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Toward a Constitutionalized Theory of Immigration Detention

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Introduction

On March 19, 2008, federal immigration authorities arrested and jailed Cheikh Diop, a Senegalese national, after serving him with a Notice to Appear in immigration court. The government subsequently incarcerated Diop for two years and eleven months while it sought to remove him from the United States.[1] Diop's Kafkaesque journey through the immigration system ultimately led to "1072 days of detention, four rulings by an immigration judge, three rulings by the [Board of Immigration Appeals], a state court ruling on [a prior drug] conviction and a subsequent pending appeal to the intermediate state court, a ruling by a federal district court judge on his habeas petition, and an appeal to [the Third Circuit]," all of which occurred while he was behind bars.[2] Eventually, the government conceded that Diop had a statutory right to remain in the United States and released him from custody.

Amadou Lamine Diouf, also a native of Senegal, shares a similar story. Immigration authorities sent Diouf, a Seattle resident, to a Southern California jail as the government pursued a removal order.[3] Like Diop, Diouf's experience with American courts was convoluted. Two separate panels of the Ninth Circuit considered appeals from district court habeas proceedings and a third panel reviewed his immigration case.[4] Nearly two years after Diouf's arrest, a federal court ordered the government to provide Diouf a bond hearing. After an immigration judge found that he neither posed a threat to public safety nor presented a flight risk from the jurisdiction of the immigration court, the government released Diouf from prison.[5] Five years later, after several rounds of litigation in the Ninth Circuit, the government agreed to terminate removal proceedings against Diouf.[6]

The government detained both Diop and Diouf for a prolonged period of time, without securing a criminal conviction, in the nation's immigration detention system.[7] This system is vast: in fiscal year 2011, the United States gov-

1. Since 1996, "removal" has been the proper legal term for what many people colloquially call "deportation." Removal orders can be issued either because the noncitizen is inadmissible or deportable. For a helpful discussion of this vocabulary, and the 1996 changes to the legal definitions of these words, see *United States v. Ventura-Candelario*, 981 F. Supp. 868 (S.D.N.Y. 1997).

2. Diop v. ICE/Homeland Sec., 656 F.3d 221, 221-26 (3d Cir. 2011).

3. Diouf v. Napolitano, 634 F.3d 1081 (9th Cir. 2011).

4. *See id.*; Diouf v. Mukasey, 542 F.3d 1222 (9th Cir. 2008); Diouf v. Holder, No 06-73991 (9th Cir. docketed Aug. 15, 2006).

5. *Diouf*, 634 F.3d at 1083-84.

6. Order, *Diouf*, No. 06-73991, ECF. No. 116.

7. I define immigration detention as any confinement—actual or constructive—occurring *either* during administrative removal proceedings (and judicial review of such proceedings) *or* related to a final and unreviewable judicial order. This includes any detention purportedly authorized by 8 U.S.C. § 1231(a)(6) (2012).

ernment admitted 429,247 individuals to immigration detention.[8] Though the majority of immigration detainees spend far less time in prison than Diop and Diouf,[9] lengthy immigration detention is not uncommon. A research report analyzing a snapshot of the immigration detainee population on a single day found that on January 25, 2009 at least 4,170 people—and possibly more—had been held in immigration detention for over six months.[10] Some 1,334 of those individuals had been confined for over a year, and, in one extreme case, an individual had spent fifteen years in prison.[11] Moreover, the economic cost of this vast system is great: in 2012, the federal government spent over $1.8 billion on immigration detention.[12] By any metric, the immigration detention system is impressive in size and scope.

Immigration detention is authorized by a complex statutory and regulatory scheme. With one notable exception, the Supreme Court has largely upheld the system that Congress has designed, bowing to traditional congressional primacy in the regulation of immigration.[13] The Court has relied on the plenary power doctrine—an extratextual, judicially created doctrine granting the political branches great deference in the immigration sphere—to sustain our nation's present immigration detention system.[14]

This Note proposes an alternative legal model of immigration detention. Instead of a theory marked by judicial deference to Congress and the President, I advance a constitutionalized theory of immigration detention. I confine my argument to the structure of judicial review of administrative detention determinations—that is, how the federal courts should review the immigration enforcement officials' and administrative adjudicators' decisions to detain a non-

8. John Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2011*, U.S. Dep't of Homeland Sec. 5 tbl.4 (Sept. 2012), http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. In 2012, the average daily population of immigration detainees was 34,000 individuals. U.S. Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement Salaries and Expenses 37 (2012). Over 200 detention facilities house immigration detainees. *Id.* at 36-37.

9. The average length of stay in detention for all immigration detainees subject to mandatory detention was 34.7 days in fiscal year 2011. *See* Dep't of Homeland Sec., Annual Performance Report: Fiscal Years 2011-2013, at 22 (2012) [hereinafter DHS, Annual Performance Report].

10. Am. Civil Liberties Union, *Prolonged Immigration Detention of Individuals Who Are Challenging Removal* 4 (2009), http://www.aclu.org/files/assets/prolonged_detention_issue_brief.pdf.

11. *Id.*

12. DHS, Annual Performance Report, *supra* note 9, at 66. The Department requested nearly $2 billion dollars to run "custody operations," i.e., the immigrant detention system, for fiscal year 2013. *Id.*

13. *See infra* Section I.C.

14. *See infra* Section I.A.

citizen during the pendency of immigration proceedings or the execution of a removal order. I draw on constitutional text and principles as well as contemporary and historical judicial practice to envision the contours of a system of constitutionalized judicial review of immigration detention.

