

# Washington University Journal of Law & Policy

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Volume 27 *Immigration*

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2008

## Threats to the Future of the Immigration Class Action

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# Threats to the Future of the Immigration Class Action

Jill E. Family\*

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## I. INTRODUCTION

The role of the federal courts in immigration law is very limited. The plenary power doctrine, developed in the nineteenth century, promotes an extremely deferential, “hands off” approach by the

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judiciary. Under the doctrine, congressional power over immigration law is plenary. In exercising this plenary power, Congress gets to legislate in ways that would be wholly unacceptable in other contexts. For example, the Supreme Court has explained that when it comes to immigration, Congress may dictate what due process is for certain foreign nationals.<sup>1</sup> There is an ongoing debate about the current strength of the plenary power doctrine.<sup>2</sup> However, even as the

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1. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”); *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”); *Chae Chan Ping (Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (describing as legislative prerogative the power to exclude “foreigners of a different race . . . who will not assimilate with us” and describing decisions exercised under that prerogative as “conclusive upon the judiciary”).

2. *See, e.g.*, STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 177–222 (1987) [hereinafter *IMMIGRATION AND THE JUDICIARY*]; T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 *GEO. IMMIGR. L.J.* 365 (2002); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L.J.* 257 (2000); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1 (1998) [hereinafter *Segregation’s Last Stronghold*]; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 *SUP. CT. REV.* 255; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 *HASTINGS CONST. L.Q.* 925 (1995) [hereinafter *Ten More Years of Plenary Power*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *COLUM. L. REV.* 1625 (1992) [hereinafter *The Curious Evolution*]; Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545 (1990) [hereinafter *Immigration Law after a Century of Plenary Power*]; Michele R. Pistone, *A Times Sensitive Response to Professor Aleinikoff’s Detaining Plenary Power*, 16 *GEO. IMMIGR. L.J.* 391 (2002); Peter H. Schuck, *The Transformation of Immigration Law*, 84 *COLUM. L. REV.* 1 (1984); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 *GEO. IMMIGR. L.J.* 339 (2002); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 *HASTINGS CONST. L.Q.* 1087 (1995).

plenary power doctrine shows its age and is arguably somewhat weakened, federal courts today face complicated and broad immigration jurisdiction-stripping statutes that limit their power to review immigration administrative action.<sup>3</sup> Thus, the role of the federal courts in immigration law remains quite limited.

The restricted role of the federal courts has implications for both individual litigation and collective action, as the plenary power doctrine and the statutory limits affect all types of immigration litigation. The implications of the narrow role of the federal courts certainly have not escaped scholarly attention. For example, the history, strength, merits, and future of the plenary power doctrine are the objects of important scholarship.<sup>4</sup> The merits and meaning of the jurisdiction-stripping statutes have also received diligent scholarly attention.<sup>5</sup> But most of this scholarship focuses on the role of the federal courts from the perspective of individual litigation. This Article opts for the collective approach; it focuses on the future of the immigration class action in light of the very limited role of the federal courts in immigration law.<sup>6</sup>

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3. See, e.g., 8 U.S.C. § 1252 (2000).

4. See *supra* note 2.

5. See, e.g., Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525 (1997); Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113 (2006–2007); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); and Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463 (2000).

6. Scholars have discussed the immigration class action as a part of larger works. See, e.g., Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643, 653 (2004); David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313, 321–23 (2002); Motomura, *supra* note 5, at 434–39; Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1679–87 (2000); Robert Pauw, *Judicial Review of “Pattern and Practice” Cases: What to Do When the INS Acts*

This Article identifies and discusses three threats to the future of the immigration class action: (1) a general congressional willingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action. This Article will focus on the implications of these threats for class litigation while recognizing that these threats may also be hostile to individual litigation. For example, the general congressional willingness to restrict the role of courts in immigration law affects individual action but also has implications for class actions. When jurisdiction over a type of individual action is eliminated, those individuals have no action to bring collectively. Additionally, a congressional attitude hostile to immigration judicial review generally sets the atmosphere within which Congress considers legislative proposals that would restrict the use of the class action specifically. This atmosphere is also conducive to proposals to require judicial review waivers as a condition of obtaining an immigration benefit (which affect collective action as well as individual action).

These threats imperil a form of action that litigants have used to challenge government administration of immigration laws.<sup>7</sup> Consistent across these actions are allegations of unlawful government behavior with widespread effect.<sup>8</sup> These actions carry the promise of broad systematic reform and the potential to bring relief to those who may not know they are entitled to it, or to those who may

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*Unlawfully*, 70 WASH. L. REV. 779, 790–98 (1995); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 STAN. L. REV. 115, 145–60 (1992); Volpp, *supra* note 5, at 467–71.

7. Part II lists examples of different types of allegations brought via an immigration class action complaint. The Civil Rights Litigation Clearinghouse at Washington University in St. Louis School of Law is engaged in a groundbreaking project to add immigration class actions to its database of civil rights cases. For more information about the Clearinghouse and its developing collection of immigration class action cases, see <http://clearinghouse.wustl.edu/> (last visited Feb. 6, 2008).

8. *See, e.g., McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991) (holding federal district court had jurisdiction over a class action challenging administration of the 1986 legalization program); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (affirming district court's class-wide injunction to the extent that it ordered the immigration service to change its procedures in processing asylum applications).

know but lack the resources to mount a challenge.<sup>9</sup> Also, as the Supreme Court has observed, it may be impossible to challenge an immigration pattern or practice in the context of an individual hearing.<sup>10</sup>

This identification of threats exposes patterns of attack against the immigration class action. At the same time, it exposes an immigration front in the broad war against the class action. It does so not only by focusing attention on the fate of the immigration class action generally, but also by initiating a specific discussion about the threat presented by judicial review waivers, including the collective action waiver, to immigration class actions. The government has argued that these immigration waivers are not subject to the Constitution.<sup>11</sup> This Article critiques this assertion. The identification of threats here and the focus on collective action is a call for further thought about what would be lost if the immigration class action disappeared.<sup>12</sup> It reveals a need to know more about immigration class actions in practice and to learn more about a form of immigration litigation that is under attack.<sup>13</sup>

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9. See Neuman, *supra* note 6, at 1680–81; Volpp, *supra* note 5, at 468–71; Motomura, *supra* note 5, at 390–91.

10. *McNary*, 498 U.S. at 496–97. See also Motomura, *supra* note 5, at 389–90; Pauw, *supra* note 6, at 794–96.

11. See *infra* note 162.

12. Immigration class actions have undoubtedly led to changed government behavior in administering the immigration laws; but there are many unanswered questions. For example, a question ripe for exploration is whether past immigration class actions could have achieved the same results as individual actions. Recent groundbreaking immigration cases were not brought as class actions. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

13. In their important and influential study, Peter Schuck and Theodore Wang examined the changing patterns of immigration litigation in the 1980s by analyzing immigration cases reported on Westlaw and Lexis during the years 1979, 1985, 1989 and 1990. Schuck & Wang, *supra* note 6. The study identifies and discusses a category of “affirmative challenges,” which the study defines as “cases initiated by aliens, labor unions, or others seeking to directly challenge governmental policies or practices.” *Id.* at 121. For this category of immigration cases, the study discusses case volumes in various circuits, goals of the challenges, issues in contention in those cases, grounds upon which the challenges are based, success rates of the claims, and distinguishes between impact and other types of affirmative immigration litigation. *Id.* at 121, 145–60.

## II. THE IMMIGRATION CLASS ACTION

Litigants have used the class action format to challenge government behavior in a variety of immigration law contexts. For example, named plaintiffs have sued on behalf of a class of similarly situated foreign nationals challenging the administration of an immigration benefit program.<sup>14</sup> Others have used the class action format to challenge a procedure or practice used in removing foreign nationals from the United States.<sup>15</sup>

Examples of challenges to benefit programs include several class action lawsuits confronting the administration of the 1986 legalization program.<sup>16</sup> In general, these lawsuits claimed that, in administering the legalization program, the immigration service excluded individuals from the program whom Congress intended to include, either by instituting faulty regulations or by employing procedures that rendered the application process constitutionally infirm. The class of plaintiffs belonging to *McNary v. Haitian Refugee Center, Inc.* alleged that the immigration service used constitutionally flawed procedures during the legalization application

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14. See *infra* notes 16–28.

15. See *infra* notes 29–32. There is another scenario that could give rise to an immigration class action. A class may challenge a state or federal law that regulates foreign nationals in the United States unrelated to immigration status. So-called alienage actions concern how foreign nationals are treated in the United States in non-immigration contexts. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (class action comprised of foreign national children denied access to Texas public schools); *Toll v. Moreno*, 458 U.S. 1 (1982) (class action challenging state university practice of denying foreign nationals in-state tuition rates); *Elkins v. Moreno*, 435 U.S. 647 (1978) (class action challenging state university practice of denying foreign nationals in-state tuition rates); *Foley v. Connelie*, 435 U.S. 291 (1978) (class action challenging restrictive state policy of hiring only U.S. citizen police officers); *Mathews v. Diaz*, 426 U.S. 67 (1976) (class action challenging Social Security eligibility rules); *Hampton v. Wong*, 426 U.S. 88 (1976) (class action challenging federal service employment restrictions to U.S. citizens); *Hurtado v. U.S.*, 410 U.S. 578 (1973) (class action challenging material witness compensation scheme as applied to foreign nationals); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (class action challenging state civil service law restricting certain positions to U.S. citizens); *Graham v. Richardson*, 403 U.S. 365 (1971) (class action challenging state welfare laws as applied to foreign nationals). This Article focuses on class actions tied more directly to immigration status (either the granting of or taking away).

16. See, e.g., *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43 (1993); *McNary*, 498 U.S. 479; *Aparicio v. Blakeway*, 302 F.3d 437 (5th Cir. 2002); *Immigrant Assistance Project of the L.A. County Fed'n of Labor v. I.N.S.*, 306 F.3d 842 (9th Cir. 2002); *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130 (9th Cir. 1999); *Abdullah v. I.N.S.*, 184 F.3d 158 (2d Cir. 1999); *Naranjo-Aguilera v. I.N.S.*, 30 F.3d 1106 (9th Cir. 1994).

process.<sup>17</sup> The class argued that because the service did not allow applicants to challenge adverse evidence, denied applicants the opportunity to present witnesses, failed to provide competent interpreters, and failed to provide verbatim recording of interviews, the procedure foreclosed meaningful administrative review.<sup>18</sup>

Litigants have used the class action format to challenge the government's administration of immigration benefits outside of the legalization context.<sup>19</sup> Class action litigation has also targeted the government's administration of asylum laws.<sup>20</sup> In response to one class action, *Haitian Refugee Center v. Smith*, the Court of Appeals for the Fifth Circuit, in 1982, upheld a class-wide injunction that ordered the immigration service to reprocess asylum applications in a manner consistent with due process.<sup>21</sup> A more recent class action, *Ngwanyia v. Ashcroft*, challenged the government's procedures in adjusting the immigration status of those granted asylum to legal

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17. *McNary*, 498 U.S. at 487–88.

18. *Id.*

19. *See, e.g.*, *Gonzales v. U.S. Dep't of Homeland Sec.*, 239 F.R.D. 620 (W.D. Wash. 2006) (certifying class challenging administration of an inadmissibility waiver); *Santillan v. Gonzales*, 388 F. Supp. 2d 1065 (N.D. Cal. 2005) (granting summary judgment to class challenging delays in issuing evidence of permanent resident status to those granted that status in immigration court); *Campos v. I.N.S.*, 32 F. Supp. 2d 1337 (S.D. Fla. 1998) (denying in part a motion to dismiss class claims challenging the administration of medical waivers as a part of the naturalization process).

20. *See, e.g.*, *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1992) (ordering district court to dismiss class action complaint challenging interdiction at sea procedures); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (affirming district court's class-wide injunction to the extent it ordered the immigration service to reprocess asylum applications); *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1373–74 (S.D. Fla. 2002), *aff'd sub nom.*, *Moise v. Bulger*, 321 F.3d 1336 (11th Cir. 2003) (per curiam) (denying motion to certify habeas class of Haitian refugees); *Wang v. Reno*, 862 F. Supp. 801, 811 (E.D.N.Y. 1994) (declining to create habeas class of foreign nationals challenging asylum decisions because, among other things, too many individual issues were present); *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (approving settlement agreement between class of Salvadoran and Guatemalan asylum seekers and the government providing for de novo asylum adjudication); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (certifying provisional class of Salvadorans challenging asylum practices).

21. *Smith*, 676 F.2d at 1040–41. In response to a surge of asylum applications, the immigration service implemented an accelerated processing program. Administrative judges held eighteen individual hearings per day and provided short time frames for applicants to compile their claims. Due to the speed, there was a shortage of attorneys available to those applicants who desired counsel. During the accelerated program, the immigration service did not grant asylum to any applicants. *Id.* at 1029–32.

permanent resident.<sup>22</sup> The complaint alleged that the government was under-using the number of asylee adjustments permitted per year.<sup>23</sup> The lawsuit settled with the government committing to distribute a minimum number of adjustments of status to legal permanent resident to asylees over a three-year period.<sup>24</sup>

Another recent class action complaint, *Ptasinska v. United States Department of State*, similarly challenged the government's administration of a yearly immigration quota.<sup>25</sup> Congress dictates the number of individuals who may, each year, receive an immigrant (legal permanent resident) visa.<sup>26</sup> The class action complaint alleged, *inter alia*, that the immigration service hoarded visa numbers allowed by Congress.<sup>27</sup> Soon after the complaint was filed and as further litigation loomed, the government relented and accepted additional applications for legal permanent resident status.<sup>28</sup>

As far as challenges related to removal, class actions have challenged detention procedures and other removal-related procedures.<sup>29</sup> In *Ali v. Ashcroft*, a class challenged the government's

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22. *Ngwanyia v. Ashcroft*, No. 02-502 (D. Minn. Feb. 12, 2004).

