United States and reasoning for the eradication of the national origins system).

83. *See* H.R. REP. NO. 89-745, at 11 (1965) ("The national origins system has failed to

responsible due to years of special allowances for refugees.[84] Nevertheless, despite some opposition,[85] both houses showed wide support for the bill.[86] In essence, the legislation replaced the former race-based admissions scheme with a preference system weighted towards family reunification and skilled workers.[87] Congress left the majority of the INA intact, intentionally limiting its efforts to the national origins system.[88] In a concession to restrictionist members of Congress, however, the bill also included immigration restrictions from the Western Hemisphere for the first time.[89] These focused efforts, however, removed manifest racism from the INA and deeply altered both immigration patterns and immigration

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maintain the ethnic balance of the American population as it was designed and intended since the nations favored with the high quotas have left their quotas largely unused.").

84. *See* DANIELS, *supra* note 16, at 115 (commenting that by 1965 the national origins system "was more like a colander than a shield"). *See also* S. REP. NO. 89-748, at 3–4 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3331–32 (expressing the congressional sentiment that the refugee adjustments were a necessary measure); H.R. REP. NO. 89-745, at 12 (1965) (same). Congress noticeably attempted to distance itself from the 1924 legislation, stressing its humanitarian efforts despite the strictures of the quota system. *See* S. REP. NO. 89-748, at 4 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3331 ("The performance of the Congress in the field of immigration in the postwar period has been far more generous and sympathetic than adherence to the national origins system alone would allow . . . .").

85. *See* S. REP. NO. 89-748, at 19 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3346-49 ("[N]o one should be so naïve as to believe that the adoption of this bill will end the cries to change our immigration laws."). The Representative then forecasts that the 1965 Amendments "would only be the opening wedge in a continuing effort to chip and chip and chip until our immigration laws would be a shambles." *Id.* at 3346.

86. *See* GIMPEL & EDWARDS, *supra* note 10, at 108–09 (giving the final vote tallies as 320-69 in the House and 76-18 in the Senate). *See also* LEMAY, ANATOMY, *supra* note 15, at 11–12 (observing that in the years prior to the 1965 Amendments, large numbers of Congressmen were submitting their own bills to reform immigration laws).

87. *See* H.R. REP. NO. 89-745, at 12 (1965) (summarizing the admissions system as "based upon first come, first served, without regard to place of birth, within the preference categories, and subject to specified limitations"); S. REP. NO. 89-748, at 1–2 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3329–30 (noting that the new system gave priority "to close relatives of U.S. citizens . . . , to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled laborers who are needed in the United States, and to certain refugees").

88. *See* S. REP. NO. 89-748, at 1–2 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3329 (expressing the limited purpose of the 1965 Amendments as removing the national origins system); H.R. REP. NO. 89-745, at 13 (1965) (same). *But see* HUTCHINSON, *supra* note 43, at 378 (noting that the 1965 Act went further than the 1952 Act "by adding several new components to the structure of immigration law and policy").

89. *See* BRIGGS, *supra* note 35, at 110 (explaining that a ceiling on immigration from Latin America was a compromise necessary to gain the support needed to pass the legislation).

policy.[90] In the words of President Lyndon Johnson at the signing of the bill:

> [The 1965 Amendments] repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American nation . . . . The fairness of [the new] standard is so self-evident that we may well wonder that it has not always been applied.[91]

The substance of the 1965 Amendments paralleled contemporaneous developments in other areas of U.S. politics and law.[92] The combined effect of these other changes suggests a compelling rationale for the 1965 Amendments far beyond the desire to improve the American reputation abroad for Cold War purposes.[93] The seminal achievement of the 1960s, the Civil Rights Act of 1964,[94] exemplified the evolving attitudes about race and the legal structure.[95] Advances in education, gender equality, and civil liberties in general demonstrated both Congress and the Supreme Court's willingness to heed the appeals for progressive change.[96] Finally, the protection of constitutional rights in criminal matters evinced a renewed commitment to personal liberties.[97] In conjunction with these

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90. *See* JOHNSON, FLOODGATES, *supra* note 15, at 51 (referring to 1965 as a "watershed in U.S. immigration policy" before adding that immigration laws continue to have subtler but equally discriminatory effects).

91. President's Message to Congress, Oct. 3, 1965.

92. *See* Monhollon, *supra* note 79, at 281–87 (recounting the major legal occurrences in the U.S. of the decade for a host of separate groups, including minorities and women); BRIGGS, *supra* note 35, at 106 ("Between 1964 and 1966 the most ambitious domestic reform agenda in the nation's history was proposed and enacted.").

93. *See* JOHNSON, FLOODGATES, *supra* note 15, at 51 ("The civil rights movement of the 1950s and 1960s . . . dramatically changed the law in ways completely at odds with the racial exclusions in place in the U.S. immigration laws."); BRIGGS, *supra* note 35, at 106–07 (suggesting that the proscription against racial categorization of citizens created a "political climate" favorable to progressive immigration legislation).

94. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

95. *See, e.g.*, Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 110–12 (2007) (crediting the coalescence of racially disparate groups as a central explanation for the success of the African-American civil rights movement). The authors suggest that a combination of coordinated and sustained efforts at the local level propelled a hesitant federal government into passing the Civil Rights Act. *Id.*

96. *See* Monhollon, *supra* note 79, at 281–82 (describing how "altered conceptions of justice and methods for promoting them" spurred the federal government into action). The author establishes three principles that served as guideposts for many of the accomplishments during this time: a commitment to equal protection, a standardized system of justice nation-wide, and an accessible and active court system. *Id.*

97. *See infra* Part V.B.i–ii (describing the "criminal procedure revolution" and its

developments, the 1965 Amendments explicitly eliminated race from the immigration admissions system, enjoyed wide support in Congress, and derived at least in part from the historic ideals of fairness and equality.[98] All of these related achievements "reflected a vision of distributive justice in which the government assumed responsibility for actively protecting citizens' individual rights and economic opportunities . . . ."[99]

E. Subsequent Reform—Increasing Enforcement, Decreasing Judicial Review

In spite of their shared values, the lasting impact of these political and legal transformations was not uniform—some prospered while others faltered.[100] Within immigration law, the 1965 Amendments initially provided a measure of stability, which lasted well over a decade.[101] However, in the years following the 1965 Amendments, the country witnessed a large and unexpected influx of immigrants,[102] a

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legacy).

98. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 300–02 (1996) (citing the legislative history of the 1965 Amendments to confirm the congressional concern with the lack of racial equality in immigration law). *But see* Boswell, *supra* note 33, at 332–46 (examining the "barriers" against immigration into the U.S. which the 1965 Amendments did not remove, including barriers in the legal structure, the traditional norms of immigration law, and continued biases from both politicians and the public). While the 1965 Amendments did not fashion a perfect system of immigration, the author admits that "[i]n retrospect, it appears that the 1965 Amendments have been the last positive immigration reform of the twentieth century." *Id.* at 332.

99. Monhollon, *supra* note 79, at 281. *But see* BRIGGS, *supra* note 35, at 7–8 (maintaining that the 1965 Amendments, despite "purging the immigration statutes of the explicit racism inherent in the national origin system," nevertheless perpetuated restricted amounts of immigration).

100. *See* Monhollon, *supra* note 79, at 286–87 (noting that "racial and gender equality . . . have now become widely accepted" while "abortion and the outlawing of school-sponsored prayer continue to cause major political conflict").

101. *See* DANIELS, *supra* note 16, at 220 (explaining the variety of events that "pushed immigration policy to the fore," including economic fears and renewed anti-immigrant sentiments). *But see* Boswell, *supra* note 33, at 329 (observing that a reaction against the 1965 Amendments occurred as soon as the early 1970s); BRIGGS, *supra* note 35, at 158 (lamenting the lack of congressional action in immigration in the years after the 1965 Amendments despite rising issues such as undocumented immigration).

102. *See* LEMAY, ANATOMY, *supra* note 15, at 13–17 (describing the declining immigration from Europe and the concurrent rise in immigration from Asian and Latin American countries).

development that Congress had actually attempted to avoid.[103] This new wave of immigration, paired with national economic troubles, pushed Congress once again towards immigration reform.[104] "In the process [of debating immigration policy], old ghosts of racial and ethnic tensions would be resurrected once again, albeit dressed in more muted and restrained political language."[105] A critical cause of the renewed tension was a massive increase in undocumented immigration, which had ironically been spurred by the cap on immigration from the Western Hemisphere and the consequent "backlogs in legal visa-processing time . . . thereby increasing pressure to enter without inspection."[106] Though relatively new to immigration policy debates, undocumented immigration came to be the true impetus behind the next significant immigration legislation, the Immigration Reform and Control Act of 1986 (IRCA),[107] as well as the dominant theme in every immigration policy debate in the ensuing decades.[108]

IRCA focused primarily on enforcement in the context of labor and employment,[109] and most subsequent immigration legislation of importance would concentrate on domestic enforcement in some fashion.[110] This legislation contained four central directives: sanctions against U.S. employers of undocumented immigrants, stricter enforcement controls, and the formation of both amnesty and guest

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103. *See* BRIGGS, *supra* note 35, at 109–14 (outlining the debates and compromises that ultimately produced the 1965 Amendments and which centered largely on the details of the new preference system and its attempts to control immigration).

104. See LEMAY, ANATOMY, *supra* note 15, at 25–27 (describing the "growing sense of crisis" during the 1970s in response to increased undocumented immigration).

105. HAYES, *supra* note 7, at 18.

106. KANSTROOM, *supra* note 12, at 225.

107. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C).

108. *See* LEMAY, ANATOMY, *supra* note 15, at 21–25 (showing that undocumented immigrants formed a large part in the massive upsurge of immigration and thus came to dominate the perception of immigration); BRIGGS, *supra* note 35, at 154–58 (explaining the "explosion of illegal immigration" partially through the termination of the *bracero* guest worker program in 1964, which had established a pattern of migration by Mexican laborers in seasonal employment in the U.S. agricultural industry).

109. *See* BRIGGS, *supra* note 35, at 163 ("The passage of IRCA produced the most extensive legislation in the area of employment law in the United States in two decades . . . .").

110. *See* DANIELS, *supra* note 16, at 219 (commenting that by the mid-1980s, proposals for immigration reform came from a range of ideological stance, but that generally immigration reform "meant undoing, *somehow*, much of the unintended consequences of the 1965 act").

worker programs.[111] Immigration adjudications lay beyond the scope of the law and thus continued to operate in much the same fashion as they had since the 1961 Amendment.[112] This included the federal judiciary's appellate role, maintaining an important external check on the process of deportation for immigration proceedings and continuing the "public perception of . . . appropriate procedural fairness."[113]

The increased emphasis on enforcement in IRCA signaled a significant transition in immigration policy that would more clearly materialize in the 1990s.[114] Immigration had grown more contentious as the public debate increasingly focused on negative effects of immigrants within the country.[115] Congress reacted by passing two pieces of legislation in 1996, the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA)[116] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[117] Designed to tighten the influx and regulate the presence of immigrants in the country, the laws "expanded the litany of crimes for which aliens can be summarily deported, eliminated waiver of deportation relief, and precluded judicial review of certain deportation orders."[118] The legislation also completely removed the 1961 Amendments, permitting only narrow allowances for federal judicial review and completely prohibiting review for certain

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111. *See* Francisco L. Rivera-Batiz, *Introduction* to U.S. IMMIGRATION POLICY REFORM IN THE 1980S: A PRELIMINARY ASSESSMENT 2–10 (Francisco L. Rivera-Batiz et al. eds., 1991) (expressing doubt as to the success of all four components of the IRCA, but noting that measuring the progress of the law is inherently difficult due to the nature of undocumented immigration).