23. *Ngwanyia v. Ashcroft*, 302 F. Supp. 2d 1076, 1081 (D. Minn. 2004), *vacated*, 376 F. Supp. 2d 923 (D. Minn. 2005).

24. *Ngwanyia v. Gonzales*, 376 F. Supp. 2d 923, 927 (D. Minn. 2005).

25. *Complaint, Ptasinska v. U.S. Dep't of State*, No. 07-CV-03795 (N.D. Ill. 2007).

26. *See* 8 U.S.C. §§ 1151–1153 (2000). The Department of State helps to administer the doling out of visa numbers by issuing a monthly visa bulletin that signals when any visa numbers are available. In June 2007, the Department of State issued a visa bulletin indicating that visa numbers would be available in July. Visa Bulletin for July 2007 (June 12, 2007), *available at* [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3258.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3258.html). Individuals relied on this information and submitted applications for legal permanent residence. On July 2, 2007, however, the Department of State reversed course and issued an update to the July visa bulletin. Update on July Visa Eligibility (July 2, 2007), *available at* [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3266.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3266.html). This July update stated that, in fact, no visa numbers were available.

27. *Complaint, Ptasinska v. U.S. Dep't of State*, No. 07-CU-O 3795 (N.D. Ill. 2007).

28. American Immigration Law Foundation, *AILF Welcomes Government Reversal on Permanent Resident Applications ("Green Cards")*, July 19, 2007, [http://www.aifl.org/lac/lac\\_lit\\_visab.shtml](http://www.aifl.org/lac/lac_lit_visab.shtml).

29. *See, e.g.*, *I.N.S. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991) (upholding, in response to a class action, forbidding employment as a condition of immigration bond); *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999) (affirming preliminary injunction in a class action challenging numerical limits on the number of suspensions of deportation permitted each year); *Turkmen v. Ashcroft*, No. 02-CV-2307, 2004 U.S. Dist. LEXIS 14537 (E.D. N.Y. July 29, 2004) (addressing discovery issues in a class action challenging post-September 11 detention of foreign nationals); *Kazarov v. Achim*, No. 02-C-5097, 2003 WL 22956006 (N.D.

enforcement policy of removing individuals to Somalia even though the country had no functioning government.<sup>30</sup> The detention of juveniles was the object of a class challenge in *Reno v. Flores*,<sup>31</sup> as was the detention of Mariel Cubans in *Fernandez-Roque v. Smith*.<sup>32</sup>

These class actions, and others like them, are litigated against a framework of immigration decision-making that is designed around individual cases. Before exploring threats to the existence of these class actions, a brief review of the individual process is necessary.

The immigration services located within the Department of Homeland Security are divided into benefit and enforcement units.<sup>33</sup> United States Citizenship and Immigration Services (“USCIS”) is charged with administering immigration benefits.<sup>34</sup> USCIS receives applications for particular immigration benefits, including applications for a particular legal immigration status (legal permanent resident status, for example), based on congressionally determined criteria, such as a qualifying family or employment relationship.<sup>35</sup> This branch of the immigration service also receives applications for naturalization and affirmative asylum applications.<sup>36</sup> Among other duties, United States Immigration and Customs Enforcement (“ICE”) is responsible for the interior enforcement of the immigration laws, and United States Customs and Border Protection (“CBP”) patrols

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Ill. Dec. 12, 2003) (certifying class challenging detention of those ordered but not yet removed from the United States); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (affirming certification of class challenging the immigration service’s procedures in obtaining waivers of a right to a hearing in removal proceedings and also affirming that those procedures violated notions of due process); *Perez-Funez v. I.N.S.*, 611 F. Supp. 990 (C.D. Cal. 1984) (certifying class and granting preliminary injunction to class challenging the immigration service practice of obtaining waiver of a right to a hearing from unaccompanied minor foreign nationals).

30. *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003), *withdrawn*, 421 F.3d 795 (9th Cir. 2005).

31. *Reno v. Flores*, 507 U.S. 292 (1993) (addressing a class action challenging detention of juveniles, the Supreme Court determined that the immigration service had not violated due process standards).

32. *Fernandez-Roque v. Smith*, 91 F.R.D. 117 (N.D. Ga. 1981) (certifying class challenging detention of Mariel Cubans).

33. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 3 (2005).

34. *Id.* at 3–4.

35. *Id.*; 8 U.S.C. §§ 1151–53 (2000).

36. LEGOMSKY, *supra* note 33, at 3. Foreign nationals in removal proceedings may apply for certain benefits before an immigration judge, an employee of the Department of Justice. *Id.* at 639–40; 8 U.S.C. § 1229a(c)(4)(A) (2000); 8 C.F.R. § 1245.2(a)(1) (2007).

the nation's borders and ports of entry.<sup>37</sup> While USCIS doles out benefits and oversees admission,<sup>38</sup> ICE charges foreign nationals with removal (based on deportability or inadmissibility), represents the government in removal proceedings that take place within the Department of Justice, and oversees expulsion.<sup>39</sup>

The adjudication process governing an application for an immigration benefit revolves around an individual application. USCIS adjudicates the application for an immigration benefit, such as legal permanent resident status.<sup>40</sup> If the application is denied, there may be an opportunity to appeal the decision to the Administrative Appeals Office, which is located within USCIS.<sup>41</sup> From there, there may be judicial review of the decision, depending on the nature of the decision being appealed and the applicability of major jurisdiction-stripping legislation discussed below.<sup>42</sup>

The adjudication process governing an attempt to remove a foreign national from the United States is also focused on the individual. An individual in removal proceedings faces a process housed within the executive branch that is designed to render a decision as to whether that individual may remain in the United States.<sup>43</sup> Proceedings commence when the government issues a charging document to a foreign national and that document is filed with the immigration court.<sup>44</sup> An immigration judge, an executive branch employee located within the Department of Justice, determines whether the individual is removable from the United

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37. U.S. Immigration and Customs Enforcement, ICE Operations, <http://www.ice.gov/about/operations.htm> (last visited Mar. 22, 2008); U.S. Customs and Border Protection, Mission Statement, <http://www.cbp.gov/xp/cgov/toolbox/about/mission/guardians.xml> (last visited Mar. 22, 2008).

38. *See supra* note 33. Under the Immigration and Nationality Act, an admission refers to a lawful entry. "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2000).

39. LEGOMSKY, *supra* note 33, at 635, 639.

40. *See, e.g.*, 8 C.F.R. § 204.1 (2007).

41. Department of Homeland Security, Delegation to the Bureau of Citizenship and Immigration Services, Delegation 0150.1 (Mar. 1, 2003) (granting authority "to exercise appellate jurisdiction over the matters described in 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003)").

42. *See infra* Part III.A.

43. LEGOMSKY, *supra* note 33, at 639–42.

44. 8 C.F.R. § 1003.14(a) (2007).

States under the immigration statutes.<sup>45</sup> The immigration judge reaches this determination after a hearing where both the government and the foreign national, only represented by counsel if he or she provides her own, present testimony and evidence.<sup>46</sup>

There is an opportunity to appeal the immigration judge's decision to the Board of Immigration Appeals ("Board"), also located within the Department of Justice.<sup>47</sup> The Board renders the final executive branch order. There may be limited judicial review of the final order by the federal judiciary depending on the application of the jurisdiction-stripping legislation discussed below.<sup>48</sup> An individual wishing to challenge the final executive order accesses the federal courts by filing a petition for review in the appropriate federal court of appeals.<sup>49</sup>

As the above examples illustrate, immigration litigants have used the class action format to supplement opportunities for individual litigation. The remainder of this Article reveals that there are several threats to the future of the immigration class action.

### III. THREATS TO THE FUTURE OF THE IMMIGRATION CLASS ACTION

This part presents the growing impediments to the immigration class action. It discusses the three threats to the future of the immigration class action introduced above: (1) a general congressional willingness to restrict immigration judicial review; (2) the application of waivers of judicial review to immigration law; and (3) legislative jurisdiction-stripping attacks more specific to the immigration class action. As discussed above, this Article focuses on the implications of these threats for class actions.

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45. 8 C.F.R. § 1003.10 (2007); 8 C.F.R. § 1003.37 (2007).

46. 8 C.F.R. § 1003.16 (2007).

47. 8 C.F.R. § 1003.1 (2007); 8 C.F.R. § 1003.3 (2007).

48. *See infra* Part III.A.

49. 8 U.S.C. § 1252(a)(1) (2000).

*A. Threat One: Congressional Willingness to Restrict Immigration  
Judicial Review*

Congress considers proposals for immigration judicial review waivers and for restrictions more specific to the immigration class action in an atmosphere that is conducive to restrictions on immigration judicial review. Congress has expressed a general willingness to limit immigration judicial review by instructing the courts not to review certain types of immigration cases. These limitations eliminate more than just individual litigation. If courts may not review certain administrative decisions, that prohibition extends to both individual and collective litigation.

The major legislative source for these congressional restrictions is the Illegal Immigration and Immigrant Responsibility Act of 1996 (“IIRIRA”) as modified by the REAL ID Act.<sup>50</sup> Under the restrictions against judicial review that Congress implemented through IIRIRA in 1996 and modified in 2005 through the REAL ID Act, the role of the federal courts in reviewing immigration administrative action is quite narrow. Congress has created several categories of restrictions. There are restrictions based on the substance of the case, timing, and form. The form and timing restrictions are most relevant to a discussion of specific jurisdiction-stripping attacks against immigration class actions; the form and timing restrictions are therefore addressed more thoroughly under the third threat. However, the substantive restrictions are discussed here briefly to provide some flavor of the overall breadth of the restrictions, and because they also affect class actions by narrowing the types of substantive claims that may be brought via individual or collective litigation.

The major substantive restrictions include statutory provisions: (1) providing that no court has jurisdiction to review certain discretionary actions; (2) narrowing access to the federal courts for those deemed removable due to commission of certain criminal acts; and (3) creating an extremely limited role for the federal courts in

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50. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.) (1996); REAL ID Act of 2005, Pub. L. No. 109-13 (2005).

reviewing expedited removal orders.<sup>51</sup> The limitations on judicial review of discretionary acts and of orders based on criminal convictions, however, do not preclude courts from hearing related constitutional claims or questions of law.<sup>52</sup>

For example, the federal courts have no jurisdiction to review the discretionary decision to grant a foreign national a waiver of inadmissibility grounds, no jurisdiction to review the discretionary decision to grant cancellation of removal to a foreign national who meets the stringent cancellation requirements, and no jurisdiction to review the discretionary decision of whether to adjust an individual's status to legal permanent resident.<sup>53</sup> There is judicial review, however, of a related constitutional claim or question of law.<sup>54</sup> Also, courts do have jurisdiction over the discretionary decision to grant asylum.<sup>55</sup>

Furthermore, Congress has stripped courts of jurisdiction over final removal orders based on a wide variety of criminal offenses, but jurisdiction over related constitutional claims and questions of law remains. Here are two examples. If an individual's removal order is based on a violation of a controlled substance law of a state, federal law, or law of a foreign country, there is no judicial review of the removal order, except for related constitutional claims or questions of law.<sup>56</sup> Likewise, if an individual's removal order is based on the

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51. 8 U.S.C. § 1252(a)(2) (2000). *See also* 8 U.S.C. § 1182(h) (2000); 8 U.S.C. § 1182(i)(2) (2000). Under expedited removal, certain foreign nationals may be removed from the United States without a hearing. Congress has removed federal court jurisdiction over the operation and implementation of the expedited removal program except for extremely narrow habeas corpus actions limited to determining whether the affected individual is within the class of persons to whom expedited removal applies. *See* 8 U.S.C. § 1225 (2000).

52. 8 U.S.C. § 1252(a)(2)(D) (2000).

53. 8 U.S.C. § 1252(a)(2)(B) (2000). For example, 8 U.S.C. § 1229b (2000) governs cancellation of removal. It provides that *if* a foreign national can meet the statutory requirements (as applicable) relating to duration of residence, duration of status, an absence of certain criminal convictions, good moral character, and "exceptional and extremely unusual hardship" to a qualifying spouse, parent or child, the Secretary of Homeland Security *may* cancel removal. 8 U.S.C. § 1252(a)(2)(B)(i) (2000) states that there is no jurisdiction to review "any judgment regarding the granting of relief under section . . . [8 U.S.C. § 1229b]."

54. The ban on judicial review presumes that the decision is, in fact, discretionary as that term is used in the statute. *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688–92 (9th Cir. 2003).

55. 8 U.S.C. § 1252(a)(2)(B)(ii) (2000).

56. 8 U.S.C. § 1252(a)(2)(C) (2000); 8 U.S.C. § 1252(a)(2)(D) (2000).

commission of an aggravated felony, there is no judicial review, except, for example, to check whether the underlying criminal offense is, in fact, an aggravated felony.<sup>57</sup>

After IIRIRA's jurisdiction-stripping measures took effect, litigation ensued and federal courts began to interpret IIRIRA's provisions. For example, in *I.N.S. v. St. Cyr*, the Supreme Court determined that the 1996 statutory language, as originally drafted, did not contain a clear statement of intent to eliminate habeas corpus jurisdiction.<sup>58</sup> Therefore, the Supreme Court sanctioned federal court jurisdiction over immigration cases filed under habeas corpus jurisdiction even if IIRIRA eliminated statutory jurisdiction over the same case.<sup>59</sup> This opening for habeas actions raised the possibility of a habeas class action to take the place of any statutorily-barred class action.<sup>60</sup>

The promise of the habeas action in general and in habeas class actions was short-lived, however, because Congress responded to the Supreme Court's decision in *St. Cyr* through the REAL ID Act of 2005. Language in the REAL ID Act aimed to clarify that the restrictions on judicial review implemented through IIRIRA include the elimination of habeas corpus jurisdiction. The jurisdiction-stripping statutes now explicitly state that notwithstanding any habeas corpus provision, no court has jurisdiction to review the applicable administrative determination.<sup>61</sup> Also through the REAL ID Act,

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57. *Henry v. Bureau of Immigration and Customs Enforcement*, 493 F.3d 303, 306 (3d Cir. 2007) ("Whether [Petitioner's] conviction constitutes an aggravated felony presents a question of law within our subject matter jurisdiction over which we exercise plenary review."). The term "aggravated felony" is deceptive; it is a term of art that refers to a statutory laundry list of offenses that Congress deemed to be aggravated felonies for immigration purposes, but the offense need not necessarily be aggravated or a felony. 8 U.S.C. § 1101(a)(43) (2000). While the list does include murder and rape, it also includes a theft offense for which the term of imprisonment is one year (and term of imprisonment includes time not served). 8 U.S.C. § 1101(a)(43)(A) (2000); 8 U.S.C. § 1101(a)(43)(G) (2000); 8 U.S.C. § 1101(a)(48)(B) (2000) (stating that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part").

58. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

59. *Id.* at 312–14.

60. See Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 37–48 (2005–2006).

61. *E.g.*, 8 U.S.C. § 1252(a)(2)(A)–(C) (2000).

Congress provided, as mentioned above, that the restrictions on review of certain discretionary decisions and of orders against certain foreign nationals with criminal convictions do not prevent courts from reviewing constitutional claims or questions of law.<sup>62</sup>

IIRIRA and REAL ID are evidence of a congressional willingness to limit the role of the federal courts in immigration cases. Some evidence of the continuing vitality of such efforts can be found in the legislative history of the ongoing congressional debate about immigration reform. During legislative consideration of immigration reform that took place from the winter of 2005 through the summer of 2007, which did not result in a final bill, proposals to limit the role of the federal courts in immigration cases even further met with varying success. For example, in the 109th Congress, the House passed but the Senate Judiciary Committee rejected a certificate of reviewability requirement that would have established an additional hurdle to judicial review.<sup>63</sup> Foreign nationals seeking to challenge their removal orders in court would first need to obtain permission to access the courts from a single court of appeals judge.<sup>64</sup> The request for permission could be automatically denied due to inaction on the request within a short time frame.<sup>65</sup> Also, as a part of the immigration reform debate, Congress has battled over attempts to narrow the role of the federal courts in reviewing naturalization determinations and visa revocations.<sup>66</sup>

It is hard to measure the strength of these proposals, however, because, as of the time of this writing, no final immigration reform bill has emerged from Congress. Nevertheless, the restrictions implemented through IIRIRA and REAL ID, and the incorporation of

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62. REAL ID Act of 2005, Pub. L. No. 109-13 (2005); 8 U.S.C. § 1252(a)(2)(D) (2007).

63. Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499, 509-28 (2008). Proponents of the provision argued that it is necessary to temper the skyrocketing number of immigration cases filed in the federal courts. *Id.* at 513, 521-22. Despite restrictions on judicial review, the number of immigration cases filed in the federal courts has, in fact, grown astronomically. 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, 45-48 (2006-2007).

64. Family, *supra* note 63, at 509.

65. *Id.*

66. *E.g.*, S. 1639, 110th Cong. § 229 (2007) (eliminating judicial review of visa revocations); H.R. 4437, 109th Cong. § 609(e) (2005) (narrowing district court jurisdiction over naturalization petitions).

attempts to strip judicial review into the immigration reform debate (judicial review, after all, is not a core facet of the immigration reform debate) are evidence of a congressional willingness to restrict the role of the federal courts in immigration cases. This willingness narrows the availability of the class action by restricting the scope of review and sets the atmosphere for further action detrimental to the class action.

### *B. Threat Two: Waivers of Judicial Review*

#### 1. The Threat

In the ongoing broad war against the class action, we find another threat to the future of the immigration class action: the judicial review waiver. In the immigration context, a judicial review waiver means that a foreign national must waive rights to judicial review as a condition of obtaining an immigration benefit from the government.<sup>67</sup> Such waivers also threaten individual actions, but the focus here is on consequences for the class action.

Class actions are generally subject to negative treatment; one need not look very far to find commentary critical of the class action. In the media, stories abound of class action lawyers as evil-doers: lawyers striking it rich to the detriment of class members.<sup>68</sup> Scholars debate the effectiveness of the class action and weigh its achievements against its costs.<sup>69</sup> Congress has weighed in on the issue. In 2005, Congress passed the Class Action Fairness Act, which, *inter alia*, expanded federal court diversity jurisdiction to allow for more class action lawsuits to be brought in federal court.<sup>70</sup>

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67. See, e.g., *infra* notes 93–101 and accompanying text.

68. See, e.g., Julie Creswell, *New Blow to a Law Firm Under Inquiry*, N.Y. TIMES at C13 (Feb. 1, 2007) (describing indictment of Milberg Weiss and two partners charging that the firm made secret kickback payments to class action representative plaintiffs); Lynnley Browning, *Class Action Suits Mean Delays, and Maybe, Cash*, N.Y. TIMES at C9 (Jan. 12, 2003) (“Usually, the lawyers who bring the suits stand to gain the most.”).

69. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 373–75 (2005) (discussing scholarly criticism of the class action); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 34–35 (2000) (same).

70. Class Action Fairness Act of 2005, Pub. L. No. 109-2.

It also passed, over a Presidential veto, the Private Securities Litigation Reform Act of 1995.<sup>71</sup> This Act, containing one title called “Reduction of Abusive Litigation” and another called “Reduction of Coercive Settlements,” imposed additional requirements on plaintiffs conducting private securities law class action litigation.<sup>72</sup> At the very least, there exists a sense in Congress that class actions are potentially destructive, if not inherently abusive, and must be closely monitored.

Such a sense and its accompanying “fixes” pose a threat to all class actions, including immigration class actions. There is no guarantee that such a sense of class actions generally will be contained to certain types of class actions.<sup>73</sup> To a busy legislator, it may be difficult to separate suspicions about more mainstream class actions from immigration class actions. For example, one of the immigration reform bills the Senate recently considered allowed for restricted use of the class action to challenge the validity of a proposed legalization program.<sup>74</sup> One of the restrictions required a legalization class action to be brought in conformity with the Class Action Fairness Act.<sup>75</sup> The Class Action Fairness Act shifts certain class action litigation from state court to federal court and also contains a consumer class action bill of rights.<sup>76</sup> Its application to an immigration class action seems odd.<sup>77</sup> It could be a sign, however, of

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71. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 1995.

72. *Id.*

73. There are also negative portrayals of the immigration class action itself. For example, Secretary of Homeland Security Michael Chertoff has characterized one class-wide injunction as hindering national security. Press Release, U.S. Government Seeks to End Litigation Undermining Expedited Removal of Salvadorans, (Nov. 17, 2005), *available at* [http://www.dhs.gov/xnews/releases/press\\_release\\_0798.shtm](http://www.dhs.gov/xnews/releases/press_release_0798.shtm) (describing the class-wide injunction as preventing “full control of our borders”); Press Release, Statement by Homeland Security Secretary Michael Chertoff on Blocked Senate Amendment to Improve Immigration Enforcement and End “Catch and Release,” (July 14, 2006), *available at* [http://www.dhs.gov/xnews/releases/press\\_release\\_0954.shtm](http://www.dhs.gov/xnews/releases/press_release_0954.shtm) (referring to the injunction as an “obstruction” and stating that the Department of Homeland Security “need[s] Congress to act and pass legislation that would free DHS from outdated injunctions so that [it] can improve enforcement”). Also, David Martin has described the disruptive impact of the class action from the government’s perspective. Martin, *supra* note 6, at 321–22.

74. *See infra* notes 211–17.

75. *See infra* note 217.

76. Class Action Fairness Act of 2005, Pub. L. No. 109-2.

77. In addition to expanding federal diversity jurisdiction, the Class Action Fairness Act contains provisions which govern class action settlements, including coupon settlements and “zero value” settlements. Class Action Fairness Act of 2005, Pub. L. No. 109-2. It also contains

restrictions aimed at mainstream class actions migrating to the immigration law sphere. The general suspicion of the class action is a threat to the immigration class action, and any perceived divisions among types of class actions may be illusory.

The existence of any divide is of particular interest if it is true, as Myriam Gilles predicts, that “class actions will soon be virtually extinct.”<sup>78</sup> One of the two factors Professor Gilles uses to support this proposition is the growth of the waiver of the right to participate in a class action by contract.<sup>79</sup> These “collective action waivers” are most commonly associated with class actions that would arise from a contractual relationship.<sup>80</sup> They are designed “to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding.”<sup>81</sup> According to Professor Gilles, “the waiver is viable wherever a contractual relationship connects the claimant to the defendant.”<sup>82</sup>

Maybe, then, such waivers do not pose a threat to immigration class actions. After all, when we talk about immigration law, we are not talking about agreements for cellular phone service, shrink-wrapped software, or a terms and conditions window on our computer screen in eight point font that demands an “I agree” click to access a new version of iTunes. Immigration law is public law, of course. Perhaps a breath of relief may be found when Professor Gilles writes, “Of course, there are other civil rights cases that do not implicate contractual relations, including cases concerning prison conditions, taxation, zoning, police misconduct, and so forth

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settlement notice provisions which require litigants to notify certain federal and state officials of a pending settlement. *Id.*; David F. Herr & Michael C. McCarthy, *The Class Action Fairness Act of 2005—Congress Again Wades into Complex Litigation Management Issues*, 228 F.R.D. 673, 674–75 (2005).

78. Gilles, *supra* note 69, at 375. Professor Gilles argues that the shift to arbitration contributes to the end of the class action. *Id.* at 392–93. Not all scholars agree with this prediction. Mark Weidemaier argues that a shift to arbitration does not necessarily dictate an end to aggregation. W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69 (2007).

79. Gilles, *supra* note 69, at 375.

80. Gilles, *supra* note 69, at 375–76.

81. Gilles, *supra* note 69, at 375.

82. Gilles, *supra* note 69, at 413.

... [S]uch cases are, I think, impervious to class action waivers, and so form an irreducible stump of class action practice.”<sup>83</sup>

Conceivably, immigration class actions are a part of the “irreducible stump” and there is no real need for alarm, at least from the threat of waivers of judicial review rights, including the collective action waiver. The doctrine behind the collective action waiver in the context of arbitration is founded on private law principles that mesh arbitration law with contract law.<sup>84</sup> Immigration law is public law, based on its own foundations that, at least intuitively, have nothing to do with private law.

There are at least two causes of concern, however. First, the idea of waiving judicial review rights as a condition for immigration status has been implemented and both the House and the Senate have endorsed proposals to use the concept further.<sup>85</sup> Second, the Supreme Court has characterized the relationship between the United States and its immigrants in language based in notions of contract law.<sup>86</sup> The Supreme Court has borrowed rhetoric of contract law, and concepts of contractual fairness, to justify exceptional judicial deference to Congress via the plenary power doctrine. For example, the Supreme Court has explained that the decision to grant lawful entry to a foreign national is a sovereign prerogative and is attached to terms and conditions that Congress sees fit to include.<sup>87</sup> There are competing theories of the nature of the relationship between the United States and immigrants, but “immigration as contract” is a prevalent theory.<sup>88</sup> As discussed below, the government has argued in

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83. Gilles, *supra* note 69, at 420–21. Professor Gilles recognizes that some types of civil rights cases do implicate contractual relations and thus are susceptible to collective action waivers. *Id.* at 418–20. Professor Gilles argues that there is no doctrinal reason “why government entities could not avail themselves of waivers to avoid class action liability in a broad array of cases, including employment, housing, entitlement, and education-related class actions.” *Id.* at 420.

84. The business interests pushing for class action limitations and insisting on arbitration agreements are not the defendants in immigration class actions. The government is the relevant defendant in the immigration context. The government is the powerful force that would benefit from limits on immigration class actions and other limits on judicial review.

85. *See infra* notes 93–101.

86. *See infra* Part III.B.2.

87. *See infra* Part III.B.2.

88. HIROSHI MOTOMURA, AMERICANS IN WAITING 9–12 (2006). Steve Legomsky has discussed several rationales behind the plenary power doctrine. *Immigration Law and the*

litigation that this sense of immigration as contract justifies implementation of judicial review waivers.<sup>89</sup> In fact, according to the government, this theory of immigration as contract leads to the conclusion that these waivers are not subject to the Constitution.<sup>90</sup>

The idea of a private law concept such as the collective action waiver migrating to an area of public law like immigration law may seem dubious.<sup>91</sup> Immigration law addresses government action regarding admission and expulsion of foreign nationals and not a private relationship between two contracting parties. What makes this idea less odd than when it first appears, however, is that while immigration law is indeed public law, it is a strange variety of public law.<sup>92</sup> When viewed through the lens of the plenary power doctrine and the theory that the government's relationship to its immigrants is at least contractual by analogy, the idea becomes plausible and must be recognized as a credible threat. In fact, here are three examples of how judicial review waivers already exist in the immigration legislative sphere.