112. *See* Durham, *supra* note 44, at 675 ("Immigration judges were adjudicating the same types of controversies that their predecessors had adjudicated since the turn of the century, although with greater independence from the much larger and more powerful INS.")

113. *Id.* at 676.

114. *See* DANIELS, *supra* note 16, at 232–47 (explaining the rise in public sentiments against immigration and Congress's reaction to this shift through "get tough" legislation).

115. *Id.* at 239–40 (detailing the increased media scrutiny received by immigrants generally, and especially undocumented immigrants, as well the government agencies responsible for immigration matters).

116. Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.).

117. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

118. Sara A. Martin, *Postcards From the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 683–84 (1999). The author notes that the terms "Orwellian," "Kafkaesque," and "draconian" were used by critics to characterize the two pieces of legislation. *Id.* at 683–84.

criminal deportees.[119] Federal courts, which had for decades served as courts of appeal for immigration proceedings, began to see themselves removed from the picture.[120] The legislation prompted confusion, however, especially as to the extent to which habeas corpus review still remained.[121] The circuit split that developed was resolved by the Supreme Court in 2001 in *INS v. St. Cyr*,[122] ruling that federal habeas review remained available as Congress had not clearly eliminated it through IIRIRA.

Congress's response to *St. Cyr* came four years later with the REAL ID Act of 2005 (RIDA), the last and currently controlling law of a series of laws aimed at removing the federal courts from immigration.[123] Included in the law was an explicit denial of traditional habeas review,[124] which had been an important mechanism in immigration law

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119. *See id.* at 701–06 (describing the restrictions on review by the federal courts as "the most controversial portions of the new legislation"). *See also* Andrea Lovell, *The Proper Scope of Habeas Corpus Review in Civil Removal Proceedings*, 73 WASH. L. REV. 459, 463–65 (1998) (noting that the legislation was prompted partially by fears of increasing criminal activity and thus treated criminal immigrants particularly harshly).

120. *See, e.g.*, KANSTROOM, *supra* note 12, at 229 ("If judicial review of deportation orders is an essential part of the rule of law, then 1996 could well have been the year in which the rule of deportation law died.").

121. *See* Lovell, *supra* note 119, at 459–61 (reviewing the difficulty that courts had in deciding how to apply the language of IIRIRA to habeas petitions in light of the unique circumstances of their habeas corpus responsibilities).

122. *See* INS v. St. Cyr, 533 U.S. 289, 314 (2001) (finding that federal courts retained the ability to hear habeas corpus petitions). The Court considered whether federal courts retained jurisdiction under the general habeas corpus statute. *Id.* at 298. In *St. Cyr*, INS enacted removal proceedings against Enrico St. Cyr in April 1997, more than a year after his criminal conviction. *Id.* at 293. In the intermediate period between St. Cyr's conviction and the commencement of removal proceedings, the AEDPA and the IIRIRA were enacted by Congress, eliminating the possibility for waiver of deportation at the discretion of the Attorney General. *Id.* at 292–93. The Court reiterated the viewpoint that statutes must be interpreted, if possible, to avoid constitutional problems; a presumption that ran against the viewpoint argued by INS. *Id.* at 300. The Court found support from the historical basis of habeas corpus and its important role in deportation orders. *Id.* at 301–03. Additionally, the Court found that even where judicial review was precluded, the Court was still permitted limited review of habeas corpus. *Id.* at 311–12. The Court expressed some dismay at Congress's rather dismissive treatment of habeas corpus: "[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention." *Id.* at 305.

123. Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (2005) (codified as amended in scattered sections of 8 & 49 U.S.C.).

124. *See* Jennifer Norako, *Accuracy or Fairness?: The Meaning of Habeas Corpus Review After* Boumediene v. Bush *And Its Implications On Alien Removal Orders*, 58 AM.

"since the enactment of the Judiciary Act of 1789."[125] Under Supreme Court precedent, however, the venerated habeas corpus petition cannot be denied without offering a sufficient replacement.[126] With this in mind, Congress crafted a seemingly suitable alternate: judicial review can now only occur after all administrative proceedings were exhausted and only regarding "constitutional claims and questions of law."[127] Habeas review traditionally has been thought of as a challenge to the *legality* of executive detention, not any factual determinations behind it,[128] and therefore RIDA's new language initially appears to track this standard. As will be discussed below, recent developments in habeas corpus jurisprudence have put the validity of RIDA in doubt.

II. Current Process of Removal Proceeding

Prior to evaluating any policy choices as manifested in immigration removal hearings, it is helpful to briefly examine the typical components and processes of such hearings. As with most governmental operations, Congress designs the procedures and allocates the authority necessary to carry out its policy determinations. Executive agencies then carry out these mandates and craft appropriate regulations as needed, and the Judiciary reviews appeals of final decisions to ensure legitimate law and proper procedure. This familiar structure, however, has been altered in the immigration context by Congress and the executive branch through a controversial emphasis on the first two stages.[129] Though the federal Judiciary theoretically

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U. L. REV. 1611, 1622 (2009) (noting that Congress's intent to replace habeas corpus review was unambiguous, purportedly to answer the Supreme Court's ruling in *St. Cyr*).

125. *St. Cyr*, 533 U.S. at 305.

126. *Id.* at 305 (observing that the Suspension Clause of the Constitution requires that unless Congress formally revokes the writ of habeas corpus, it must provide a suitable alternative should it remove the availability of the writ).

127. Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, div. B, § 106, 119 Stat. 231, 302, 310 (2005).

128. *See St. Cyr*, 533 U.S. at 306–07 (remarking that in the immigration context, a habeas corpus petition was historically "the sole means by which an alien could test the *legality* of his or her deportation order" (emphasis added)).

129. *See generally* Benson, *Paper Dolls*, *supra* note 30 (blaming the barriers placed between federal courts for the severe issues plaguing immigration adjudications and the many parties involved). *See also* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 599–600 (2009) (viewing all three levels

maintains its traditional role, immigration law now largely concludes at the enforcement stage.[130] This atypical arrangement not only reveals past policy considerations but consequently affects the future behavior of the other actors.

It also should be noted that immigration is an entirely federal domain. As early as 1849, the Supreme Court insinuated that immigration policy belonged to the federal government,[131] and unequivocally stated so by the 1880s.[132] Though the constitutional and theoretical rationales for this "plenary power" are not absolutely accepted,[133] this long-standing doctrine remains foundational to immigration policy.[134] Despite revived efforts by state and local governments to regulate immigration[135] and federal agencies' recent collaborations with municipal authorities,[136] immigration remains a federal prerogative. Consequently, immigration reform as a matter of course will take place at the federal level and on the national stage.

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of immigration adjudication, those being the two administrative courts and then the federal judiciary, in dire need of reform).

130. *See* Family, *supra* note 129, at 600–04 (describing the many problems faced by all judges involved in immigration adjudications that hamper their ability to produce impartial and adequate rulings). The author views high caseloads, politicized hiring and firing processes, and inadequate representation as the main problems. *Id.*

131. *See* LEGOMSKY, JUDICIARY, *supra* note 25, at 178–82 (describing a Supreme Court ruling that a state tax on the "importation of alien passengers . . . usurped an exclusively federal power").

132. The Chinese Exclusion Case, 130 U.S. 581, 604–06 (1889) (holding that the power to exclude aliens is an inherent authority of the sovereign federal government that does not depend on an enumerated power).

133. *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 574 (2008) (referring to the federal government's undivided power over immigration policy as "the exclusivity lie").

134. *See* AUERBACH, *supra* note 24, at 2 (explaining Congress's plenary power over immigration shared with the Executive branch); *and* LEGOMSKY, *supra* note 25, at 178–80 (same).

135. *See* Rodríguez, *supra* note 133, at 581–90 (presenting an illustration of states' rather comprehensive approaches to immigrants within their borders).

136. *See generally* Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. FOR SOC. JUST. 321, 323–31 (2008) (detailing the history and current enthusiasm for utilizing local authorities to assist the federal agencies in enforcing immigration policy).

A. Executive Enforcement Producing Removal Hearings

All removal hearings begin with some form of contact between the noncitizen and one of three federal agencies tasked with initiating such proceedings.[137] Customs and Border Protection (CBP) patrols the physical borders as well as ports-of-entry, Immigration and Customs Enforcement (ICE) investigates and pursues immigration violations within the nation, and Citizenship and Immigration Services (CIS) oversees lawful immigration into the country and monitors those immigrants lawfully present.[138] Whether it is CIS mailing a summons to a permanent resident charged with a fraudulent marriage[139] or ICE arresting hundreds of employees during a workplace raid and hand-delivering the summons while they sit in detention,[140] these noncitizens are now respondents in an immigration court proceeding.

Although immigration adjudications remain technically civil hearings, immigration enforcement measures have become highly criminalized in a number of manners.[141] First and most importantly, the use of criminal convictions as cause for removal has spiked since Congress began emphasizing criminality as a cause for deportation.[142]

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137. 8 C.F.R. § 239.1 (2005). *See also* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.) (explaining the structure of federal agencies within the Department of Homeland Security since 2002, and the immigration courts which remain within the Department of Justice and, thus, separate from other immigration agencies).

138. *See* Stephen Yale-Loehr et al., *Overview of Immigration Law*, 1727 PLI/Corp 73, 83 (2009) (presenting a brief outline of the federal agencies involved in immigration and their responsibilities).

139. *See* Dinesh Shenoy & Salima Oines Khakoo, *One Strike and You're Out! The Crumbling Distinction Between the Criminal and the Civil for Immigrants in the Twenty-First Century*, 35 WM. MITCHELL L. REV. 135, 138–43 (2008) (clarifying that all aliens, defined as any person who is not a full-fledged citizen of the United States, are at risk of deportation, including permanent residents).

140. *Cf.* Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1, 1–5 (2008) (presenting an overview of the notorious raid in Postville, Iowa by ICE in 2008 that arrested and detained hundreds of undocumented workers).

141. *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472–73 (2007) (remarking that courts have long insisted that deportation is not a criminal punishment, and consequently that immigration hearings are purely civil in nature, yet many criminal elements are currently present in the immigration system). The author describes an "emerging trend in U.S. immigration law [of the] heightened use of criminal enforcement strategies, both in setting immigration priorities and in executing them." *Id.* at 475.

142. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1720–28

Any noncitizen, including permanent residents, is susceptible to the "collateral effects" of deportation.[143] Second, the raid and detention practices of ICE push the boundaries of acceptable government action and seemingly violate the most basic norms of criminal procedure law.[144] Despite the impact on immigrant families and the questionable reliability of the routines, they continue to be widely employed.[145] Third, federal agencies increasingly make use of state and local authorities to carry out their goals.[146] Equipped with greater access to a national immigration database and a working relationship with ICE, some local police forces have been authorized to enforce federal immigration laws.[147]

(2009) (describing the "major expansion of immigration sanctions, higher levels of enforcement, and a narrowing of avenues for the government to exercise discretionary relief from removal" that took place in the 1980s and 1990s).

143. *See* Shenoy & Khakoo, *supra* note 139, at 151–57 (remarking on the low standards required for a noncitizen to be deemed a criminal for purposes of potentially triggering removal hearings). Essentially any type of acceptance of criminal wrongdoing by the noncitizen will suffice, including the mere admittance of facts that could suffice for a conviction. *Id. See also* Padilla v. Kentucky, 130 S. Ct. 1473, 1492–94 (2010) (holding that undocumented defendants have a right under the Sixth Amendment to be told by their attorney of the risk of deportation attached to various criminal convictions).

144. *See* Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1129 (seeking to limit the current autonomy that immigration raids possess as administrative searches by requiring Fourth Amendment rules to be followed); *see also* David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 417–18 (arguing for greater scrutiny of immigration raids in order to protect the sanctity of homes and families). ICE's other current programs include the "Border Enforcement Security Task Force" which "[i]nvestigate[s] and dismantle[s] transnational criminal enterprises at U.S. borders and key seaports" as well as the "Secure Communities" program which "[f]ocuses federal resources on assisting local communities by identifying and removing high-risk criminal aliens." U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, TOPICS OF INTEREST: PROGRAMS (2010), http://www.ice.gov/pi/topics/index.htm (providing a list of ICE's "key programs and initiatives") (last visited Oct. 12, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

145. *See* Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 565 (commenting that ICE has "dramatically expanded its interior immigration enforcement efforts" including thousands of home raids).

146. *See* Parra-Chico, *supra* note 136, at 324–30 (describing the "blurring of lines of authority between federal and local law enforcement of both criminal and civil immigration laws").

147. *See id.* at 327–30 (observing that state and local law enforcement now have access to federal immigration agency information through national databases).

B. Removal Hearings

The respondent will then proceed to a removal hearing at one of the federal immigration courts throughout the country.[148] These administrative courts conduct civil hearings within the Department of Justice and are the main judicial component of the immigration structure.[149] The precise procedure of the hearing itself and the burden of proof will depend on the charge brought against the respondent.[150] Despite their resemblance to ordinary criminal trials and the dire consequences of a finding of removability,[151] these hearings operate rather informally.[152] The immigration judge plays an active role in the proceedings along with the government prosecutor: "[T]he immigration judge can and will jump in at any time and ask questions of his or her own; some judges are known to take away examination entirely from counsel."[153] Moreover, the rights

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148. *See generally* OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, FY 2009 STATISTICAL YEAR BOOK (2010) B1–R3, http://www.justice.gov/eoir/statspub/fy09syb.pdf (offering a synopsis of the Immigration Courts during 2009, including statistics on the types of cases heard and the rate of processing). Prior to the actual hearing, the respondent may accept the charges and agree to voluntarily depart from the country. Immigration and Nationality Act, § 240B, 8 U.S.C. § 1229 (2006).

149. *See* Family, *supra* note 129, at 598–604 (providing an outline of the general procedures and problems contained within Immigration Courts, which generally are the authorities who decide "whether the government will remove a foreign national from the United States").

150. *See* Mary E. Kramer, *Practicing Before the Immigration Court: Crimes and Other Grounds of Removal and Application for Relief*, SL010 ALI-ABA 239, 243 (2006) (commenting that generally the burden of proof of admissibility will be on the noncitizen who has entered or attempted to enter the country "without inspection," but that the government will carry the burden of proof of inadmissibility for noncitizens who were inspected upon entry). A deportable alien trying to avoid removal may seek several forms of relief, such as voluntary departure, cancellation of removal, adjustment of status, asylum, withholding of removal, and waiver. *Id.* at 267–80 (listing the many possibilities for relief from deportation).

151. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (remarking that deportation "may result also in loss of both property and life; or of all that makes life worth living"). *See also* Stumpf, *supra* note 142, at 1690–93 (critiquing the lack of availability of other penalties in the context of immigration, and decrying the lack of proportionality of deportation to the "crimes" of immigration).

152. *See* Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 117–20 ("The merits hearing 'generally conforms to the familiar adversarial model,' albeit without many of the procedural protections present in criminal trials.").

153. Kramer, *supra* note 150, at 245. *See also* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act*, 69 OHIO ST. L.J. 557, 566 (2008) (commenting on the affirmative duty of Immigration Judges to develop a factual record on which to base their final decision).

afforded to the respondent in this civil hearing resemble only a skeletal version of the due process procedures that characterize the average criminal trial.[154] The respondent's ability to post bond depends entirely on the charge entered by the federal agency.[155] Currently there is no comparable right to counsel, although respondents may furnish counsel at their own expense.[156] The Federal Rules of Evidence do not strictly apply[157] and there is only a restricted right of confrontation. Finally, the opportunity for review of an immigration judge's final decision is constrained both by statute and the practical realities of an overburdened court system.[158]

Following the immigration judge's decision, both the respondents as well as the government may appeal administratively to the Board of Immigration Appeals.[159] The BIA, also within the Department of Justice

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154. *See* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeal's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 485–86 (attempting to explain the unclear due process rights of noncitizen respondents in deportation hearings). "[T]he Supreme Court has been deferential to the legislative and executive branches in deciding immigration policy questions . . . . The Court has never provided a definitive answer to the question of which constitutional rights outweigh plenary power. Rather, it has addressed different scenarios under which it has given some, little, or no protection to immigrants under the Constitution." *Id.*

155. Immigration and Nationality Act, § 236(c), 8 U.S.C. § 1226(c) (2006). *See also* 8 C.F.R. §§ 103.1(j), 287.5(c) (2007); 8 C.F.R. § 236.1(d)(1) (2007) (providing that for respondents who are not statutorily barred from release on bond, the decision is made by ICE prosecutors and only involves immigration judges if the respondent seeks review).

156. *See* Immigration and Nationality Act, § 292, 8 U.S.C. § 1362 (2006) ("In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."). *See also* Kaufman, *supra* note 152, at 124–30 (claiming that beyond the lack of appointed counsel, procedural barriers often prevent respondents' counsel from providing full representation).

157. *See* Kramer, *supra* note 150, at 244 ("Anything which is relevant is admissible in immigration court. However, most courts do have Local Rules, which govern the filing of motions, exhibits, and applications.").

158. *See generally* Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 859–64 (2009) (describing the efforts of executive branch officials to minimize the role of immigration adjudications by supposedly increasing efficiency through abbreviated processes). *See also* Benson, *Paper Dolls*, *supra* note 30, at 41–43 (remarking on Congress's recent efforts "to reduce the quantity and quality of judicial review of administrative removal orders" but whose "net effect was a multiplication of levels and forms of judicial review").

159. 8 C.F.R. § 1003.1 (2008). The board's appellate jurisdiction covers essentially the entire scope of the decisions made by immigration judges, including orders of exclusion and deportation. 8 C.F.R. § 1003.1(b) (2008). Notably, either party to the original proceeding, either the respondent or the government, may seek BIA appeal of an immigration judge's decision. 8 C.F.R. 1003.3(a) (2002).

and under the close supervision of the Attorney General,[160] receives the full record of the case upon which to conduct its review.[161] The BIA cannot undertake *de novo* review of the facts as established by the immigration judge, and applies instead the highly deferential "clearly erroneous" standard.[162] Moreover, the BIA is clearly barred from establishing any factual findings not stated by the immigration judge, and must instead remand the decision to the immigration judge where further factual conclusions are needed.[163] Questions of law and other discretionary matters, however, may be reviewed *de novo*.[164] "The Board's decisions are binding on [the] immigration judges, and precedential decisions are binding on the [Department of Justice] and immigration judges in all proceedings involving the same issue."[165]

The BIA, now reaching its seventieth year of operation, has recently been subject to regulatory "streamlining" efforts which alter the basic appeals process and actually interfere with the judicial integrity necessary to impart an honest review.[166] For much of its history, the BIA heard

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160. *See* Reddy, *supra* note 153, at 565–66 n.57 ("Like Immigration Courts, the BIA is part of the Department of Justice, subject to the general supervision of the Executive Office for Immigration Review (EOIR) of the [Department of Justice], and its attorneys are appointed by the Attorney General."). Nevertheless, the BIA has slowly gained independence from the enforcement arm of immigration since its inception in the 1940s, and though it is not completely independent today, the trend has been to sever it from the Attorney General and the enforcement arm of immigration policy. *See* Durham, *supra* note 44, at 682 (observing that a common thread between all of the changes to the BIA during its history are "measures which seek to create deeper separation between the judge and prosecutor").

161. 8 C.F.R. § 1003.3 (2002). *See* Rana, *supra* note 158, at 843 (listing the various documents that the BIA will include in its review, including "transcripts of testimony, exhibits, briefs submitted by the parties, and the written decision of the immigration judge").

162. 8 C.F.R. § 1003.1(d)(3)(i).

163. 8 C.F.R. § 1003.1(d)(3)(iv). "Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in fact finding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further fact finding must file a motion for remand. If further fact finding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service." *Id.*

164. 8 C.F.R. § 1003.1(d)(3)(ii).

165. Rana, *supra* note 158, at 843 (citing 8 C.F.R. § 1003.1(g)).

166. *See generally id.* (presenting a comprehensive evaluation of the streamlining efforts and their detrimental effect on judicial review of immigration enforcement actions). The BIA's procedures and the Board itself are wholly dependent on agency-issued regulations, and thus the Attorney General has unfettered authority to alter every aspect of the BIA. *Id.* at 843 (noting that the BIA, which is the "nation's chief administrative body for immigration law," nevertheless exists "only by virtue of the regulations established by the Attorney General").

appeals in three-member panels and issued written decisions.[167] In 1999, however, special allowances were made for occasional decisions by a single member of the Board in order to process a growing number of appeals.[168] The subsequent Attorney General intensified the trend towards less judicial review despite improvements in the Board's efficiency, and essentially made the special streamlined processes the norm.[169] A single member of the BIA can now affirm an immigration judge's decision without any written opinion, while overturning an immigration court decision still requires a written decision.[170] At the same time, tighter deadlines were required for the BIA, thereby increasing the average Board member's caseload to 4,000 appeals a year.[171] Finally, the number of members on the BIA has been reduced from twenty-three members to currently fourteen members.[172] The effects of this streamlining effort have been to actually increase appeals and provoke harsh criticism from federal judges.[173]

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167. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56, 135-01 (Oct. 18, 1999) (codified at 8 C.F.R. § 1003).

168. *See* Durham, *supra* note 44, at 682 (commenting that the initial use of the streamlined procedures was used only when "certain conditions were met" but that "more than fifty percent of the cases received by the Board were assigned for decision by a single member for summary affirmance").