First, to take advantage of the Visa Waiver Program ("VWP"), a foreign national must waive rights to judicial review. Under the VWP, nationals of certain pre-approved countries are permitted to travel to the United States without undergoing the visa application

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*Principle of Plenary Congressional Power*, *supra* note 2, at 261–78. One rationale Professor Legomsky discusses is the idea of immigrants as guests, "to whom hospitality may be terminated at the pleasure of the host." *Id.* at 269. This idea is founded in property law notions and the right/privilege distinction. *Id.* at 269–70. *See also* IMMIGRATION AND THE JUDICIARY, *supra* note 2, at 314–24. Similarly, Peter Schuck describes a "classical immigration law" order based on "consent-based obligation," where the government could grant or withdraw its consent "on the basis of arbitrary criteria and summary procedures." Schuck, *supra* note 2, at 3, 47. Also, Gerald Neuman has analyzed the intersection between the foundations of U.S. immigration law and social contract theory. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 9–13 (1996).

89. *See infra* note 162.

90. *See infra* note 162.

91. Professor Gilles argues that collective action waivers could seep into public law areas where contractual relations are implicated. *See supra* note 83. In another context and under different circumstances, the Supreme Court stymied the migration of a judicial review waiver. In *E.E.O.C. v. Waffle House, Inc.*, the Court held that the EEOC was not a party to an arbitration agreement between an employer and an employee. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002). The agreement contained a judicial review waiver. *Id.* The Court held the EEOC was not subject to that provision and was not barred from seeking victim-specific relief. *Id.*

92. *See infra* notes 134–41.

process if the individual is a nonimmigrant (temporary) visitor for a period of ninety days or less.<sup>93</sup> Despite that the program waives the need for a visa, the individual is still subject to the inadmissibility grounds, and the border officer at the port of entry decides whether the individual is eligible to enter the United States legally. The statute requires the individual to waive “any right” to judicial review of the border officer’s determination whether the individual is admissible into the United States.<sup>94</sup> The individual must also waive “any right” to challenge any action to remove the individual from the United States, other than a claim for asylum.<sup>95</sup> The form completed by those applying for admission under the VWP states: “WAIVER OF RIGHTS: I hereby waive any rights to review or appeal of a U.S. Customs and Border Protection officer’s determination as to my admissibility, or to contest, other than on the basis of an application for asylum, any action in deportation.”<sup>96</sup> The condition imposed by the government on the foreign national is this: the government will waive the requirement to apply for a visa prior to travel, but the foreign national must waive rights to judicial review to take advantage of the benefit.<sup>97</sup> While the VWP waiver does not single out class actions, the waiver of “any rights” threatens the right to participate in a class action.

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93. 8 U.S.C. § 1187(a) (2000); 8 U.S.C. § 1187(c) (2000). For more information on the visa waiver program, see A. James Vazquez-Azpíri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL’Y REV. 513 (2005).

94. 8 U.S.C. § 1187(b)(1) (2000); 8 U.S.C. § 1187(g) (2000). *See also* 8 C.F.R. § 217.4(a)(1) (2007) (“Such refusal and removal shall be made at the level of the port director or officer-in-charge, or an officer acting in that capacity, and shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission under section 217 of the Act, who applies for asylum in the United States.”).

95. 8 U.S.C. § 1187(b)(2) (2000). *See also* 8 C.F.R. § 217.4(b)(1) (2007) (“Such removal shall be determined by the district director who has jurisdiction over the place where the alien is found, and shall be effected without referral of the alien to an immigration judge for a determination of deportability, except that an alien admitted as a Visa Waiver Pilot Program visitor who applies for asylum in the United States must be issued a Form I-863 for a proceeding in accordance with § 208.2(b)(1) and (2) of this chapter.”).

96. Department of Homeland Security, U.S. Customs and Border Protection, Form I-94W (10/04).

97. Courts have upheld the judicial review waiver component of the visa waiver program. *See infra* notes 166–76 and accompanying text.

The second and third examples are legislative proposals endorsed as a part of recent congressional debate over immigration reform. The House and the Senate each endorsed an expansion of the concept of requiring a judicial review waiver as a condition of obtaining an immigration benefit. In December of 2005, the House passed an enforcement-heavy immigration reform bill.<sup>98</sup> One provision in this bill would have changed the application procedure for a nonimmigrant (temporary) visa to require waiver of rights to judicial review. The endorsed bill states:

An alien may not be issued a nonimmigrant visa unless the alien has waived any right—(A) to review or appeal under this Act of an immigration officer's determination as to the inadmissibility of the alien at the port of entry into the United States; or (B) to contest, other than on the basis of an application for asylum, any action for removal of the alien.<sup>99</sup>

In May 2006, the Senate endorsed a proposal to require a waiver of judicial review rights as a condition to legalize one's immigration status.<sup>100</sup> Those wishing to apply for a legalization benefit called "deferred mandatory departure" would have had to waive rights to judicial review. The endorsed bill provides:

The Secretary of Homeland Security shall require an alien to include with the application a waiver of rights that explains to the alien that, in exchange for the discretionary benefit of obtaining Deferred Mandatory Departure status, the alien agrees to waive any right to judicial review or to contest any removal action, other than on the basis of an application for asylum or restriction of removal pursuant to the provisions contained in section 208 or 241(b)(3), or under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York December 10,

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98. H.R. 4437, 109th Cong. (2005). This bill did not become law.

99. H.R. 4437 § 806 (adding § 221(a)(3)).

100. S. 2611, 109th Cong. § 601(b) (2006) (adding § 245C(b)(7)(c)). This bill did not become law.

1984, or cancellation of removal pursuant to section 240A(a).<sup>101</sup>

Both of these endorsed proposals require the waiver of “any right” and thus are a threat to both individual and collective litigation.

For the purpose of a discussion of the future of the immigration class action, such provisions narrow any perceived divide between types of class actions. If the House and Senate bills became law, the application form for a nonimmigrant visa and the application form for deferred mandatory departure status, respectively, would have made immigration law seem a bit more like the cellular phone service agreement, the shrink-wrapped computer software and the “I agree” terms and conditions window. If one wants iTunes, one clicks to agree. If one wants to receive a nonimmigrant visa or to legalize, one agrees to waive rights to judicial review. The application process under the VWP already resembles the contractual-based waivers commonly found in these types of transactions.

The VWP waiver differs from those passed by the House and the Senate as part of immigration reform, however. The judicial review waiver embedded in the VWP is triggered only if a foreign national chooses one of two avenues of obtaining legal entry into the United States. A foreign national could choose to endure the lengthier route: to apply for a visa to travel to the United States. Therefore, there is a way for the foreign national to avoid the waiver.<sup>102</sup> The objectives governed by the nonimmigrant visa waiver and the legalization waiver, however, have no waiver-free alternatives.<sup>103</sup>

This kind of restriction on judicial review, which allows Congress to limit judicial review by requiring applicants for immigration benefits to agree in advance to the limitation, is, if valid, potentially

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101. S. 2611, § 601(b) (adding § 245C(b)(7)(c)).

102. However, if the House-required nonimmigrant waiver became law, there would be no waiver-free alternative.

103. As discussed below, immigration really does not implicate a contractual relationship and courts should be wary of carrying the analogy too far. If the idea of immigration as contract is to be carried into the twenty-first century, however, then application of immigration as contract implicates a modern understanding of contracts. For example, the absence of a waiver-free alternative raises questions about contracts of adhesion and unconscionability. Whether a court would hold such a waiver to be unconscionable is beyond the scope of this Article. It is mentioned here as an example of the types of tough questions that must be asked if the contract analogy continues.

far reaching. Drawing on the plenary power doctrine and analogizing immigration to contract, proponents can argue that Congress is free to use its plenary power to name the terms of the bargain. In cases challenging VWP waivers, for example, the government has argued that the Constitution does not apply to those waivers, as they are terms of a sovereign contract.<sup>104</sup> The terms could include a blanket waiver of judicial review as exemplified by the VWP waiver, the proposed nonimmigrant visa waiver, and the proposed legalization waiver. Such a waiver aims to forbid participation in any type of legal challenge, whether a collective action or an individual action. Thus, such blanket waivers are a threat to the immigration class action. Also, the same justification could be invoked as support for a more narrow collective action waiver. Of course, whether such legislative proposals would meet political success is debatable, but the scope of the concept is potentially broad.

## 2. Evaluating the Threat

Placing the political viability question to the side, what about legal viability? This Article hopes to spark a discussion about legal viability by exploring the role of the contract analogy as a justification for immigration judicial review waivers not subject to the Constitution.<sup>105</sup> To do so, it reviews the plenary power doctrine, which gives Congress plenary authority in the area of immigration law, and examines how the plenary power doctrine interacts with the contract analogy to create the government's argument that mandatory judicial review waivers are simply terms of a sovereign contract not subject to the Constitution. The analysis reveals that using the contract analogy to justify immigration judicial review waivers simply stretches the analogy too far while raising serious constitutional questions about congressional plenary power to dictate the terms of legal entry. Also, the analysis reveals that the contract analogy is stale.

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104. *See infra* note 162.

105. This Article sets aside for future discussion an evaluation of other potential challenges to the implementation of such waivers, including application of the due process clause, in favor of focusing on the government's threshold argument that the Constitution does not apply.

a. The Plenary Power Doctrine

In an 1889 opinion known as the *Chinese Exclusion Case*, which is the foundation of the plenary power doctrine, the Supreme Court described the power to exclude foreigners as incident to sovereignty.<sup>106</sup> The Court explained that “whatever license” foreign nationals may obtain from the government, that license “is held at the will of the government, revocable at any time, at its pleasure.”<sup>107</sup> This tie to sovereignty, including a vision of the relationship between the government and an immigrant in the commercial terms of a license, amounted to plenary power and led the Court to hold that congressional determinations in the area are “conclusive upon the judiciary.”<sup>108</sup> In this opinion, the Supreme Court refused to review a congressional action that excluded Chinese nationals on the basis of race.<sup>109</sup> The Supreme Court refused to even question Congress’ decision to void re-entry certificates the government had issued to lawful Chinese nationals living in the United States.<sup>110</sup>

After the *Chinese Exclusion Case*, the Court continued to use the plenary power doctrine to justify its hands off approach to

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106. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889). For a discussion of precedent leading up to the Chinese Exclusion Case, see IMMIGRATION AND THE JUDICIARY, *supra* note 2, at 180–83. For a discussion of the history of state regulation of immigration law preceding the Chinese Exclusion Case, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

107. *Chinese Exclusion Case*, 130 U.S. at 609.

108. *Id.* at 606.

109. The Court referred to the Chinese as “foreigners of a different race . . . who will not assimilate with us.” *Chinese Exclusion Case*, 130 U.S. at 606. For further discussion of the racist origins of the plenary power doctrine, see *Segregation’s Last Stronghold*, *supra* note 2; DANIEL KANSTROOM, DEPORTATION NATION 116–18 (2007); LEGOMSKY, *supra* note 33, at 115–18; IMMIGRATION AND THE JUDICIARY, *supra* note 2, at 246–48; Schuck, *supra* note 2, at 3–5.

110. *Chinese Exclusion Case*, 130 U.S. at 609 (“Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.”). Chae Chan Ping left the United States for China after living in the United States from 1875–1887. *Id.* at 582. He left with a certificate that, at the time of his departure, would have permitted his reentry into the United States even though Congress had cut off Chinese immigration. *Id.* While Chae Chan Ping was sailing back to the United States, Congress voided all reentry certificates like his and then refused him entry to the United States. *Id.*

immigration law.<sup>111</sup> For example, in *Fong Yue Ting v. United States*, the Court held in 1893 that plenary power also granted Congress free reign in the deportation context.<sup>112</sup>

In the 1950s, the Court continued to use the plenary power doctrine to justify congressional actions in both the admission and deportation contexts. In *U.S. ex rel. Knauff v. Shaughnessy*, the Court refused to disturb the government's decision to deny legal entry to a German-born wife of a United States Citizen.<sup>113</sup> The Court responded to the wife's challenge to her permanent exclusion using language steeped in the notion of immigration as privilege and contract. The Court wrote:

At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.<sup>114</sup>

In the process of refusing to review the government's decision or the procedures the government employed, the Court brusquely stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>115</sup> In another case, *Shaughnessy v. United States ex rel. Mezei*, the Court employed similar reasoning to find no fault with an executive branch decision to exclude a returning legal permanent resident and to subject him to indefinite detention.<sup>116</sup>

Describing these selected cases, however, tells only part of the plenary power story. Since the *Chinese Exclusion Case*, the Court has

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111. See IMMIGRATION AND THE JUDICIARY, *supra* note 2, at 192–211; *Immigration Law after a Century of Plenary Power*, *supra* note 2, at 550–60.

112. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

113. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). The government determined that her entry would be prejudicial to the interests of the United States and deemed her permanently excluded without holding a hearing, pursuant to a wartime statute. *Id.* at 539–42.

114. *Id.* at 542.

115. *Id.* at 544.

116. *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953). In yet another case, *Harisiades v. Shaughnessy*, the Court described congressional free reign to create and apply substantive deportation categories. 342 U.S. 580 (1952).

not been consistent in its application of the plenary power doctrine. For example, in 1903, the Court, in *Yamataya v. Fisher*, applied due process protection, albeit weak protection, to a foreign national whom the government had admitted into the United States.<sup>117</sup> Even in *Mezei*, a quintessential plenary power decision, the Court explained in dicta that foreign nationals who make it through the nation's "gates," legally or illegally, are subject to the due process clause.<sup>118</sup> Also, in 1953, the Court held in *Kwong Hai Chew v. Colding* that a returning legal permanent resident seaman did not lose due process protection with his temporary exit from the United States.<sup>119</sup> In 1963 and in 1982, the Court reaffirmed that exits of a non-extended nature would not strip returning legal permanent residents of due process protections.<sup>120</sup> In *Landon v. Plasencia*, the Court recognized that it "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative," however, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."<sup>121</sup> Although the Court has extended due process protection to certain returning permanent residents through these cases, it has not overruled *Mezei*,

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117. *Yamataya v. Fisher*, 189 U.S. 86 (1903). In its opinion, the Court reiterated:

That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention—are principles firmly established by the decisions of this court.

*Id.* at 97. The Court, however, also stated: "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." *Id.* at 100. The Court held that a foreign national admitted into the United States is entitled to an opportunity to be heard in the deportation context, but also held that a meaningful opportunity had been afforded even though the foreign national did not speak English. *Id.* at 102 ("If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune.").

118. *Mezei*, 345 U.S. at 212.

119. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

120. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Landon v. Plasencia*, 459 U.S. 21 (1982).

121. *Plasencia*, 459 U.S. at 32.

which treated a returning permanent resident as an initial entrant not subject to the due process clause.

The convoluted history of the plenary power doctrine has even further twists. In 1977, in *Fiallo v. Bell*, the Court, faced with the question as to whether Congress could discriminate on the basis of sex and on the basis of illegitimate birth status in defining qualifying familial relationships for immigration purposes, underscored “the limited scope of judicial inquiry into immigration legislation” and upheld congressional power to dictate the terms of lawful entry.<sup>122</sup> Significantly, the Court mentioned, in a footnote, a “limited judicial responsibility under the Constitution *even with respect to the power of Congress to regulate the admission and exclusion of aliens*,” thus rejecting the government’s argument that the issue was nonjusticiable.<sup>123</sup> In his dissent, however, Justice Marshall described the majority’s application of its limited judicial responsibility as “toothless.”<sup>124</sup>

In 1983, the Court shot down the one-House veto of administrative immigration action in *I.N.S. v. Chadha*.<sup>125</sup> The Court said it was not questioning congressional plenary power over immigration but rather its chosen means of implementation.<sup>126</sup> In 2001, the Court in *Nguyen v. I.N.S.* applied equal protection analysis to a claim of sex discrimination based on differing methods of citizenship acquisition.<sup>127</sup> In so doing, the Court sidestepped the issue

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122. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Congress did not recognize the relationship between a U.S. Citizen father and an illegitimate child for immigration purposes while it did recognize the relationship between a U.S. Citizen mother and an illegitimate child. *Id.* at 788. The Court described this differing treatment as a policy question “entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.” *Id.* at 798.

123. *Id.* at 795 n.5 (emphasis added). Additionally, in *Kleindienst v. Mandel*, the Supreme Court applied a “facially legitimate and bona fide reason” test to the reasoning behind a decision to deny legal entry while acknowledging that “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.” 408 U.S. 753, 769 (1972). See also *Reno v. Flores*, 507 U.S. 292, 306 (1993).

124. *Fiallo*, 430 U.S. at 805.

125. *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

126. *Id.* at 940–41.

127. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

of plenary power because it determined the statute survived equal protection analysis anyway.<sup>128</sup>

The Court avoided the plenary power question again in its 2001 decision of *Zadvydas v. Davis*.<sup>129</sup> It invoked the statutory interpretation canon of constitutional avoidance and thereby sidestepped the issue of whether Congress can subject individuals ordered deported to indefinite detention.<sup>130</sup> The Court held that the statute itself did not authorize indefinite detention.<sup>131</sup> In the opinion, the Court described congressional power over immigration as “subject to important constitutional limitations,” yet refused to overrule *Mezei* and instead reiterated the idea that due process protections hinge on location; those inside are protected and those outside are not.<sup>132</sup>

These cases reveal that, today, the plenary power doctrine allows for selective application of constitutional protection. For example, those who have passed through the gates are protected, but those who are knocking on the door (unless they are seeking reentry after a non-extended trip abroad) are at best entitled to the limited judicial responsibility Justice Marshall called “toothless.” Immigration law has advanced from its plenary power roots, but it is debatable how far it has advanced.

Scholars continue to debate whether the plenary power doctrine is alive, dying, or dead.<sup>133</sup> The fact that this debate is ongoing is surprising given the advancement of legal theory in other areas of public law. Scholars have persuasively demonstrated that the development of immigration law has not followed the same path as the development of other areas of public law.<sup>134</sup> According to Peter

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128. *Id.* at 72–73.

129. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

130. *Id.* at 682.

131. *Id.* at 689–90.

132. *Id.* at 692–95. *See* Aleinikoff, *supra* note 2, at 373–75. In *Clark v. Martinez*, the Court extended protection against indefinite detention to those who did not legally enter, but did so on statutory interpretation grounds. 543 U.S. 371 (2005). More recently, the Court upheld a statute mandating detention during removal proceedings against a due process challenge. *Demore v. Kim*, 538 U.S. 510 (2003).

133. *See supra* note 2.

134. *See, e.g., Ten More Years of Plenary Power, supra* note 2; IMMIGRATION AND THE JUDICIARY, *supra* note 2, at 197, 205; *The Curious Evolution, supra* note 2; NEUMAN, *supra* note 88; Schuck, *supra* note 2.

Schuck, “[p]robably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”<sup>135</sup> Immigration law has been described as a “constitutional oddity”<sup>136</sup> and as a “neglected stepchild of our public law.”<sup>137</sup> Also, it has been observed that when it comes to immigration law, “normal constitutional reasoning does not necessarily apply.”<sup>138</sup> As treatment of other public law issues evolved, the Supreme Court has allowed what Schuck calls “classical immigration law” to hang around.<sup>139</sup>

This classic sense of immigration law is rooted in nineteenth century theories of constitutional rights and the relationship between government and the people.<sup>140</sup> It is an open question whether immigration law has or ever will catch up to “contemporary public law values.”<sup>141</sup>

There are, however, well-documented cracks in the plenary power doctrine. As described above, even as early as the turn of the twentieth century the Supreme Court found ways to ameliorate the harsh effects of the plenary power doctrine.<sup>142</sup> The Supreme Court continues to dance around the plenary power doctrine in some cases, but also gives it influence at other times.<sup>143</sup> Instead of facing the issue of the constitutionality of the plenary power doctrine head on, the Court has often blunted the effect of the doctrine through various tactics, including use of the statutory interpretation canon of

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135. Schuck, *supra* note 2, at 1.

136. *Ten More Years of Plenary Power*, *supra* note 2, at 937.

137. *The Curious Evolution*, *supra* note 2, at 1631.

138. NEUMAN, *supra* note 88, at 13.

139. Schuck, *supra* note 2, at 3.

140. Schuck, *supra* note 2, at 2–3. See also Annie M. Chan, *Community and the Constitution: A Reassessment of the Roots of Immigration Law*, 21 VT. L. REV. 491, 492–95 (1996); *The Curious Evolution*, *supra* note 2, at 1632–38; NEUMAN, *supra* note 88, at 9–15.

141. Schuck, *supra* note 2, at 3. See also *Ten More Years of Plenary Power*, *supra* note 2, at 925–27; *The Curious Evolution*, *supra* note 2, at 1626–27.

142. See *supra* notes 117–32 and accompanying text.

143. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (“The Government also looks for support to cases holding that Congress has ‘plenary power’ to create immigration law, and that the judicial branch must defer to executive and legislative branch decisionmaking in that area . . . . [b]ut that power is subject to important constitutional limitations.”); *Miller v. Albright*, 523 U.S. 420, 455–56 (1998) (stating that “judicial power over immigration and naturalization is extremely limited” while citing cases that affirm congressional plenary power).

constitutional avoidance.<sup>144</sup> The Court has not, however, explicitly overruled the doctrine. Therefore, the future of the doctrine is uncertain, especially in the face of a changed Supreme Court that sends more conservative signals.<sup>145</sup>

b. The Contract Analogy, the Plenary Power Doctrine, and Judicial Review Waivers

The contract analogy shares its roots with the plenary power doctrine, as the Supreme Court has used the contract analogy to justify the plenary power doctrine.<sup>146</sup> As Hiroshi Motomura has described in his work on immigration as a transition to citizenship, the immigration contract is not a contract *per se*.<sup>147</sup> It is more the idea of “immigration as contract.”<sup>148</sup> The rhetoric of contract and concepts of fairness developed in contract law are borrowed to describe the relationship between the United States and a foreign national.<sup>149</sup> While described in the rhetoric of contract, the relationship is not actually a contracted agreement.<sup>150</sup> Under the idea of immigration as contract, the government’s decision to grant lawful entry is an act of sovereign benevolence that is accompanied by terms and conditions.

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144. *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 2; Legomsky, *supra* note 33, at 230–31; *The Curious Evolution*, *supra* note 2; *Immigration Law After a Century of Plenary Power*, *supra* note 2.

145. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, at A1 (July 1, 2007).

146. MOTOMURA, *supra* note 88, at 9–10, 26–37, 42–43. In addition to justifying any terms of lawful entry, the contract analogy also allowed the government to limit the terms of its obligations to foreign nationals. Peter Schuck describes that under classical immigration law, “[t]he government’s legal obligation to aliens rested almost entirely upon the terms and conditions upon which its consent to their entry had been granted and to which they had at least implicitly agreed.” Schuck, *supra* note 2, at 47.

147. *See infra* note 148.

148. MOTOMURA, *supra* note 88, at 9–10, 26–37, 42–43. Professor Motomura writes that “contract” in this sense does not mean a formal agreement, either in the nineteenth century or modern sense, but rather a framework for making decisions about immigration law that “adopts ideas of fairness and justice often associated with contracts.” *Id.* at 10. Professor Motomura presents “immigration as contract” in combination with “immigration as affiliation” as the established framework for thinking about immigration in the United States. *Id.* at 10–11. In his book, Professor Motomura presents a third way to think about immigration: “immigration as transition.” *Id.* at 11.

149. MOTOMURA, *supra* note 88, at 10.

150. MOTOMURA, *supra* note 88, at 9–10, 26–37, 42–43. *See also* Legomsky, *supra* note 33, at 500 (drawing an analogy between a deportable offense and a breach of contract).

Once admitted, the foreign national must keep up his or her end of the bargain, otherwise deportation may result.<sup>151</sup>

The contract analogy is tied to the plenary power notion that immigration benefits are a privilege and that the sovereign power (Congress) gets to dictate whatever terms it wants in exchange for the immigration benefit. For example, Congress is free to engage in race discrimination, sex discrimination, and to detain indefinitely, among other things.<sup>152</sup>

There are significant problems with this analogy. Professor Motomura has engaged in a thoughtful examination of the analogy's shortcomings as a framework for thinking about immigration law.<sup>153</sup> One of the shortcomings he identified is that the idea of immigration as contract adopts the rhetoric of contract without the existence of any real contract—that the contract label “fit[s] poorly.”<sup>154</sup> In discussing this shortcoming, Professor Motomura raises the issue of unconscionability as applied to a one-sided agreement.<sup>155</sup> Because of the nature of plenary power, this immigration “contract” is like a contract where the party drafting the standard form agreement, the party with superior bargaining power, may not even be bound by the terms. There is no bargaining between parties and it is difficult for the foreign national to enforce the terms, especially if Congress restricts judicial review.

Professor Motomura's analysis critiques the idea of immigration as contract as a framework for thinking about the nature of immigration law. To use the contract analogy as a justification for the requirement of a judicial review waiver, however, the contract

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151. MOTOMURA, *supra* note 88, at 9–10, 26–37, 42–43. Professor Motomura also discusses how the immigration as contract idea can work in a foreign national's favor. *Id.* at 43–45, 52–53, 56–57.

152. *Chae Chang Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953). *See also* Schuck, *supra* note 2, at 3, 47 (discussing the classical immigration law notion of government granting consent to enter accompanied by terms and conditions).

153. MOTOMURA, *supra* note 88, at 58–62. According to Professor Motomura, the framework of immigration as contract is inadequate because it is easily manipulated, because it concerns an “agreement” that may or may not be legally enforceable and thus adopts the rhetoric of contract without the existence of any real contract, and because it awkwardly applies a market-based concept to public law. *Id.* at 58–62.

154. MOTOMURA, *supra* note 88, at 60.

155. *Id.*

analogy would have to cross a line that should not be crossed—the line that distinguishes using the idea as the basis for thinking about the nature of the relationship from using the idea to create an actual immigration contract. Courts should not cross this line. The relationship between the government and immigrants is not actually contractual. Thus, there is no real immigration contract. The idea of immigration as contract is borrowed rhetoric and nothing more. As merely an analogy, it is an analogy with shortcomings. As Professor Motomura has described, the label does not fit.

Also, crossing this line highlights the outdated character of the analogy because overextending it from analogy to an actual immigration contract raises questions about modern enforcement of an actual immigration contract. If immigration is more than just *like* a contract, is the immigration contract enforced under modern notions of contract law? This Article does not intend to draw conclusions about whether a court would enforce such a contract, but merely to emphasize that the analogy as originally constructed is outdated.<sup>156</sup> The contract analogy, developed during a different era, is rooted in nineteenth century notions of the authority of government and of private law, including contract.<sup>157</sup> If immigration really is a contract, do modern notions of contract law apply? Or, do we apply nineteenth

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156. Courts, when interpreting actual contracts, have recently wrestled with complex, modern contract issues that are intertwined with arbitration law. For example, are collective action waivers enforceable? Who decides—court or arbitrator? *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (holding that an arbitrator hears a challenge to an underlying contract, as opposed to a specific challenge to an arbitration agreement, which a court may hear); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002) (holding that an arbitration agreement containing a class action bar is not unconscionable where attorneys fees are available as an incentive to bring suit despite the small amount of individual damages); *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005) (concluding that under California law, in some circumstances, collective action waivers in consumer contracts of adhesion are not enforceable); *Strand v. U.S. Bank Nat'l Ass'n* ND, 693 N.W.2d 918 (N.D. 2005) (determining that a collective action bar in an arbitration agreement is not unconscionable under North Dakota law). *See also* *Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007) (refusing to enforce a forum selection clause that would have precluded collective actions as violating Washington public policy).