169. *See id.* at 682–83 (attacking the increased streamlined procedures as efforts to minimalize immigration adjudications under the guise of making the hearings more efficient). "During the same period, Attorney General [John] Ashcroft also used his statutory authority to vacate precedent decisions of the Board and issue new and binding decisions himself." *Id.* at 683.

170. 8 C.F.R. §§ 1003.1(e)(4)(i), (ii). *See* Rana, *supra* note 158, at 846–49 (arguing that the allowance for single-member affirmance without a written element significantly lessens the effectiveness of the BIA).

171. *See id.* at 833 (remarking that with the allowances for single-member decisions and the increased caseload, "Board members could spend no more than a few minutes on each case").

172. *See* Durham, *supra* note 44, at 683 (explaining the questionable plan to increase the BIA's effectiveness in deciding cases as well as its ability to remove its backlog by cutting the number of board members in half). The dubious motivations of the reduction of the BIA's size was further suggested by later revelations that those board members chosen to be removed "were those with essentially the most immigrant-friendly and anti-agency decision record on precedent cases." *Id.* (citing Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1155–61 (2004)).

173. *See generally* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *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, 43–51 (2005) (providing a broad analysis of the large considerable increase in the number of petitions for review for both the BIA and the federal courts of appeals, concluding that a number of factors have contributed including the revamped policies and procedures of

C. Current Role of Article III Courts in Reviewing Removal Decisions

Once the respondent exhausts all available administrative remedies with a final decision by the BIA, the respondent facing removal may attempt to seek review of the final removal decision at the federal court of appeals in the geographically appropriate circuit court.[174] Under RIDA, this appeal absolutely must be submitted within thirty days of the BIA's final order, and failure to do so forecloses any chance of further review.[175] The high threshold issue for every appeal is establishing the court's jurisdiction, which under the language of the RIDA requires usually either a "constitutional claim" or a "question of law." [176] Though courts have understood this to bar all review of discretionary and factual determinations, they have not agreed beyond that, as the courts recognize that Congress intended to severely limit their jurisdiction but are hesitant to read the language as strongly as it is worded.[177] Unsurprisingly, the confusion has engendered a circuit split, and thus despite the supposed uniformity of federal immigration law,[178] respondents will face different standards of review jurisdiction depending on where their removal hearing took place.[179]

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the BIA). The authors also posit that there has been a shift in the willingness of immigration lawyers and their clients to utilize judicial review as a means to challenge, perhaps even delay, final orders from the Department of Justice. *Id.* at 85–93.

174. 8 U.S.C. § 1252. The statute clearly states that the federal courts of appeals are generally the only means available of acquiring any type of review once the Department of Justice has completed its adjudications under an immigration judge and the BIA. 8 U.S.C. § 1252(a)(5).

175. 8 U.S.C. § 1252(b)(1).

176. 8 U.S.C. § 1252(a)(2)(D). *See also* Seipp, *supra* note 57, at 1 (commenting that "[e]ven if the practitioner does not address the jurisdictional issue in the initial briefing of the case, he or she must be prepared to respond to the inevitable 'lack of jurisdiction' arguments advanced by the government or raised by the court *sua sponte*").

177. *See* Moore, *supra* note 46, at 2047–51 (observing that although there are categories of decisions which are clearly factual or discretionary in nature, the courts have not been uniform in exactly what that dividing line is between the two); Reddy, *supra* note 153, at 577–79 ("The inability of appellate courts to determine clearly those discretionary judgments that fall within the category of a "question of law" has not only produced inconsistent results among circuit courts in relief from removal cases, but has also limited the degree of judicial review over removal decisions.").

178. *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization.").

179. *See* Reddy, *supra* note 153, at 579–91 (describing the variance between different federal circuits in allowing certain evidentiary and credibility findings by the court of appeal).

III. Immigration Reform

A. The One Agreement in Immigration Reform

From a much larger perspective, immigration reform is greatly needed simply to come to terms with immigration in the modern era and the realities of undocumented immigration.[180] As stated by one legal scholar, "[t]he American immigration regime is surreal. Twelve million human beings live out their lives in the United States—own property, raise children, pay taxes—in the absence of formal legal status."[181] The current structure of immigration law created at the middle of the twentieth century remains in place, both in spirit through the preference-based system of the 1965 Amendments[182] and in fact through the continuing use of the INA as the framework of immigration law, but widespread uncertainty continues as to the functional details of that structure.[183] Ongoing debate and proposed legislation touches on every facet of immigration, including admissions standards, enforcement practices, the function of the courts, and detention practices.[184] Despite the occasional contentiousness over the particulars,

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180. *See generally* James A.R. Nafziger, *Immigration and Immigration Law After 9/11: Getting It Straight*, 37 DENV. J. INT'L L. & POL'Y 555, 562–66 (2009) (cataloguing the facts and studies on immigration in recent years and confirming that legislative reform is vital to restore the operability of immigration to the U.S.). *See also* Lucas Guttentag, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 157, 158–63 (2007) (emphasizing the continuing importance of civil rights and judicial review as central considerations of immigration reform); Stacy McCland, *Immigration Reform and Agriculture: What We Really Want, What We Really Need, and What Will Happen If They Leave?*, 10 BARRY L. REV. 63, 78–79 (2008) (advocating for a candid evaluation of the U.S. agricultural industry's dependence on immigrant labor and a legal recognition of this reliance).

181. Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 23, 25 (2009). Despite this extraordinary situation, the author argues that the "criminalization strategy [which labels all undocumented immigrants as criminals] is now firmly entrenched and impossible to dislodge. Until Congress manages a normalization, 'illegal' migrants will suffer from both the social and legal marginalization that their stigma confers." *Id.* at 72.

182. *See* Motomura, *supra* note 37, at 1936–38 (describing the lasting effect that the "nondiscrimination principles" of the 1965 Amendments have had on immigration policy). In effect, the 1965 Amendments "marked the full adoption of a basic nondiscrimination principle in American immigration law." *Id.* at 1935.

183. *See* Vaughns, *supra* note 17, at 167–71 (comparing the outwardly vigorous immigration enforcement laws with the irregular and sometimes lenient application of those laws); Nafziger, *supra* note 180, at 562 ("Public opinion, though consistently supportive of immigrants, fluctuates cyclically . . . [and] Congress has typically responded . . . in cycles of liberality and restriction.").

184. *See* Nafziger, *supra* note 180, at 561–62 (observing that public opinion

"all observers of immigration policies agree that current system is broken and in desperate need of repair."[185]

B. Why Reform Should Include Immigration Adjudications Generally

Criticism towards immigration courts has come both from legal scholars as well as federal judges, decrying the direction in which immigration adjudications have been taken in terms of isolation from judicial review.[186] On a theoretical level, judicial review stands as a hallmark of the overall judicial system and notions of justice.[187] Unambiguous efforts to isolate the immigration courts from the federal judiciary cut against this principle, and though precedent allows Congress to control the form and function of immigration adjudication, it is clear that immigration adjudication has departed from the standard procedural safeguards of our judicial processes.[188] This also contrasts with an immigration system whose underlying premises tend towards

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surrounding immigration and potential reform has intensified regarding all aspects of immigration, especially after the attacks of September 11th, 2001, and this has hindered the progress of reform). Despite efforts for comprehensive legislation to confront the many issues plaguing immigration, there has only been a patchwork of developments which have primarily restricted immigration into the country, penalized immigrants within the country, and added criminal elements to immigration. *Id.* at 562–63.

185. Vaughns, *supra* note 17, at 151. *Compare* Lucas Guttentag, *Immigration and American Values: Some Initial Steps for a New Administration*, HUM. RTS. MAG., Fall 2008, at 10 ("Major legislation to restore fairness, credibility, and accountability is essential."), *with* Asa Hutchinson, *Holes in the Fence: Immigration Reform and Border Security in the United States*, 59 ADMIN. L. REV. 533, 536 (2007) ("The rule of law must prevail . . . [and] we must concentrate on the security side, the enforcement side, the side of integrity.").

186. *See* Rana, *supra* note 158, at 834 (explaining that recent changes to immigration adjudication have led to more appeals to the Courts of Appeals, and "courts in every circuit [in 2006] began issuing scathing critiques of the quality of the agency's decision making and the lacks of its adherence to basic principles of the rules of law").

187. *See, e.g.*, *id.* at 839 (noting that external judicial review "has customarily served the function of ensuring that an agency is complying with its own regulations while carrying out congressional intent"). The author adds that the importance of judicial review is magnified in the context of immigration removal hearings due to the highly punitive nature of deportation. *Id.*

188. *See* Rana, *supra* note 158, at 859–64 (describing the effect that RIDA and streamlining have had on appellate court review of immigration matters as having "surreptitiously expanded the zone of untouchable agency decision making"); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1630–31 (2000) (suggesting that limits on judicial review in the realm of immigration adjudications risk a loss of independence from enforcement and a loss of the courts of appeals' more diverse experience on which to base its analysis).

fairness.[189] Admittedly, the legislation of 1961 and 1965 were created in different circumstances, especially in terms of the undocumented population, yet their principles should continue to apply.

From a practical standpoint, limited judicial review also produces questionable legal proceedings. Federal judges have candidly critiqued immigration court decisions that have come before them on review, disparaging the lack of quality that they must contend with on review.[190] Administrative courts are under Congress's control and located within the executive branch, yet they still are part of the U.S. court system and thus should conform to its high standards. Furthermore, given the recent streamlining changes to the Immigration Court adjudications, the risk of injustice arguably has increased.[191] In fact, the streamlining efforts themselves may even have helped increase petitions for review from the BIA.[192] Though Congress and the Department of Justice have made their position on their unreviewability clear, it is not in the nature of the U.S. federal government to exclude a branch from the normal functions of government.

Certainly the measures taken to streamline the immigration adjudications are not wholly without merit, and the advantages offered must be acknowledged. Without challenging long-standing precedent, Congress has essentially unrestrained control over all facets of immigration and naturalization, thus making judicial review a policy

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189. *See* H.R. Rep. 87-1086, pt. 2, at 2968 (1961) (recognizing that aliens seeking review of administrative orders should be given a full and fair opportunity to do so). *See also supra* Part D (establishing the foundation for the 1965 Amendments, which included recognizing the inevitable need for judicial review and the embrace of racial fairness).

190. *See, e.g.*, Benslimane v. Gonzalez, 430 F.3d 828, 830 (7th Cir. 2005) ("[A]djudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."). Written by Judge Richard Posner of the Seventh Circuit, the opinion also stated that "it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts . . . ." *Id.*

191. *See* Rana, *supra* note 158, at 859–64 (observing that the combined effect of RIDA and streamlined adjudication procedures have meant that reviewing courts of appeals often have less information on which to base their analysis).