157. Schuck, *supra* note 2, at 47–53. Professor Schuck describes a movement from an individualistic to a communitarian legal order in immigration law. The plenary power doctrine is associated with the individualistic legal order that has already been replaced in other areas of law. Professor Schuck argues that “immigration is gradually rejoining the mainstream of our public law.” *Id.* at 90.

century notions of contract law? Or, does the plenary power doctrine excuse these contracts from any notion of established contract law?

Another shortcoming is that this analogy is interconnected with the plenary power doctrine, a doctrine that has been widely criticized on a number of fronts, including racist origins and a shaky legal foundation.<sup>158</sup> The contract analogy is tied to the plenary power doctrine because the analogy influences congressional power to dictate the terms of legal entry. These waivers are especially interesting because, at least in certain contexts, they raise questions at the core of the plenary power doctrine. They concern congressional power to dictate the terms of lawful entry.<sup>159</sup> Is it the case that, as Justice Scalia quoted with approval in his dissenting opinion in *McNary*, “[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress[?]”<sup>160</sup>

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158. See, e.g., *Segregation's Last Stronghold*, *supra* note 2; KANSTROOM, *supra* note 109, at 7, 22, 63–90 (connecting ideas underlying the plenary power doctrine to slavery and to removal of American Indians from their lands); IMMIGRATION AND THE JUDICIARY, *supra* note 2; NEUMAN, *supra* note 88, at 119–25.

159. In *Zadvydas*, the Supreme Court explained:

The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

*Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

160. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 503 (1991) (quoting *I.N.S. v. Pangilinan*, 486 U.S. 875, 884 (1988)). The serious nature of this question has led the court to avoid directly confronting the plenary power doctrine by interpreting statutes to avoid the question. See, e.g., *Zadvydas*, 533 U.S. 678. Such a tactic could be used in the context of a judicial review waiver. For example, the deferred mandatory departure waiver provision, if enacted, could and should be read as not waiving judicial review rights of those denied that status. The deferred mandatory departure waiver provision demands that applicants for that particular immigration benefit waive rights to judicial review “in exchange for the discretionary benefit of obtaining Deferred Mandatory Departure status.” See *supra* note 101. If the waiver is in exchange for the *benefit*, then the waiver may not apply to those who are *denied* deferred mandatory departure status. This one example of a narrow interpretation illustrates that although the goal of these waivers may be to decrease litigation, the waivers themselves will generate litigation. See generally Benson, *supra* note 63.

If today, at its core, legal entry is still a privilege doled out by the government and if such benefits are subject to the whim of congressional plenary power, cannot Congress dictate the terms? Under the classical vision of plenary power, if the judicial review waiver were a condition of admission, the decision to require such a waiver would be conclusive upon the judiciary. The cracks in the plenary power doctrine, however, complicate the situation and illustrate problems attached to using the doctrine and the contract analogy to justify judicial review waivers.

The cracks in the plenary power doctrine establish that the Constitution does protect those inside of the United States. The proposed waivers, however, could apply to both those inside and outside of the United States. Those seeking initial lawful entry are outside and thus, according to the plenary power regime, have no constitutional protection against the terms of the sovereign contract. Those inside, even if inside illegally, do fall under the protection of the Constitution. Therefore, those foreign nationals entering into any type of immigration contract, if applying from inside the United States, would be protected by the Constitution. But, those who sign the contract outside of the United States face a tougher argument that the contract is subject to the Constitution.<sup>161</sup> This inside/outside distinction theoretically means that a judicial review waiver contained in the contract would sometimes be subject to the Constitution but not at other times. A further complication is that by the time such a waiver is enforced, the individual may be inside the United States despite having been outside at the time of signing the contract.

Decisions upholding waivers of judicial review under the VWP illustrate how such waivers implicate the plenary power doctrine and the analogy between immigration and contract. The government has argued that because immigration is a sovereign contract, no constitutional protections should apply when determining the validity of the waiver.<sup>162</sup>

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161. This distinction raises the stakes in legislative proposals that require a foreign national to exit the United States before legalization takes place.

162. *Nose v. U.S. Attorney Gen.*, 993 F.2d 75, 79 n.7 (5th Cir. 1993) (“The Government maintains that Nose did not waive a constitutional right since this is merely a ‘case sounding in

These cases reveal the continuing influence of the idea that the relationship between the United States and immigrants involves bargain, but also reveal a refusal to overextend the contract analogy. In discussing the VWP waiver, courts have exhibited an instinct to hold the foreign national to the bargain.<sup>163</sup> For example, the Court of Appeals for the Tenth Circuit enforced a waiver based on reasoning that to do otherwise “would render the quid pro quo aspect of the VWP meaningless . . . .”<sup>164</sup> Quid pro quo means one thing is given in exchange for the other.<sup>165</sup> In exchange for the privilege of traveling to the United States without a visa, a foreign national gives up any right to review.

Despite an instinct towards bargain, courts have applied the Constitution to these waivers despite government pleas to the contrary. The government has argued that these waivers are not really waivers of constitutional rights but instead are a term of a contract.<sup>166</sup> The Fifth Circuit rejected the argument and asserted its jurisdiction to

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contract . . . .”); *Vang v. Gonzales*, No. 06-3600, 2007 WL 1580107, at \*3 (6th Cir. May 31, 2007) (“[The Government] correctly points out . . . that Petitioners’ claims regarding [the VWP] waiver in this case are not constitutional claims because at the time the Petitioners signed the waivers, they were aliens residing outside of the United States.”); *Kusumoto v. U.S. Dep’t of Justice*, No. 98 CV 271, 1998 WL 213715 at \*7 n.7 (N.D.N.Y. Apr/ 9, 1998) (“[T]he INS views the waiver contained in the [VWP] as a mere contract, by which the INS agrees to let the alien enter the country if the unadmitted alien agrees in advance to leave without a deportation hearing.”).

163. Opinions addressing the validity of the judicial review waiver clause of the VWP frequently contain references to the quid pro quo nature of the deal. *Schmitt v. Maurer*, 451 F.3d 1092, 1093 (10th Cir. 2006) (“As part of the program, however, participants must agree to two conditions.”); *Freeman v. Gonzales*, 444 F.3d 1031, 1033 n.1 (9th Cir. 2006) (“In exchange for this procedural benefit, VWP entrants waive their right to challenge any removal action. . . .”); *Itaeva v. I.N.S.*, 314 F.3d 1238, 1239 (10th Cir. 2003) (“In return for this streamlined procedure, the nonimmigrant agrees to waive the right to contest a removal order. . . .”); *Wigglesworth v. I.N.S.*, 319 F.3d 951, 956 (7th Cir. 2003) (“In return for being admitted pursuant to this streamlined procedure, the alien must waive certain rights. . . .”); *Polizio v. Jenifer*, 217 F. Supp. 2d 811, 816 (E.D. Mich. 2002) (“While Petitioner may not like that his entry under the [VWP] came with a waiver of rights, he received the benefits of the [VWP]—namely, entering this country without a visa. He must now bear the consequences of having violated the terms of his agreement.”); *McGuire v. U.S. Immigration and Naturalization Service*, 804 F. Supp. 1229, 1234 (N.D. Cal. 1992) (“Plaintiff, having received the benefits of the [VWP]—namely, entering this country without a visa—must now bear the consequences of having violated the terms of that agreement.”).

164. *Itaeva*, 314 F.3d at 1242.

165. BLACK’S LAW DICTIONARY 1261 (7th ed. 1999).

166. See *supra* note 162.

review the adequacy of the waiver under the Constitution.<sup>167</sup> The Fifth Circuit explained that foreign nationals who have entered the United States are entitled to the protection of the due process clause.<sup>168</sup> By the time the waiver was questioned, the foreign national was inside the United States. She had entered under the VWP, overstayed her authorized period of stay and found herself in removal proceedings.<sup>169</sup> The court rejected the government's contract argument by relying on *Cleveland Board of Education v. Loudermill*<sup>170</sup> to explain that Congress does not define the scope of the due process clause and applied the knowing and voluntary standard to the waiver.<sup>171</sup> The Court of Appeals for the Sixth Circuit, however, in an unpublished opinion, agreed with the government that these waivers are not subject to the Constitution.<sup>172</sup> The Sixth Circuit held that when the waiver is completed, the foreign national has not yet entered the United States, even if the foreign national is physically inside the United States border at the time the waiver is enforced.<sup>173</sup> The court explained that because a foreign national has no constitutional rights before entry, when the waiver is signed, such applicants do not waive "rights of constitutional significance."<sup>174</sup>

Other courts have followed the Fifth Circuit's lead and have applied the knowing and voluntary standard to these waivers, but have not addressed whether the Constitution applies. Relying on precedent that due process rights may be waived, the Courts of Appeals for the Fourth (in an unpublished opinion) and Seventh Circuits have also evaluated VWP waivers under a knowing and voluntary standard.<sup>175</sup> These two courts followed the Fifth Circuit's consideration of factors such as the party's background, the clarity of

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167. *Nose*, 993 F.2d at 79.

168. *Id.* at 78.

169. *Id.* at 77.

170. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

171. *Nose*, 993 F.2d at 79 n.7 ("Implicit in this argument is the notion that Congress has the unbridled authority to limit the procedural devices to protect the constitutional interests which it creates. The Supreme Court has rejected this 'bitter with the sweet' approach.")

172. *Vang v. Gonzales*, No. 06-3600, 2007 WL 1580107, at \*3 (6th Cir. May 31, 2002).

173. *Id.*

174. *Vang*, 2007 WL 1580107 at \*3.

175. *See Wigglesworth v. I.N.S.*, 319 F.3d 951 (7th Cir. 2003) (rejecting argument that judicial review waiver was not knowing or intelligent); *United States v. Shomade*, No. 97-4172, 1997 WL 592729 (4th Cir. Sept. 26, 1997) (same).

the waiver provision, and whether an attorney represented the party.<sup>176</sup>

These cases are helpful to get a sense of how courts may treat judicial review waivers in immigration contexts other than the VWP. However, as described earlier, these VWP waivers of judicial review are fundamentally different than other types of waivers, including the proposed waiver in exchange for a nonimmigrant visa and the proposed waiver in the legalization context. The VWP waiver is a part of a program that allows for an easier alternative to obtain a temporary visit to the United States. Granted, the waiver under the VWP can have longstanding and serious effects. A foreign national entering under the VWP signs the waiver and then loses rights to challenge the admissibility decision and also waives rights to challenge a later deportation action.<sup>177</sup> In the context of a nonimmigrant visa application and in the legalization context, however, as with other applications for benefits, there is no alternative process. It is an all or nothing endeavor. The foreign national cannot bargain for terms, nor is there any competitor who can supply the good or the service. The foreign national has no other option.<sup>178</sup>

This analysis raises doubts about the modern vitality of the idea of immigration as contract as a justification for immigration judicial review waivers not subject to the Constitution. Immigration as

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176. *Nose*, 993 F.2d at 79. In these three cases, each court upheld the waiver as knowing and voluntary. The Fifth Circuit determined that a knowing waiver existed where a nurse, a “highly educated person,” entered under the VWP. *Id.* This nurse had studied English for over two years and had passed an English proficiency exam. *Id.* The court held that the waiver was clear and that the nurse had consulted an attorney before she entered the United States. *Id.* The Seventh Circuit assumed that the knowing and voluntary standard applied and determined that waiver survived that scrutiny despite the absence of attorney consultation where the waiver was provided to an individual in her native language, the individual had a high school education, owned her own business and had traveled extensively. *Wigglesworth*, 319 F.3d at 959. The Fourth Circuit, in an unpublished opinion, rejected the argument that the waiver was not knowing or intelligent where the foreign national “is well-educated and has no difficulty reading or understanding English.” *Shomade*, 1997 WL 592729, at \*1. *See also* Polizio v. Jenifer, 217 F. Supp. 2d 811, 815 (E.D. Mich. 2002) (rejecting argument that judicial review waiver under VWP was not knowing or intelligent); *Tsukamoto v. Radcliffe*, 29 F. Supp. 2d 660, 662 (D. Haw. 1998) (same).

177. In fact, the cases addressing the adequacy of the VWP waiver cited here involve putative challenges to removal based upon deportability that were stymied by the waiver.

178. There is not even an arbitration option.

contract is an outdated analogy that would have to be stretched too far to justify such waivers. It is an idea that shares tainted roots with a cracked plenary power doctrine. Also, the use of the contract analogy to justify these waivers raises a serious constitutional question about congressional power over immigration law: May Congress require a waiver of judicial review rights as a condition for legal entry, eliminating all avenues of judicial review, including class actions?<sup>179</sup>

The development of the immigration judicial review waiver is a threat to watch. There is no guarantee that the general war against the class action will not include a front against the immigration class action. In fact, the next threat provides evidence that the front already exists.