192. *See* Palmer, Yale-Loehr & Cronin, *supra* note 173, at 29–32 (concluding that the streamlining procedures prompted respondents in immigration hearings to seek external review as the administrative appeals process left them unsatisfied). The authors also note that the Department of Justice has taken the counter-position "that people are appealing BIA decisions at a higher rate simply to delay being expelled in the face of more prompt BIA decisions." *Id.* at 31.

question as opposed to a legal question.[193] Curtailing judicial review also conserves judicial resources and accelerates immigration removals.[194] Nevertheless, the immigration system still forms part of our national policy, and should not be excused from either the principles underlying both our national standards of justice and the modern immigration system.

C. Why Reform Should Specifically Include Habeas Corpus

"[A] serious Suspension Clause issue would arise if the 1996 statutes have withdrawn that power [to issue a writ of habeas corpus] from federal judges and provided no adequate substitute."[195] So wrote the *St. Cyr* Supreme Court in 2001, finding that Congress had not clearly removed habeas corpus review in the immigration context.[196] Thus the question now becomes if Congress followed those instructions when it passed the jurisdiction-stripping RIDA in 2005 and provided an adequate substitute.[197] This Note contends that Congress failed to do this judged by recent developments in habeas corpus law, and that Congress should return to long-held principles still contained within the immigration system and fully restore the respondent's right to seek a petition of habeas corpus.

The Supreme Court's recent decision in *Boumediene v. Bush*[198] established what had long been lacking in habeas corpus

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193. *See supra* Part IA (discussing the plenary power of Congress over immigration policy).

194. *See* Moore, *supra* note 46, at 2059–60 (proposing that the main argument for limitations on judicial review in immigration adjudications is the conservation of judicial resources and the acceleration of immigration enforcement operations).

195. INS v. St. Cyr, 533 U.S. 289, 290 (2001).

196. *See id.* at 314 (concluding that "the absence of such a forum [to provide adequate habeas review], coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration" indicates that Congress had not removed habeas corpus review for any immigration respondents).

197. *See* Norako, *supra* note 124 (arguing that RIDA was Congress's direct answer to the *St. Cyr* case, and was thus crafted with the *St. Cyr*'s decision in mind).

198. *See* Boumediene v. Bush, 553 U.S. 723, 777–87 (2008) (finding that the reach of the Constitution includes militant detainees held at an overseas military compound and that the detainees therefore possessed the right to petition for habeas corpus review). In *Boumediene*, the Court considered whether the Military Commissions Act of 2006 forbade federal courts from considering writs of habeas corpus. *Id.* at 735–36. Because the Suspension Clause of the Constitution applied to the Military Commissions Act, the Court looked to determine whether Congress had provided petitioners with an adequate substitute

jurisprudence: a definition.[199] In so doing, the Court therefore promulgated the closest approximation to a bright-line rule for determining what is required for a habeas corpus substitute.[200] Writing for the majority, Justice Kennedy explained that the availability of the writ is not static but accommodates each particular circumstance.[201] At a minimum, it requires "a *meaningful* opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[202] The Court added that where the detention comes as a result of executive detention, and thus without the procedural guarantees inherent to a full court trial, habeas review takes on an even more important role.[203] In the words of the Court: "Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be *effective*. The habeas court must have sufficient authority to conduct a *meaningful review* of both the cause for detention and the Executive's power to detain."[204]

Applying this standard to RIDA, the law simply does not suffice. The relevant language of RIDA, "constitutional claims and questions of law," appears at first glance to meet the requirements, as it grants jurisdiction for legal attacks on detention.[205] The *Boumediene* Court, however, did not simply require that there be an allowance for review;

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for the habeas writ. *Id.* at 765–71. The Court determined that the Detainee Treatment Act of 2005 did not provide adequate substitute for the habeas writ. *Id.* at 784–94.

199. *See* Norako, *supra* note 124, at 1617–18 ("Despite the significance of the writ, courts have struggled in defining its exact scope and purpose."). The writ of habeas corpus was largely only defined as a means to challenge executive detention, but remained unclear on the specific requirements for such a challenge. *Id.* "Our case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred." *Boumediene*, 553 U.S. at 772–73.

200. *Id.* at 1626–28 (describing the vague contours established by the *Boumediene* Court in setting out what constitutes sufficient habeas review, noting that the determination is highly case-sensitive).

201. *See Boumediene*, 553 U.S. at 778–79 (describing "common-law habeas corpus" as "an adaptable remedy [whose] precise application and scope changed depending upon the circumstances").

202. *Id.* at 2266 (emphasis added).

203. *Id.* at 783 (realizing that executive detention is not as constrained as criminal detention is by limits on duration and requirements of procedure; thus, greater checks are required in order to protect the detainee).

204. Boumediene v. Bush, 553 U.S. 723, 783 (2008) (emphasis added).

205. *See* 8 U.S.C. § 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C), or in any other provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims or questions of law* . . . ." (emphasis added)).

instead, the Court characterized this review as "effective" and "meaningful."[206] It is these heightened standards which disqualify the judicial review under RIDA from being a sufficient replacement for habeas corpus review.[207] First of all, the court of appeals judge must depend on the administrative record for all factual determinations, and has very limited ability to either reconsider such factual findings or accept new evidence from the respondent.[208] Second, the strict thirty-day time limit placed on appeals risks the right to habeas corpus review, as the detained respondent must receive the final order, obtain the assistance of a lawyer, and that lawyer must file the writ, all within thirty days.[209] Finally, one of the effects of the recent streamlining procedures has been the rise of single-member affirmations without a written opinion.[210] Such a procedure leaves a reviewing judge with less to consider and obscures the reasoning of the immigration courts as well as the BIA.[211] The provisions for judicial review contained within RIDA fail to meet the requirements for habeas corpus review as explained by the *Boumediene* Court, as the reviewing judge's analysis is limited to an ambiguous record which can only be challenged during the first thirty days of detention. Since evidentiary errors, subsequent factual developments, and prolonged detention should form part of an effective and meaningful habeas review, congressional action is required to amend this disparity.

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206. *Boumediene*, 553 U.S. at 783.

207. *See* Norako, *supra* note 124, at 1640–47 (presenting argument against the sufficiency of RIDA as valid replacement for writ of habeas corpus).

208. 8 U.S.C. §§ 1252(b)(4)(A), (B). *See* Norako, *supra* note 124, at 1640–44 (contending that the general inability of a reviewing court to modify or supplement the evidence precludes the judge from providing a meaningful review).

209. 8 U.S.C. § 1252(b)(1). *See* Norako, *supra* note 124, at 1644–47 (suggesting that such a short time-frame easily causes unfair results where the respondent is the innocent victim of delayed decisions and deliveries of final orders).

210. *See* Durham, *supra* note 44, at 659–60 (commenting that "appeals are now routinely heard by single members" and that there has been a "proliferation of 'affirmance without opinion' decisions"). *See also supra* Part III.B (explaining the origins and process of the streamlining efforts and reduced involvement of the BIA).

211. *See* Rana, *supra* note 158, at 849 (explaining that the streamlining procedures often prevents a reviewing court of appeals from understanding the BIA's ground for summary affirmance, thus leaving the court of appeals only with the record from the immigration judge).

IV. Larger Examination of What is Needed for Reform—Looking Backwards and Forwards

A. Immigration Reform Must Consider Immigration Broadly

Immigration reform must take into evaluation the current circumstances and current laws and regulations in order to best decide what to do next. However, the current legal structure rests squarely on a history of civil liberties that first became clearly apparent with the Immigration Act of 1965 and the political and social developments of that time.[212] Immigration reform therefore is not simply a matter of economic arguments and population numbers. There are broader policy considerations that also form part of our national rhetoric.[213] Though historically our immigration policy has not been viewed as constrained by the language of our Constitution,[214] constitutional principles should form part of our consideration.[215] These were the impulses that drove

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212. *See* Monhollon, *supra* note 79, at 286–87 ("During the Sixties era, the federal government acted decisively to create national standards of justice that greatly expanded legal protections for racial and ethnic minorities and for women."). However, these developments are certainly not the final declaration on civil rights—"[a]s in the 1960s, Americans continue to debate the limits of individual liberty, community rights, the rights of minorities, and the use of public versus private power to make the United States a just society." *Id.*

213. *See* Owen Fiss, *The Immigrant as Pariah*, *in* A COMMUNITY OF EQUALS 3, 19–21 (Joshua Cohen & Joel Rogers eds., 1999) ("The social disabilities [levied against immigrants] are unconstitutional because they create a social structure that is inconsistent with the conception of community embodied in the Constitution."). The author draws a clear distinction between social disabilities, which consist of limits on the basic elements of participation in a civic community such as housing, employment, and basic necessities, and political disabilities, which consist of limits on the involvement in the organization and control of that community. *Id.* at 4–7. He then concludes that the Constitution contains an "antisubjugation principle," embodied in the Thirteenth and Fourteenth Amendments, which directs the United States to not "subjugate immigrants, not because we owe them anything, but to preserve our society as a community of equals." *Id.* at 17.

214. *See* NEUMAN, *supra* note 19, at 119–34 (arguing that the fundamental powers of the United States as a sovereign and under the Constitution do not provide conclusively the ability to exclude migrants from its territory, but that universal individual rights, including the freedom of movement, provide at least a narrow right of access to the country).

215. *See* Robin West, *A Moral Responsibility*, *in* A COMMUNITY OF EQUALS 63, 66–67 (Joshua Cohen & Joel Rogers eds., 1999) (furthering the belief that, in addition to the Courts, "the [American] people and their representatives" possess an obligation mandated by the Constitution to not subjugate immigrants socially). The author describes the Constitution as "the expression and embodiment of our egalitarian and communitarian better selves: it presents and imposes our defining conception of social justice—at once liberal egalitarian, respectful of individuals and mindful or our communitarian natures—and it embodies, expresses, and enforces our political morality." *Id.*

reform in the 1960s and which continue to be interwoven in our immigration policy, but which have since receded as reform debates have focused single-mindedly on discrete sections of immigration policy.[216]

The abandonment in 1965 of the national origins system in favor of a system designed to reunite families and recognize skilled or otherwise valuable immigrants was a decision that has had enormous ramifications for the contemporary United States.[217] Statistical evidence suggests that the new system triggered a surge of immigration, and for the last three decades political reactions have attempted to alleviate the effects of this shift through legislative changes.[218] In attempting to modify the immigration system, however, these new laws have reached too far, challenging the very ideals that pushed the country towards a preference-based system half a century ago. This departure is evidenced by the ever-tightening restrictions on judicial review, most recently the elimination of full habeas corpus review for removal orders.[219] In addition to a commitment to these enduring principles, the benefits of judicial involvement should not be underestimated, and an evaluation of the transformations that took place in criminal procedure in the 1960s provides an explanation for this.

B. Criminal Procedure Revolution

The same era that produced the 1961 and 1965 Amendments also gave rise to the famed, if not infamous, "criminal procedure

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216. *See* KANSTROOM, *supra* note 12, at 226 (describing the current immigration scheme as "an exceptionally rigid legal regime . . . riven with discretionary executive authority, and increasingly immune from meaningful oversight"); Boswell, *supra* note 33, at 332 ("[T]he 1965 Amendments were regarded as groundbreaking because the legislation dismantled a legacy of discriminatory immigration policy [yet] . . . [i]n retrospect, it appears that the 1965 Amendments have been the last positive immigration reform of the twentieth century.").

217. *See* BRIGGS, *supra* note 35, at 112–16 (explaining the policy behind the Immigration Act of 1965 and its effect on immigration policy).

218. *See id.* at 118–89 (providing a comprehensive overview of developments subsequent to the 1965 Amendments, including the ramp-up of immigration numerically, increased global political issues involving immigration, and culminating in the increasingly complex issue of undocumented immigration).

219. *See supra* Parts II.C, III.C (discussing, respectively, the effect of RIDA on habeas corpus and the questionable constitutionality of RIDA in removing habeas review without providing a sufficient replacement).

revolution" (Revolution), accomplished by the U.S. Supreme Court under Chief Justice Earl Warren.[220] Though the transformations in both immigration and criminal procedure can be traced to developments predating the social movements of the 1960s, both also are inextricably linked to this remarkable decade.[221] And though the Revolution is a consortium of "hundreds of criminal procedure cases" whereas the 1961 and 1965 Amendments are simply two instances of federal legislation,[222] the policy choices reflected in each share a common foundation in the broader political advances of the 1960s.[223]

The Revolution represented an influential turning point in criminal procedure law that continues to have an important impact on the daily functions of the U.S. criminal system.[224] These relatively rapid changes to criminal procedure law were strongly criticized by some at the time and arguably even swayed major elections,[225] and some of the major components, such as the evidential exclusionary rule, remain controversial.[226] Yet, the enduring nature of many of the

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220. *See, e.g.*, MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 157 (2001) (describing the two main goals of the Warren Court in the area of criminal procedure as ensuring basic procedures for all citizens regardless of resources and applying the "spirit" of the Constitution instead of the "wording"). *But see* JOHN DENTON CARTER, THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM 112–20 (1973) (criticizing the Warren Court's judicial philosophy as incorrectly being interpreted to favor only a small segment of the population).

221. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 446 (2000) (drawing a political connection between the Revolution and the concurrent effort to confront poverty and other systemic problems stemming from race); *see also* BRIGGS, *supra* note 35, at 106–07 (arguing that the Civil Rights Act fostered the political climate necessary for immigration reform).

222. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1365 (2004).

223. *See* A. Kenneth Pye, *The Warren Court and Criminal Procedure*, *in* THE WARREN COURT: A CRITICAL ANALYSIS 58, 65 (Richard H. Sayler et al. eds., 1968) (noting that the Revolution is best comprehended by evaluating it in the context of the broader civil rights movement); *see* also BRIGGS, *supra* note 35, at 106–07 (observing that the principles prohibiting racial discrimination against citizens logically led to prohibiting racial discrimination in national immirgration policy).

224. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 146–47 (1997) (referring to the Warren Court's rulings in criminal procedure as "a remarkable edifice of Fourth Amendment, Fifth Amendment, and Sixth Amendment rules" as well as "the foundations of modern constitutional criminal procedure").

225. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 497–500 (1997) (noting that during the 1968 presidential campaign, Richard Nixon unequivocally and successfully ran against the criminal procedure rulings of the Warren Court, claiming that the Warren Court "weakened law and encouraged criminals").

226. *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND

practices promoted by the Warren Court indicates their permanence in the legal system, as some of the obligatory procedures have since become deeply ingrained in police and judicial operations across the nation.[227] This regularity has in turn fostered greater confidence in the court system to produce fair results.[228] Furthermore, a general public acceptance of these constitutional judgments suggests a common acknowledgement of their reasoning.[229] The reliance on the Bill of Rights resonates with a common understanding of the relationship between the individual and the government.[230]

In comparison to the ongoing uncertainty of immigration law, the Revolution presents a relatively stable authority. It is this degree of stability that offers guidance for potential immigration reform, especially regarding the benefits of judicial involvement. If such reform can achieve results comparable to those of the Revolution, then immigration law may finally achieve the steadiness that it has long been lacking. The most effective manner in which to accomplish this is a return to the policies that shaped immigration legislation in the 1960s, including a restoration of judicial review to its former levels.

INTERPRETATION 609–12 (2008) (explaining the basic shape of the current exclusionary rule but noting that there are continued calls to remove the exclusionary rule in place of remedies less harsh towards law enforcement); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 33–45 (1999) (arguing that the exclusionary rule harmfully imports the antagonism of the courtroom into the practices of police enforcement, and that courts should be more flexible in allowing evidence).

227. *See* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 191, 191–95 (Richard A. Leo & George C. Thomas III eds., 1998) (arguing that the Miranda warnings enjoy "acceptance across a broad spectrum" and that police officers have both adopted the warnings and adapted to them).

228. *See* JOHN F. DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA 107 (1992) (characterizing the Warren Court as emphasizing "fairness, equity, and the presumption of innocence above the crime control model that espoused efficiency, finality, and the presumption of guilt").

229. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 270–77 (explaining that many of the Warren Court's first landmark cases in criminal procedure were viewed positively by the public, embodying "equal justice for all, the furthering of national values against foot-dragging states, [and] the Court acting because others would not").

230. *See* Pye, *supra* note 223, at 62 (commenting on "the disparity between the reality of the criminal process and the ideals of civilized conduct to which we as a nation had sworn allegiance").

i. Description of the Criminal Procedure Revolution

Prior to the Revolution's standardization of criminal procedure, criminal law generally was a state matter.[231] Owing mainly to federalism concerns and traditional practices, the vast majority of criminal defendants only came into contact with state laws: "More than 99 percent of all prosecutions were brought in the state systems. In those cases, both the Court's pronouncements and the Constitution were largely irrelevant." [232] Consequently, the procedures allowed to a criminal defendant depended entirely on the state constitutions and legislatures, as the protections offered in the Bill of Rights constrained only the federal government.[233] The passage of the Fourteenth Amendment in 1868 and the requirement of due process for the states nominally gave the federal courts an instrument through which they could ensure the most basic individual protections at the state level.[234] For decades, however, this supervision only triggered remedial rulings where the state court disregarded the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[235] In effect, this standard required extreme violations by state courts to provoke the Court's intervention, such as the unjust trial overturned in *Powell v. Alabama*,[236] and was administered unpredictably through a case-by-case analysis.[237]

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231. *See* MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953–1969 218–19 (2005) (describing the near-absolute control the individual states possessed over their respective criminal laws and procedures prior to the middle of the twentieth century).

232. *Id.* at 218.

233. *See* UROFSKY, *supra* note 220, at 158 (noting that the Supreme Court declared in 1833 that the Bill of Rights "applied only against the federal government, and this remained the accepted interpretation until after the Civil War").

234. *See* BELKNAP, *supra* note 231, at 218–19 (arguing that the initial interpretation of the Fourteenth Amendment by the Supreme Court as applied to state criminal proceedings was very loose and allowed the states great independence and flexibility).

235. Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

236. *Id.* (holding that Alabama's refusal to appoint competent counsel for eight African-American defendants tried for rape charges was a denial of due process). In *Powell*, the defendants were arrested and at trial the judge "appointed all the members of the bar" to represent the defendants. *Id.* at 49. A jury sentenced the defendants to death. *Id.* at 50. The Court found that the attorney who finally represented Defendants had no opportunity to prepare or investigate the case. *Id.* at 57–58. The Court then analyzed the history of the right to counsel and the history of incorporating the Bill of Rights through the Fourteenth Amendment. *Id.* at 59–70. The Court held that courts must appoint counsel in capital cases when the defendant cannot afford counsel and is incapable of a pro se defense. *Id.* at 71.

237. *See* BELKNAP, *supra* note 231, at 219 (explaining the unpredictability and gradual

This adaptive process continued through the early years of the Warren Court.[238] Beginning in the mid-1950s, however, egalitarian sentiments began to emerge in some of its rulings,[239] and in 1959 the Court's new direction surfaced with the decision in *Frank v. Maryland*.[240] "The controversy ignited by [these early decisions] foreshadowed larger storms that would swirl around the Court . . . as it labored to bring criminal procedure in line with changes in American legal culture."[241] This alignment most clearly materialized in *Mapp v. Ohio*,[242] in which the exclusionary rule was brought to bear against the states by applying the federal interpretation of the Fourth Amendment to the states through the Fourteenth Amendment.[243] Although this "selective incorporation" of constitutional rights had actually commenced decades earlier,[244] it was not

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process by which the Bill of Rights were applied to the states through the Fourteenth Amendment).

238. *See* Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, *in* EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 91, 91–92 (Harry N. Scheiber ed., 2007) (identifying Chief Justice Warren's preliminary outlook on criminal procedure as being particularly affected by his personal history in law enforcement and desire to uphold high standards).

239. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (ruling that due process requires that any state which provides for appellate review must not discriminate against any defendant, here for refusing to supply indigent defendants with a copy of the trial transcript); Mallory v. U.S., 354 U.S. 449, 455–56 (1957) (holding that interrogation of a defendant for many hours and refusing to arraign the defendant before a magistrate judge constitutes a due process violation).

240. *See* Frank v. Maryland, 359 U.S. 360, 372–73 (1959) (holding that Baltimore could impose a fine on its residents who resist inspection of their house by health inspectors pursuant to a city ordinance), In *Frank*, a health inspector, unable to gain access to a residence, observed unsanitary conditions and called police, who then obtained a warrant and arrested the resident. *Id.* at 361–62. The Court reasoned that the need for regulation of sanitary living conditions justified the city ordinance and that the inspection did not rise to a violation of the Fourteenth Amendment. *Id.* 371–72.

241. BELKNAP, *supra* note 231, at 226.

242. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (ruling that evidence must be excluded in a state criminal case where it is the product of warrantless search). In *Mapp*, police officers forced entry into a home after the resident insisted she would only open the door for a search warrant, which the police lacked. *Id.* at 644. The Court reviewed the history of the incorporation of the Fourth Amendment into the Fourteenth Amendment. *Id.* at 650–54. Finding that the Fourth Amendment applies to the States and the Federal Government, the Court concluded that the States are also subject to the exclusionary rule. *Id.* at 654.

243. *See id.* at 654 (extending the exclusionary rule against the states).

244. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (declining to invalidate a state law limiting inciting language under the First Amendment, but establishing the Fourteenth Amendment as a method through which the Bill of Rights could apply to the states). The

until *Mapp* that the Court began incorporating the federal criminal procedural protections in earnest.[245] The ruling launched an unprecedented wave of cases that came to be known as the criminal procedure revolution,[246] including *Gideon v. Wainwright*,[247] *Miranda v. Arizona*,[248] *Escobedo v. Illinois*,[249] *Malloy v. Hogan*,[250] *Katz v. United States*,[251] and many others.[252] "By the time Warren retired from the Supreme Court in 1969, a district attorney had to be an expert on constitutional law."[253]

Chief Justice Warren, himself a former state prosecutor, viewed stricter controls on law enforcement as ultimately beneficial for their operations.[254] More important, however, "was the disparity between the reality of the criminal process and the ideals of civilized conduct to which

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Court's precise and rather clear language concerning the applicability of the Fourteenth Amendment against the states: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.*

245. *See* BELKNAP, *supra* note 231, at 231 (describing the impact of *Mapp* as an "incorporation breakthrough").