### *C. Threat Three: Jurisdiction-Stripping Attacks on Immigration Class Actions*

The general willingness to restrict immigration judicial review discussed above is reflected in more specific attacks on the immigration class action. This section will describe an enacted provision that is an explicit ban on class certification. It will also discuss other enacted provisions whose meanings are not yet resolved but could be interpreted to limit class actions. These provisions include the timing and form restrictions added to the immigration statutes through IIRIRA. Finally, this section will describe legislative proposals that aim to narrow the availability of the immigration class action.

#### 1. Enacted Threats

As far as form restrictions, IIRIRA added one provision that specifically prohibits class certification and another whose meaning is unresolved. Title 8 U.S.C. § 1252(e)(1)(B) directly attacks class certifications under Federal Rule of Civil Procedure 23 in the context of expedited removal. It expressly instructs that “[w]ithout regard to

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179. In this sense, these waivers, at least outside the context of the VWP, would effectively function as a jurisdiction-stripping provision. No one may seek review because everyone has waived the opportunity.

the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—certify a class under Rule 23 of the Federal Rules of Civil Procedure” in any action for which the expedited removal statute permits judicial review.<sup>180</sup>

Another section, 8 U.S.C. § 1252(f)(1), provides some cryptic language that may be a form restriction. The section may restrict the use of class actions in a more general immigration context.<sup>181</sup> Section 1252(f)(1), entitled “Limit on injunctive relief,” reads:

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.<sup>182</sup>

The Supreme Court has not yet directly addressed the meaning of this language, but it has written in dicta that this provision “prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221–1231, but specifies that this ban does not extend to individual cases.”<sup>183</sup> According to this dicta, the ban is on “classwide injunctive relief” aimed “against the operation of” certain sections of the immigration statutes.<sup>184</sup>

Elsewhere the author has argued that this interpretation of section 1252(f)(1) is not entirely correct and that the actual effect of this section is narrow, but the statutory section nonetheless exists as a threat to the immigration class action.<sup>185</sup> This section is like the

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180. 8 U.S.C. § 1252(e)(1)(B) (2000).

181. For further discussion of section 1252(f)(1), see Family, *supra* note 60.

182. 8 U.S.C. § 1252(f)(1) (2000).

183. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–82 (1999) (Scalia, J.). Judge Easterbrook wrote similar dicta: “[T]his enactment curtails resort to a particular remedy—the injunction. Subsection (f)(1) forbids injunctive class actions . . . .” *Hor v. Gonzales*, 400 F.3d 482, 483 (7th Cir. 2005). Also, David Martin describes class actions as the “clear target” of section 1252(f)(1). Martin, *supra* note 6, at 323.

184. *Reno*, 525 U.S. at 481–82.

185. Family, *supra* note 60.

expedited removal class action bar in that it is directed at insulating a portion of the immigration laws from certain court action, but in the case of section 1252(f)(1), the identity of the “certain court action” is unresolved. Just as the expedited removal class action bar only applies to expedited removal, section 1252(f)(1) targets injunctive relief relating to only a portion of the immigration laws, “part IV of this subchapter.” Part IV governs removal.<sup>186</sup> As the above discussion of the differing functions of the immigration service suggests, the government does more than just remove foreign nationals.<sup>187</sup> Therefore, section 1252(f)(1), even if interpreted too broadly to bar class-wide injunctive relief, is still limited.<sup>188</sup> The identity of the prohibited court action is hazier in section 1252(f)(1) than in its expedited removal cousin. This is because the language of section 1252(f)(1) forbids restraints on the operation of certain sections (except by the Supreme Court) “other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” The provision does not mention Federal Rule of Civil Procedure 23 nor does it explicitly bar the certification of a class, which the expedited removal bar does.

The form restriction in section 1252(f)(1) is neither the only section nor the only type of restriction added through IIRIRA whose effect on the immigration class action remains unresolved. IIRIRA added timing restrictions to the immigration statutes that pose a threat to the availability of the immigration class action. For example, 8 U.S.C. § 1252(b)(9) calls into question whether an individual may enlist federal court review if there is no final administrative order of removal, or if the individual wishes to bring an affirmative action against the government “arising from” removal.<sup>189</sup> Examples of an

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186. Family, *supra* note 60, at 31–32.

187. See *supra* notes 33–36 and accompanying text.

188. Family, *supra* note 60, at 31–32.

189. See Motomura, *supra* note 5, at 409–13. Another potential timing restriction is section 1252(d). 8 U.S.C. § 1252(d) (2000). The section directs that “a court may review a final order of removal only if—the alien has exhausted all administrative remedies available to the alien as of right.” 8 U.S.C. § 1252(d)(1) (2000). This section, like section 1252(b)(9), raises questions about the availability of federal court review outside of the context of the individualized hearing procedure. Motomura, *supra* note 5, at 440–43. Hiroshi Motomura argues, however, that this exhaustion provision should not apply to pattern and practice cases because such matters are independent from a “final order.” *Id.* at 440–41.

affirmative action suit include a class action challenging a detention practice or challenging a deficiency in the administrative procedure afforded.

The provision states that all legal and factual questions “arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.”<sup>190</sup> There are outstanding questions as to the meaning of section 1252(b)(9), including whether this restriction on timing effectively prohibits any form of action other than a petition for review following the individualized hearing process.<sup>191</sup> If it does, it threatens to narrow the availability of the immigration class action to challenge removal because a class action does not fit within the individualized petition for review procedure.

Hiroshi Motomura has argued persuasively that section 1252(b)(9) should be construed narrowly to allow for jurisdiction in the absence of a removal order.<sup>192</sup> Professor Motomura argued that “some matters are sufficiently significant and independent of a removal proceeding that they should not be treated as part of the case or controversy for jurisdictional purposes.”<sup>193</sup> The breadth of the reading depends on what it means for an action to arise from “any action taken or proceeding brought to remove an alien from the United States.” Before IIRIRA and REAL ID, review of final orders of removal occurred in the courts of appeals.<sup>194</sup> Review of actions collateral to final orders of removal, such as an action seeking a stay of removal,

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190. 8 U.S.C. § 1252(b)(9). The full section states:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252 (b)(9) (2000).

191. For further discussion of section 1252(b)(9), see Motomura, *supra* note 5, at 415–33.

192. See Motomura, *supra* note 5, at 413–14. David Martin has expressed agreement with this interpretation. Martin, *supra* note 6, at 320–21 n.30.

193. Motomura, *supra* note 5, at 414.

194. Motomura, *supra* note 5, at 415.

could be brought in district courts.<sup>195</sup> Thus, before IIRIRA and REAL ID, courts categorized challenges into appropriate courts, considering whether the challenged act fell into the final order or the collateral to a final order category.<sup>196</sup> After IIRIRA and REAL ID, litigants are successfully presenting courts with similar requests for categorization based in section 1252(b)(9), by arguing that certain acts do not arise from “any action taken or proceeding brought to remove an alien from the United States.”<sup>197</sup> Thus, the collateral category survives.

As this discussion reveals, threats to the immigration class action are both direct and indirect. The Supreme Court has shown reluctance, however, to interpret potential indirect attacks broadly. The 1986 legalization statute contained a special judicial review provision that provided for judicial review of “a determination respecting an application [for legalization]” only in the context of review of an individual deportation order in the appropriate court of appeals.<sup>198</sup> As the immigration service administered the legalization

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195. Motomura, *supra* note 5, at 415–16.

196. *Id.*

197. 8 U.S.C. § 1252(b)(9) (2000). *See, e.g.*, Singh v. Gonzales, 499 F.3d 969, 979 (9th Cir. 2007) (determining that an ineffective assistance claim aimed at a lawyer’s post final removal order conduct did not fall under section 1252(b)(9)); Madu v. U.S. Attorney Gen., 470 F.3d 1362, 1367 (11th Cir. 2006) (holding that an argument that a foreign national is not subject to a removal order is not the same as challenging a removal order); Kumarasamy v. Attorney Gen., 453 F.3d 169, 172 (3d Cir. 2006) (same but in the context of 8 U.S.C. § 1252(a)(5)); Nadarajah v. Gonzales, 443 F.3d 1069, 1075–76 (9th Cir. 2006) (holding that a detention challenge was not a challenge to a final order of removal); Hernandez v. Gonzales, 424 F.3d 42, 42–43 (1st Cir. 2005) (determining, in the context of 8 U.S.C. § 1252(a)(5), that a detention challenge is independent of a removal challenge); Turkmen v. Ashcroft, No. 02-CV-2307, 2006 WL 1662663, \*25–26 (E.D.N.Y. June 14, 2006) (categorizing actions as arising from and not arising from a removal order); Arar v. Ashcroft, 414 F. Supp. 2d 250, 268–70 (E.D.N.Y. 2006) (holding detention-related challenges to be collateral to a removal order); Singh v. Chertoff, No. C05-1454, 2005 WL 2043044, at \*3 (N.D. Cal. Aug. 24, 2005) (determining that a decision to revoke asylum status falls outside of section 1252(b)(9)). *But see, e.g.*, Mancho v. Chertoff, 480 F. Supp. 2d 160, 162 (D.D.C. 2007) (holding that a petition for attorneys fees under the Equal Access to Justice Act did arise from a removal order). *See also* Aguilar v. U.S. Immigration and Customs Enforcement, 510 F.3d 1, 11, 13–14, 18–19 (1st Cir. 2007) (reading “arising from” to “exclude claims that are independent of, or wholly collateral to, the removal process [including] claims that cannot effectively be handled through the available administrative process” and categorizing a right to counsel claim as not collateral while categorizing a substantive due process claim (right to family integrity) as collateral).

198. 8 U.S.C. § 1160(e)(1) (2000) (“There shall be no administrative or judicial review of a determination respecting an application [for legalization] except in accordance with this subsection.”); 8 U.S.C. § 1160(e)(3) (“There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation . . .”). For more information about the

program, however, aggrieved applicants filed pre-deportation order pattern and practice lawsuits in district court. For example, in *McNary v. Haitian Refugee Ctr., Inc.*, a class sought to challenge practices and policies the immigration service implemented as a part of the legalization program.<sup>199</sup> This pattern and practice case was not a reactive response to an individual deportation order. The government argued that the district court did not have jurisdiction over such a pre-final order lawsuit. The government interpreted the special judicial review provision to bar any challenge outside of the context of review of an individual deportation order.<sup>200</sup>

The Supreme Court determined that the special judicial review provisions did not preclude federal district court jurisdiction over pre-deportation order pattern and practice class actions challenging the administration of the legalization program.<sup>201</sup> The Supreme Court read the judicial review provision narrowly. Specifically, it held that the provision did not prevent “general collateral challenges to unconstitutional practices and policies used by the agency in processing applications.”<sup>202</sup> The Court had a textual basis for the narrow reading,<sup>203</sup> but it also concluded that to deny district court review of pattern and practice collateral challenges would be the “practical equivalent of a total denial of judicial review of generic constitutional and statutory claims” because of the nature of the legalization program and the structure of judicial review.<sup>204</sup> To avoid

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legalization special judicial review provisions, see Daniel Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get into Court?*, 25 HARV. C.R.-C.L. L. REV. 53 (1990).

199. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991).

200. *Id.* at 483, 491–92.

201. *Id.* at 483.

202. *Id.* at 492.

203. The special judicial review provision applied to “judicial review of a determination respecting [a legalization] application.” The Court concluded, “a ‘determination’ describes a single act rather than a group of decisions or a practice or procedure employed in making decisions.” *Id.* at 492. Therefore, the statute did not apply to “general collateral challenges to unconstitutional practices and policies.” *Id.*

204. *Id.* at 497. A denied application for legalization did not automatically lead to a deportation proceeding because of confidentiality firewalls built into the application process. Since applicants would face deportation if not for the legalization program, the legalization statute shielded applicants with a firewall prohibiting the use of information garnered in the application process to deport the applicant. 8 U.S.C. § 1255a (c)(5) (2000); 8 U.S.C. § 1160(b)(6) (2000). A decision to deny a legalization application could be administratively

such an outcome, the Court interpreted the statute to allow for the class action to proceed.

The Court had an opportunity to revisit the principles of its *McNary* decision in a legalization class action that challenged the immigration agency's interpretation of a statutory provision.<sup>205</sup> In *Reno v. Catholic Social Services*, the Court reiterated its holding in *McNary* that the special judicial review provision did not bar review, but it also held that justiciability considerations blocked district court jurisdiction in that particular case.<sup>206</sup> The Court reaffirmed its concern about the lack of an opportunity to present certain challenges in the context of review of an individual hearing. In *Catholic Social Services*, the Court was not concerned, at least about certain class members, because it determined those class members could challenge the appropriateness of the regulation at issue in the context of review of an individual case.<sup>207</sup> The Court distinguished the *McNary* class

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appealed to a legalization appeals unit. 8 U.S.C. § 1255a (f)(3) (2000); 8 U.S.C. § 1160(e)(2)(A) (2000). Because of the firewall, however, a legalization appeals unit denial did not automatically place an individual in deportation proceedings. This protection presented a Catch-22 to individuals who desired federal court review of a legalization appeals unit denial. As explained above, the legalization special review provision permitted judicial review of a decision of the legalization appeals unit "only in the judicial review of an order of exclusion or deportation." 8 U.S.C. § 1160(e)(3). As explained by the Supreme Court, "absent initiation of a deportation proceeding against an unsuccessful applicant, judicial review of such individual determinations was completely foreclosed." *McNary*, 498 U.S. at 486. Therefore, a foreign national could be stuck in limbo with no way to access court review. The applicant cannot challenge the legalization determination until deportation proceedings terminated, but there may never be a deportation hearing or it may not occur for quite some time.