246. *See* Pye, *supra* note 223, at 58 (noting in the years immediately following the Revolution that "whether these changes constitute a 'criminal law revolution' or merely an orderly evolution towards the application of civilized standards to the trial of persons accused of crime").

247. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (establishing the requirement under the Sixth Amendment for a state to furnish legal counsel for certain criminal defendants who cannot otherwise afford it).

248. *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (holding that evidence obtained from a criminal defendant through police interrogation without a full advisement of the criminal's rights is inadmissible under the Fifth and Sixth Amendments).

249. *See* Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (expanding the Sixth Amendment right to counsel to include the right to have legal counsel present during police interrogations).

250. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that an individual's Fifth Amendment right against forced self-incrimination also protected the individual during state criminal trials).

251. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (interpreting the Fourth Amendment to protect against warrantless searches where there is a reasonable expectation of privacy, regardless of whether there was physical intrusion).

252. *See* Pye, *supra* note 223, 58–77 (surveying the cases constituting the criminal procedure revolution and noting the unprecedented nature of the rulings and their probable and lasting impact).

253. BELKNAP, *supra* note 231, at 218.

254. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 263 (1982) (describing the strict view and high standards that Chief Justice Warren maintained towards law enforcement personnel from his time spent in the profession in California).

we as a nation had sworn allegiance."[255] Despite the conventional deference shown towards the states regarding criminal law, the Court now required the states and their criminal procedure laws to meet the minimal standards of the Constitution.[256] The Revolution predictably encountered resistance from segments of a heavily divided populace, even prompting Congress in one instance to attempt to legislatively reverse the Court.[257] For parts of the country, the Revolution formed yet another part of a series of unsupported and destabilizing cases.[258]

Despite the controversy, however, the Revolution was no more than an element of the political and social landscape of the time—"[t]he Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights."[259] In the view of Chief Justice Warren, crime had become urbanized and driven by poverty,[260] and coupled with this was the evident reality that minorities endured most of the illegitimate police behavior.[261] Encouraged by the national mood as well as the specific efforts of many states to improve their criminal procedure laws, the Court demanded judicial regularity based on the federal model for all criminals across the nation.[262] "If government was going to deprive some of its

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255. Pye, *supra* note 223, at 62.

256. *See* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 802 (2009) (explaining that without the Supreme Court's "aggressive" efforts during the 1960s, "it is possible that many of the modern reforms of state criminal justice systems would never have occurred").

257. *See* POWE, *supra* note 221, at 409–10 (describing the legally questionably efforts by Congress in 1968 to undermine the Miranda warnings by legislatively restoring the pre-Miranda legal structure).

258. *See* FRIEDMAN, *supra* note 229, at 274–77 (arguing that changes in crime rates and unrelated shifts in public opinion caused the Revolution to appear less appealing in the latter half of the 1960s).

259. *See* Pye, *supra* note 223, at 65 (arguing that the growing consensus regarding greater equality throughout society made criminal rights an inevitable target of reform).

260. *See* WHITE, *supra* note 254, at 264–66 (contrasting the typical criminal of the 1950s with that of the 1960s, the latter being the product of impoverished and otherwise disadvantaged situations).

261. *See* Pye, *supra* note 223, at 65 (emphasizing the role that the African-American civil rights movement has in terms of exposing the relationship between minorities generally and law enforcement). "If the Court's espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime." *Id.*

262. *See id.* at 63 (commenting that the Revolution's application of federal standards against the states necessarily drew on Supreme Court decisions that long predated the Warren Court).

citizens of their liberty and their humanity, it was at least going to effectuate that deprivation fairly."[263]

ii. Legacy of the Revolution

In the decades following the Revolution, which effectively ended in 1969,[264] the fundamental progress made by the Warren Court remained intact.[265] Though subsequent Courts declined to expand on the developments and even chipped away at some of them,[266] the criminal justice system now clearly displayed the design of the Revolution's central precepts. Critics denounced the Warren Court for stepping beyond the bounds of the court's role,[267] yet the core intent of the Revolution was to secure "compliance with the fundamental ideals of equality and fairness guaranteed by the United States Constitution."[268] Indeed, the broader aim of many of the Warren Court's judgments was simply to uphold the Constitution.[269] Apart from the debate over the Court's methodology,

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263. WHITE, *supra* note 254, at 265.

264. *See* ANTHONY E. SCUDELLARI ET AL., *Introduction* to THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH, at v (Bureau of National Affairs, 1975) (suggesting that June 23, 1969 was "the last day of the 'Warren Court' era" because on that date the Court delivered its final case in which it applied a Bill of Rights provision against the states through the Fourteenth Amendment). The case was *Benton v. Maryland*, which incorporated the Double Jeopardy Clause of the Fifth Amendment. *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (holding that the Double Jeopardy Clause of the Fifth Amendment applies to the States through the Fourteenth Amendment).

265. *See* Hoffman & King, *supra* note 256, at 802 (listing the numerous criminal procedures which "we all take for granted today," including protections against unreasonable searches and seizures, the right to appointed counsel, and the right to confront witnesses among others).

266. *See* Kamisar, *supra* note 238, at 112 ("Since the Warren Court's revolution in criminal procedure came to an end, most of the famous cases that marked the revolution have been . . . read narrowly, applied grudgingly, and riddled with exceptions by the Burger and Rehnquist Courts.").

267. *See, e.g.*, POWE, *supra* note 221, at 395 (describing the reaction to the *Miranda* decision as including surprise at the legislative nature of the opinion and its lack of firm constitutional underpinnings).

268. Hoffman & King, *supra* note 256, at 801.

269. *See* Harry N. Scheiber, *The Warren Court, American Law, and Modern Legal Cultures*, *in* EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 1, 2 (Harry N. Scheiber ed., 2007) (positing that the Warren Court merely "brought to the forefront" the constitutional standards which had long been ignored by states).

however, "subsequent Courts have and will continue to function in the shadow of the Warren Court legacy."[270]

iii. Similarities Between Immigration Law and the Criminal Procedure Revolution

The circumstances faced by the Revolution in the 1960s bear a strong resemblance to the conditions which have frustrated recent efforts at immigration reform. First, both contend with an established system of law whose functions are central to the nation's affairs. The Revolution altered the procedures of criminal adjudications, which go to a core responsibility of government, the criminal justice system.[271] Immigration reform must deal with the admittance and administration of migrants into the nation, an issue of significant proportions for the immigrant-rich United States. Second, both the Revolution and immigration reform attempt to ameliorate harsh enforcement practices by government actors. The unrestrained conduct of state and local police agents served as the primary inspiration for the Revolution,[272] yet had long been protected from federal parameters due to federalism.[273] Immigration reform will likely seek to restrain the high-profile enforcement methods employed by federal agencies, such as workplace raids, as well as the less visible but equally severe practices, such as long-term detention. Third, there are strong racial undertones within both systems of law. The criminal justice system notoriously treated defendants differently based on their race, and this discrepancy was a motivating force behind the Revolution.[274] The explicit racism that molded the worldwide immigration quota system was legislatively removed in 1965, but immigration reform will have to confront the implicit racism that

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270. UROFSKY, *supra* note 220, at 254.

271. *See id.* (suggesting that part of the lasting effect of the Warren Court was its willingness to confront "big themes that are of great importance to modern society").

272. *See* Kamisar, *supra* note 238, at 91–92 (arguing that Chief Justice Warren's years in the criminal enforcement field instilled a drive to uphold rigorous policing methods devoid of "any trickiness or any unfairness").

273. *See* BELKNAP, *supra* note 231, at 218–19 (explaining the initial hesitance of the Supreme Court during the late nineteenth and early twentieth centuries to become overly involved in the states' systems of criminal law).

274. *See* Pye, *supra* note 223, at 65 (linking the Warren Court's criminal procedure rulings with the African-American civil rights movement). *See also* Lain, *supra* note 222, at 1451–52 (suggesting that the Warren Court's progressive stance on criminal procedure reflected the growing support of racial equality in the country as a whole).

continues to seep into immigration law and policy.[275] Fourth, the political environment for both was and is intense and highly partisan. The Warren Court had already caused massive controversy around the country with rulings in other areas of law, and only fanned the flames with its criminal procedure opinions.[276] Similarly, immigration reform tackles an issue that is historically divisive as well as presently gridlocked because of the entrenched positions of the many political factions involved. Finally, both involve federal decisions which strongly and disproportionately affect the states. The Revolution encountered a bewildering array of state law and attempted to elevate those lacking the minimal procedural protections to proper levels.[277] Immigration reform will possibly redraft immigration standards and procedures, which would consequently affect immigration movement and populations within the states, especially in those states with the highest immigrant populations.

Criminal procedure and immigration law underwent dramatic transformations during the middle of the twentieth century which contrasted with their mutually pervasive and persistent problems with class and racial discrimination.[278] The large-scale social upheaval of the 1960s reverberated far past the predominant movements of black civil rights and anti-war beliefs.[279] It promulgated novel legal standards that are clearly seen in the Revolution and in the 1961 and 1965 Amendments.[280] Nevertheless, while many of the basic principles put forward within the Revolution have

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275. *See* JOHNSON, MYTH, *supra* note 11, at 1–54 (charting the evolution of immigration policy as a direct reflection of race, and noting that "people of color from developing nations are the most likely group to be excluded from the United States").

276. *See* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 868–75 (2007) (placing the Revolution's seminal cases within the larger controversy surrounding the Warren Court, partly from the school desegregation cases, which mainly focused on the Court acting without constitutional support).

277. *See* Lain, *supra* note 222, at 1371–72 (observing that the state criminal justice systems prior to the Revolution varied widely since there were only minimal benchmarks required by the Supreme Court prior to the Warren Court).

278. *See* JOHNSON, MYTH, *supra* note 11, at 2 (noting the issues of race present in immigration law); Pye, *supra* note 223, at 65 (observing the entwinement of criminal procedures and race).

279. *See* WRIGHT, *supra* note 22, at 420 (noting the effect of the Civil Rights movement on other social movements).

280. *See* Pye, *supra* note 223, at 65 ("Concern with civil rights almost inevitably required attention to the rights of defendants in criminal cases."); BRIGGS, *supra* note 35, at 106 ("For to invoke in legislation the explicit principle that overt racism could not be tolerated in the treatment of citizens implicitly meant that there could not be overt discrimination in the nation's laws governing the way future citizens would be considered for admission as immigrants.").

matured into bedrock legal principles over time, immigration law did not gain such stability.[281] Thus, while the Revolution and current immigration reform share many characteristics, the most salient disparity is the contrasting evolvement after their mutual renovations in the 1960s. If immigration reform can import the relevant features of the Revolution, however, it may also be able to attain comparable constancy.

C. Applying the Criminal Procedure Revolution to Immigration Reform

The durability of the Warren Court's criminal procedure rulings rests with three achievements of the Revolution: the institution of standard enforcement practices,[282] an increased public faith in the criminal justice system,[283] and the realization of Constitutional promises.[284] These accomplishments, much like the Revolution's motivations, are directly linked to the more visible public priorities of the 1960s.[285] First, the federalization of criminal procedure provided national standards which applied equally throughout the states.[286] This regularity was chiefly aimed at the South, "where racial prejudice fueled already hostile sentiment toward those accused of criminal wrongdoing."[287] Beyond this, the guidelines also aspired to refine police methods and encourage better

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281. *See supra* Part I.E (discussing the major legislative changes which have occurred during the last half century).

282. *See* WHITE, *supra* note 254, at 272 (portraying the Supreme Court's rationale for the Revolution as partly to produce strong standards for police to guarantee "more enlightened law enforcement"); Lain, *supra* note 221, at 1369–72 (describing the shift of power from the state governments to the federal government in controlling criminal adjudications throughout the nation).

283. *See* UROFSKY, *supra* note 220, at 254 (noting the Warren Court's long-standing and influential criminal procedure decisions).

284. *See id.* at 157 (crediting the Revolution with aligning the rights embodied in the Constitution with proper law enforcement practices).

285. *See supra* Part I.D (presenting briefly the larger social and political movements of the era).

286. *See supra* note 282 (explaining the success of the Revolution in instituting standard enforcement practices).

287. *See* Lain, *supra* note 222, at 1371–72 (illustrating the particularly hostile attitudes towards minority criminal defendants in the southern states). "[D]efendants were routinely treated like pieces of meat to be processed and then forwarded for proper packaging. Police plucked individuals off the streets for little or no reason, searched them without a warrant, questioned them using strong-arm tactics, and then (if sufficiently satisfied with the evidence of guilt) sent them on to the formal adjudication process for trial or, more likely, a guilty plea." *Id.*

practices nation-wide.[288] Second, in the face of increasing criminal prosecutions, the Court recognized a growing dissatisfaction with the criminal justice system.[289] "[T]he Supreme Court . . . recognized that the nation was in the midst of a social revolution before this became apparent to most of the elected representatives of the people and . . . sought to eliminate the basic defects in our [criminal justice] system."[290] Though the Revolution has inspired mixed reactions since its deployment, considerable scholarship exists crediting it with constructive improvements to criminal justice.[291] Third, the Revolution delivered on Constitutional protections which had long been denied to citizens.[292] Despite the legal rationality of federalism and the traditional deference to state control over criminal law, "the implementation of constitutional rights which [had] existed only in theory in the past" resonated with the public.[293] The initial influence and lasting appeal of the Court, and the Revolution in particular, derive principally from this unabashed loyalty to the "principles of fairness and equality that were part of the *ethical structure* of the Constitution."[294] More importantly, the guiding philosophy remains viable today as a valid understanding of the Constitution's checks on the state's enforcement powers.[295]

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288. *See* POWE, *supra* note 221, at 492 (remarking that the Revolution was to ensure proper police methods not only in "backwater" regions but in every state of the country). "[The] goal was to force state systems to behave like [the Warren Court] assumed the FBI, United States attorneys, and the federal courts behaved." *Id.*

289. *See* FRIEDMAN, *supra* note 229, at 271 (describing the Court's sense that aggressive rulings were in order to effectuate needed changes in the states' criminal justice systems due to a lack of momentum by any other capable body); Pye, *supra* note 223, at 66 (contrasting the Court's traditionally gradual sensibilities with the impetus it sensed towards making radical changes to criminal procedure norms).

290. Pye, *supra* note 223, at 66.

291. *See* UROFSKY, *supra* note 220, at 254 (crediting the Warren Court's ability to select the "right" answers generally, and within its criminal procedure cases, for its long-standing influence); Hoffman & King, *supra* note 256, at 802 (suggesting that current criminal defendants are indebted to the Revolution for many of the protections they enjoy).

292. *See* WHITE, *supra* note 254, at 275 (describing the Revolution as ultimately "making law enforcement practice more closely approximate ideals of justice and fairness"); UROFSKY, *supra* note 220, at 157 (viewing the Revolution as essentially transforming the Constitution into a "living document" which more closely resembled the aspirations of the Framers for the modern age).

293. Pye, *supra* note 223, at 67.

294. WHITE, *supra* note 254, at 265 (emphasis added). The Warren Court considered the criminal justice system from the point of view of the defendant as well as the prosecutor, and attempted to craft decisions that balanced between their naturally conflicting interests. *Id.* at 265–66.

295. *See* Hoffman & King, *supra* note 256, at 802 (describing the changes enforced by

In comparing criminal procedure reform and potential immigration reform, the two most striking difficulties are the questions of capacity and citizenship, which will be explained in turn. First, in order to effectuate reform within any area of law, there must be a measure of legal capacity to make the reform binding. Despite the criticisms of judicial abandon, the Supreme Court in carrying out the Revolution possessed legal authority through its historical responsibility to interpret and apply the Constitution.[296] Additionally, this function was effectively shielded from popular judgment due to the Court's unique position in the federal government.[297] On the other hand, immigration reform must take place within the volatile political processes of Congress, as it is the only political body empowered to realize such reform. The current legislative paralysis concerning immigration is testament to the structural and political obstacles which must be managed if immigration reform is to occur. Simply put, the five votes required to perpetuate the Revolution are dwarfed by the hundreds of votes necessary to enact federal immigration legislation, not to mention the political accountability felt by each congressional member. Second and more troublesome, enforceable legal rights require citizenship. The Revolution operated on the implication that constitutional rights *owed to* criminal defendants were being denied to them.[298] In contrast, noncitizens enjoy relatively few rights and therefore often lack meaningful protection from essentially unconstitutional government action.[299]

Fortunately, the traits of the Revolution described above function as solutions to these difficulties and provide guidance for gaining long-term stability in immigration law. As a starting point, immigration reform should restore the importance of the courts, which were so central to the Revolution.[300] This can be achieved in part by restoring full habeas corpus

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the Revolution as "necessary" and vitally important to contemporary criminal adjudications).

296. *See* BELKNAP, *supra* note 231, at 218–19 (outlining the Supreme Court's authority in dictating minimal standards of criminal procedural protections as it developed from the passage of the Fourteenth Amendment).

297. *See id.* (same).

298. *See* Pye, *supra* note 223, at 67 (arguing that the Revolution fulfilled the true intent of the Bill of Rights, in that it provided criminal defendants with adequate mechanisms by which they may defend themselves from the many powers of the state).

299. *See, e.g.*, Cruz, *supra* note 154, at 485–86 (discussing the unclear due process rights of noncitizen respondents in deportation hearings).

300. *Id.* at 66–67 (recognizing the Supreme Court's initiative in implementing the Revolution "[d]espite persuasive arguments urging different action [including] the principles of federalism [which through the Revolution] have yielded to the desire of the Court to provide equal justice to the rich and the poor in state and federal criminal proceedings"). *See also* Stacy Caplow, *Renorming Immigration Court*, 13 NEXUS 85, 101 (2007-2008)

review as discussed above and allowing the numerous federal district courts to become involved in immigration adjudications.[301] Allowing this oversight of executive enforcement would encourage the federal immigration agencies to comply with proper procedures, and the courts would correct that behavior which does not conform to minimal standards.[302] Beyond applying the statutory and regulatory law, the courts would also protect fundamental rights where necessary.[303] Though not every immigrant must receive full constitutional protections, there are minimal rights that must be protected, such as the right to petition a court for habeas corpus.[304] This regularization and semi-constitutionalization of immigration enforcement should also provide greater public faith in the federal immigration enforcement agencies, as it would hopefully minimize the more extreme enforcement practices as well as establish better reputations for the police and other government actors in the immigrant communities.[305] This public goodwill would then ultimately serve to justify

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(presenting various recommendations for Immigration Courts to ameliorate a judicial system that is vitally important for "people who are very worthy, who have truly suffered and been abandoned by their countries, or who have the right to stay in this country though time, stakes, contributions, and character").

301. *See* Benson, *Paper Dolls*, *supra* note 30, at 63–64 ("Better review, at the administrative level and in the federal courts, enhances the quality of our legal system and aids the agency officials administering the law."). Moreover, due to the burden of immigration appeals on the federal courts of appeals, "cases perhaps should be shifted back to the federal district courts in order to spread the workload among a larger number of judges." *Id.*

302. *See id.* ("The dialogue generated in the review process is one of our legal system's methods of identifying problems in the law.").

303. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). Though limited historically to legal matters, "an attack on an executive order could raise all issues relating to the legality of the detention." *Id.* at 301 n.14 (quoting *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970)).

304. *See St. Cyr*, 533 U.S. at 305 ("[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention."). *See also* Norako, *supra* note 124, at 1617–20 (describing the foundations of the writ of habeas corpus in U.S. law and its great importance to immigration law).

305. *Cf.* Lanza v. Ashcroft, 389 F.3d 917, 928 (2004) ("The concern behind an alien's right to petition this Court for relief is a familiar one—that personal freedom can only be preserved when there are institutional checks on arbitrary government action."). *See also* Evans, *supra* note 145, at 603–10 (arguing that because immigration raids conducted within the U.S. are not only constitutionally questionable but also detrimental to the communities they strike, a change in policy is needed to monitor such enforcement practices with greater scrutiny).

the difficult political maneuverings that reestablished the courts' role in immigration.

V. Conclusion

Comprehensive immigration reform, if done with an eye towards the justifications stated for the creation of our modern immigration system, would not be a blind leap into radically new territory. Rather, this type of historical underpinning would give reform a sturdy foundation which both the population and the government can recognize. It would merely be "an affirmation of old principles."[306] Due consideration must be given to current realities and there must be efforts to provide logical and forward-looking solutions, yet any reform must also signify a commitment to past intentions.[307] This includes those beliefs woven into the language of the Constitution, and in addressing immigration reform with reference to its underlying principles, the public memory is refreshed of these ideals.[308] Mindful of the commitments made to provide a more equitable immigration system, Congress should decide that habeas corpus is a hallmark of all U.S. courts, including immigration courts.[309] "We cannot boast of our magnificent system of law, and enact immigration legislation which violates decent principles of legal protection."[310] This return to a firm role of judicial review in immigration would provide greatly needed stability, benefitting both future immigrants and the United States.

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306. KENNEDY, *supra* note 82, at 82.

307. *See* WHOM SHALL WE WELCOME, *supra* note 42, at xii–xv (presenting underlying beliefs of the Commission reflecting the beliefs of the United States on immigration and international relations before advocating for a change in the immigration legal structure to accurately exhibit those beliefs).

308. *See* Fiss, *supra* note 213, at 17 ("[T]he Constitution is not a set of rules to maximize individual welfare on some global scale [but] a statement about how a society wishes to organize itself.").

309. *See* Ex parte Yerger, 75 U.S. 85, 101 (1868) (finding that the "great and leading intent of the Constitution . . . in respect to the writ of habeas corpus . . . is that every citizen may be protected by judicial action from unlawful imprisonment"). Regarding the availability of the writ and suggesting the universality of habeas corpus to all those detained by the government the Court stated: "It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States."

310. WHOM SHALL WE WELCOME, *supra* note 42, at xv.