Also, the Court identified a bar to the assertion of constitutional and statutory claims other than this limbo element. Even if a foreign national were to subject himself or herself to a deportation proceeding, and then were to seek judicial review, the Court concluded that the reviewing court of appeals would be in a poor position to adjudicate constitutional pattern and practice claims based on the administrative record of an individual legalization application. *Id.* at 497; see also *Tefel v. Reno*, 972 F. Supp. 608, 615 (S.D. Fla. 1997), *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999) (following *McNary*, the court discussed the need for district court review of claims for which an adequate record is not created during the administrative process). The Court acknowledged that a court of appeals would not have the fact-finding powers to determine whether a pattern of unlawful practice was occurring in the context of an individual case. *McNary*, 498 U.S. at 497. Additionally, if limited to post-final order judicial review, the applicant would be limited to rely on the administrative record and, in *McNary*, the claimants argued that the procedure in creating the administrative record was constitutionally flawed. *Id.* at 496.

205. *Reno v. Catholic Soc. Serv.*, 509 U.S. 43 (1993).

206. *Id.* at 59–60.

207. The Court reasoned that each class members' claim would not ripen until the

members from the *Catholic Social Services* class because the *McNary* class members could not adequately present their pattern or practice challenge in the context of an individual hearing.<sup>208</sup>

*McNary* exemplifies a reluctance by the Court to interpret a less than explicit statute to preclude an affirmative class action, at least where the absence of the action would effectively preclude judicial review. The resolution of the exact effect of the indirect threats described here remains.

## 2. Proposed New Threats

IIRIRA provides evidence of a general desire to limit judicial review in the immigration context and contains more specific threats to the immigration class action, including an explicit ban on the use of Federal Rule of Civil Procedure 23 and other provisions whose effect remains uncertain.<sup>209</sup> The enacted threats may foreshadow further legislative limits aimed specifically at immigration class actions. Currently floating around Congress are legislative attempts to bar immigration class actions further and to decrease the effectiveness of the immigration class action by narrowing the ability of the federal courts to fashion immigration prospective relief.

In 2006 and in 2007, immigration reform provisions that would limit the use of the class action appeared in bills and in proposed amendments. These provisions vary from a proposed outright ban on class certifications regarding anything that has anything to do with immigration law (the ultimate form restriction) to provisions that explicitly demarcate the availability of the class action but only under specific timing and geographic restrictions.<sup>210</sup>

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immigration agency applied the objectionable regulation to each individual. *Reno*, 509 U.S. at 59–61. At that point, the individual would be challenging “a determination” and such a challenge would activate the special judicial review procedures. *Id.* at 59–61. The Court held there would be district court jurisdiction for certain class members who could not bring their claim in the context of an individual hearing. *Id.* at 61–64.

208. *Id.* at 60–61.

209. *See supra* Part III.A; Part III.C.1.

210. Also, there are proposed limits on the availability of the class action to challenge government action under the proposed Employment Eligibility Verification System (“EEVS”). S. 1639, 110th Cong. § 302 (2007). With regard to challenges to nonconfirmation notices and the enforcement of penalties for noncompliance, the bill would place limits on injunctive relief similar to 8 U.S.C. § 1252(f)(1). S. 1639, 110th Cong. § 302 (2007). Also, certifications under

One example of a bill containing restricted use of the class action is Senate Bill 1639, the second incarnation of immigration reform in the 110th Congress. This bill contains specific provisions governing judicial review of a legalization determination.<sup>211</sup> The bill provides that judicial review of a legalization denial would be available “only in conjunction with the judicial review of an order of removal”; yet, it would also prohibit review of discretionary actions and limit review to the administrative record of the denial.<sup>212</sup> Perhaps acknowledging the jurisdictional quandary presented in *McNary*, the bill contains a separate provision governing “challenges on validity of the system.”<sup>213</sup> According to this provision, the following type of claim may be brought, but only in the District Court for the District of Columbia:

Any claim that title VI<sup>214</sup> of [this Act], or any regulation, written policy, or written directive issued or unwritten policy or practice initiated by or under the authority of the Secretary of Homeland Security to implement that title, violates the Constitution of the United States or is otherwise in violation of law.<sup>215</sup>

In addition to this geographic restriction, there are timing restrictions.<sup>216</sup> Class actions would be permitted, but the action must conform to time and geographical limitations and with the Class Action Fairness Act.<sup>217</sup> Class actions would not be eliminated, but would be restricted.

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Federal Rule of Civil Procedure 23 would be barred as a means of challenging the validity of the EEVS. *Id.*

211. S. 1639, 110th Cong. § 603(c) (2007).

212. *Id.*

213. *Id.*

214. Title VI contains the legalization provisions.

215. S. 1639, 110th Cong. § 603(c) (2007).

216. Such actions must be filed within one year after the publication or promulgation date of the challenged regulation, policy or directive. *Id.* Challenges to unwritten policies or practices must be filed within a year after “the plaintiff knew or reasonably should have known of the unwritten policy or practice.” *Id.* Actions challenging the validity of the Act itself must be brought within one year of the Act’s enactment. *Id.*

217. *Id.* Senator Sessions, however, filed an amendment to S. 1639 that would have provided for no review of legalization determinations. *See* Senate Amendment 1890 of S. 1639 (submitted 2007) (“a denial, termination or rescission of benefits or status under this title [the

One legislative proposal containing an outright attempt to ban immigration class actions can be found in an amendment Senator John Cornyn submitted, but was not considered, as a part of the immigration reform debate in the 110th Congress in 2007. The proposed amendment would have prohibited any court from certifying a class under Federal Rule of Civil Procedure 23 “in any civil action filed after the date of the enactment of this Act pertaining to the administration or enforcement of the immigration laws of the United States.”<sup>218</sup> It is hard to imagine a broader form attack on the immigration class action.

This same 2007 amendment also would have diminished the effectiveness of a class action, even if the form were to survive, by severely limiting prospective relief in immigration cases; it is a form restriction in disguise.<sup>219</sup> Senator Cornyn has pushed previously and consistently for these limits on prospective relief. For example, the Senate endorsed these restrictions on prospective relief by including the “Fairness in Immigration Litigation Act of 2006” as a part of the immigration reform bill the Senate passed in May 2006.<sup>220</sup> If it had been enacted, this Act would have instituted a myriad of restrictions on prospective relief in immigration cases. The Act would have handcuffed federal judges in terms of the breadth and duration of prospective relief.<sup>221</sup> It would have set a default date for the expiration of preliminary injunctive relief of ninety days.<sup>222</sup> It also would have turned a government motion to modify or terminate an order granting prospective relief into a trigger for an automatic stay of the relief.<sup>223</sup> These provisions would have also applied to private

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legalization program] may not be reviewed by any court, and no court shall have jurisdiction to hear any claim arising from, or any challenge to, such denial, termination or rescission.”)

218. Senate Amendment 1209 of S. 1348 (submitted 2007).

219. *Id.*

220. S. 2611, 109th Cong. §§ 421, 422 (2006).

221. The legislation provides that when ordering prospective relief a court “shall,” among other things, “limit the relief to the minimum necessary to correct the violation of law,” “adopt the least intrusive means to correct the violation of law,” “minimize, to the greatest extent practicable, the adverse impact on national security, border security, immigration administration and enforcement, and public safety” and “provide for the expiration of relief on a specific date, which is not later than the earliest date necessary for the Government to remedy the violation.” S. 2611, 109th Cong. § 422(a)(1)(A)–(D).

222. S. 2611, 109th Cong. § 422(a)(3).

223. The bill reads:

settlement agreements subject to judicial enforcement and consent decrees that require court approval.<sup>224</sup>

Secretary of Homeland Security Michael Chertoff has referenced one ongoing immigration class action, originally captioned *Orantes-Hernandez v. Meese*, as the motivation behind immigration injunction reform.<sup>225</sup> According to Secretary Chertoff, this “20-year-old court order” is “the burden of what we call the Orantes Injunction.”<sup>226</sup> The injunction ordered the government to correct due process violations that hindered El Salvadorans from applying for asylum. The *Orantes* injunction, from the government’s perspective, ties the hands of immigration enforcement from swiftly removing Salvadorans apprehended at the border.<sup>227</sup> Opponents of Senator Cornyn’s injunction reform have argued that the *Orantes* injunction does not hinder the immigration enforcement efforts cited by Secretary Chertoff.<sup>228</sup> In 2005, the government filed a motion to dissolve the *Orantes* injunction while it simultaneously sought a legislative fix via

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The Government’s motion to vacate, modify, dissolve, or otherwise terminate an order granting prospective relief made in any civil action pertaining to the administration or enforcement of the immigration laws of the United States shall automatically, and without further order of the court, stay the order granting prospective relief on the date that is 15 days after the date on which such motion is filed unless the court previously has granted or denied the government’s motion.

S. 2611, 109th Cong. § 422(b)(2).

224. S. 2611, 109th Cong. § 422(c).

225. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff’d sub. nom.*, 919 F.2d 549 (9th Cir. 1990).

226. Press Release, Remarks by Homeland Security Secretary Michael Chertoff (July 14, 2006), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0953.shtm](http://www.dhs.gov/xnews/releases/press_release_0953.shtm).

227. Secretary Chertoff stated:

It’s really simple. If we want to control the border and if we want to complete the task of ending catch-and-release, and going to catch-and-remove, we have to untie the hands of the Border Patrol. And right now, the Border Patrol has its hands tied by rope that was tied 20 years ago, for a reason that no longer exists. So as a matter of common sense, we ought to be able to cut the cord here and let the Border Patrol do the job that we want them to do.

*Id.*

228. See National Immigration Law Center, *The Orantes Injunction and Expedited Removal*, 20 IMMIGRANTS’ RIGHTS UPDATE 4, (Aug. 23, 2006), available at <http://www.nilc.org/immlawpolicy/removpsds/removpsds152>.

Senator Cornyn's proposal. A district court judge upheld the injunction in July 2007.<sup>229</sup>

Although the May 2006 Senate immigration bill did not become law, Senator Cornyn continued to push his proposal to limit relief. There was a failed attempt to add the Fairness in Immigration Litigation Act to a pending Department of Homeland Security Appropriations Act in July 2006.<sup>230</sup> A few months later, House Republicans publicized a "September 'Border Security Now' Agenda."<sup>231</sup> This ten item agenda included the Fairness in Immigration Litigation Act.<sup>232</sup> The House endorsed the substantive provisions affecting prospective relief of the Fairness in Immigration Litigation Act as a part of this September push.<sup>233</sup> The Senate did not, however. Also, as explained above, Senator Cornyn submitted an amendment in 2007 that would have implemented these limits.

These restrictions and proposals send a message that the immigration class action is under threat. Sometimes this message is manifested in the form of an outright ban on forming a class under Federal Rule of Civil Procedure 23. Other times the message is indirect, manifested in vague restrictions on form, timing, or on the issuance of prospective relief. While perhaps vague, the message is no less serious. For example, prospective relief is the lifeblood of the immigration class action. These are actions challenging the government's behavior. These actions seek change in that behavior, such as implementation of different procedures, to meet constitutional requirements. The restrictions on prospective relief are no doubt meant to discourage the filing of class actions. Under this type of restriction, the availability of the class action format is

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229. *Orantes-Hernandez v. Gonzales*, No. CV 82-01107, Amended Order Granting in Part and Denying in Part Defendants' Motion to Dissolve the *Orantes* Injunction (July 26, 2007); *District Court Preserves Most of Orantes Injunction*, 84 INTERPRETER RELEASES 1786 (Aug. 6, 2007). The judge did modify the injunction to reflect political condition changes in El Salvador.

230. Senator Cornyn introduced amendment number 4577 to H.R. 5441, 109th Cong. (2007) that the chair ruled as out of order on July 12, 2006.

231. House Republican Border Security Bulletin, September 14, 2006 (on file with author).

232. House Republican Border Security Bulletin, September 14, 2006 (stating that the Fairness in Immigration Litigation Act would end "outdated injunctions that prevent the effective enforcement of immigration laws").

233. H.R. 6095, 109th Cong. § 301 (2006).

seemingly left intact, but the restrictions neuter the promise of the class action by narrowing the available relief.

#### IV. CONCLUSION

Examining the very limited role of the federal courts in immigration law with a focus on the class action uncovers threats to the future of the immigration class action. These hazards may have implications for both individual and collective action, but a focus on the implications for collective action reveals that the immigration class action, a form of action that litigants have used to challenge widespread misadministration of the immigration laws, is under threat.

Congress has exhibited a willingness to curtail immigration judicial review. That willingness negatively affects class actions by shrinking the pool of administrative action available for judicial review by class action or otherwise. Congress' curtailing actions also create a legislative atmosphere conducive to further restrictions on the role of the federal courts in immigration law, including the adoption of judicial review waivers as a requirement to obtain an immigration benefit and more specific restrictions that implicate the immigration class action.

There are signs that the trend in favor of waivers of court access increasingly prevalent in private law poses a threat to immigration judicial review. These immigration waivers would affect both individual actions and class actions by requiring waiver of rights to judicial review as a condition of obtaining an immigration benefit. The government has argued in litigation that these waivers are not subject to the Constitution, that they are terms of a sovereign contract. This Article concludes that the government's argument overextends an expired analogy of immigration law as contract law developed in the nineteenth century, and raises serious constitutional questions about congressional power.

In addition to an explicit limit on the formation of a class in one immigration context, Congress has also enacted provisions whose meanings are not yet resolved but pose a threat to the future of the immigration class action. Adding to the uncertainty are recent congressional proposals that would either expand the explicit ban on

the formation of a class to other immigration contexts, or would neuter such actions by imposing severe restrictions on prospective relief.

This collection of threats calls out for further study of the immigration class action. We should know more about what may be lost.