This Note proceeds as follows. Part I introduces the plenary power doctrine, reviews its doctrinal limitations and academic criticisms, and describes how the modern Court has largely upheld our present immigration detention system on the basis of the plenary power doctrine. The remaining Parts are dedicated to exploring a constitutionalized theory of immigration detention. Part II presents the historical and doctrinal basis for such a theory. Parts III and IV examine the implications of constitutionalizing immigration detention for mandatory and permissive immigration detention, respectively. Part V compares the federal courts' current methods for reviewing immigration detention with the constitutional protections I advance in the preceding parts.

I. The Plenary Power Doctrine and Immigration Detention

A. The Origin of the Plenary Power Doctrine

Despite the Constitution's notable near silence on the subject,[15] immigration engendered one of the nation's first constitutional crises. Fearful of "the importation of dangerous revolutionary ideas from France,"[16] the Federalists, in control of Congress and the White House, proposed the Alien and Sedition Acts in 1798.[17] The debates surrounding the legislation brought to light the Founding generation's lack of consensus on the source of the nation's power to regulate immigration. President Adams's Federalists asserted that noncitizens were not

15. The word "migration" does appear in the Constitution once, in the Migration and Importation Clause, which dealt only with involuntary migration as a slave and (perhaps) the migration of indentured servants. U.S. Const. art. I, § 9, cl. 1; *see* Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 Mo. L. Rev. 743, 785 (1996). In short order, however, Federalists would come to cite the Migration Clause as support for the federal government's authority over general immigration in early debates surrounding voluntary immigration. *See, e.g.*, 8 Annals of Cong., at 1957-58 (1798) (statement of Samuel Sewall).

16. Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909, 927 (1991). The Alien and Sedition Acts were little more than a proxy for a larger political fight between President Adams's Federalists and Thomas Jefferson's Democratic-Republicans. *See id.* at 928.

17. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21-23); Alien Act (or Alien Friends Act), ch. 58, 1 Stat. 570 (1798) (expired June 25, 1800); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired Mar. 3, 1801); Naturalization Act, ch. 54, 1 Stat. 566 (1798) (repealed 1802); *see* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 87-99 (2002); Neuman, *supra* note 16, at 927-39.

parties to the Constitution and could not claim protections from it, while arguing that the law of nations endowed the federal government with the right to expel unwanted noncitizens.[18] The Jeffersonian Democratic-Republicans believed that the Constitution conferred at least some protections onto noncitizens, with some going so far as to claim that the states—not the federal government—had the authority to expel noncitizens from their territory.[19] The contentious discourse around the Alien and Sedition Acts portends the late nineteenth-century development of the plenary power doctrine, which upholds federal primacy, while also illustrating that the Founding generation did not agree on the proper relationship between the federal government and the Constitution when it came to regulating immigration.

Gerald Neuman has chronicled the "lost century" of immigration law, convincingly showing that states provided the bulk of immigration regulation from the demise of the Alien and Sedition Acts through the Civil War, even while the federal government continued to shape at least some aspects of the nation's immigration policy.[20] Similarly, Supreme Court decisions from this era reflect an uncertain conception of the ultimate distribution of the regulatory authority over the nation's borders. Early state regulation schemes were mostly upheld, but as the country grew so too did the federal government's authority to clamp down on unwanted state interference with migration.[21]

18. *See* Cleveland, *supra* note 17, at 90-95; Neuman, *supra* note 16, at 929-34.

19. Albert Gallatin, who would become President Jefferson's Secretary of Treasury, emphasized the constitutional protections conferred on "aliens" as opposed to "citizens." 8 ANNALS OF CONG., at 1981 (1798). Although this view may not have been dominant even among Jeffersonians, John Taylor, addressing the Virginia House of Delegates, suggested that the Constitution required the government to afford noncitizens judicial process before expulsion. *Debate on Virginia Resolutions*, *in* THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS; TOGETHER WITH THE VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, THE DEBATE AND PROCEEDINGS THEREON IN THE HOUSE OF DELEGATES OF VIRGINIA, AND SEVERAL OTHER DOCUMENTS ILLUSTRATIVE OF THE REPORT AND RESOLUTIONS 116 (1850) (statement of John Taylor); *see* Cleveland, *supra* note 17, at 90-95; Neuman, *supra* note 16, at 934-38.

20. Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833 (1993). Although at least one current Justice believes that the state regulations of this era continue to serve as valid precedent permitting vigorous subfederal regulation today, it appears that a majority of the Court has rejected this proposition. *Compare* Arizona v. United States, 132 S. Ct. 2492, 2511-15 (2012) (Scalia, J., concurring in part and dissenting in part) ("[T]he States have the right to protect their borders against foreign nationals."), *with id.* at 2510 (majority opinion) ("The National Government has significant power to regulate immigration. . . . Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.").

21. *Compare* Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding a New York immigration regulation), *with* The Passenger Cases, 48 U.S. (7 How.)

Congress increasingly turned its attention to restricting immigration following the Civil War. The initial emphasis was the exclusion of Asian immigration, particularly immigration from China. It is against the backdrop of these racially charged laws that the Court developed the plenary power doctrine.[22] In 1889, the Court considered the *Chinese Exclusion Case*, which challenged the government's ability to keep a Chinese citizen out of the country pursuant to the exclusion law targeting the Chinese, even though such exclusion was in violation of a treaty between China and the United States. Writing for the Court, Justice Field held that because "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."[23] In other words, though the country may have entered into a binding commitment under international law, Congress's decision to subsequently exclude the entry of Chinese immigrants was absolute and judicially unreviewable.

The Court continued to solidify Congress's authority over immigration four years later in *Fong Yue Ting v. United States*.[24] In a 5-3 vote, the Court upheld the federal government's power to detain a noncitizen prior to deportation.[25] Justice Gray, writing for the Court, first reaffirmed the Court's commit-

283 (1849) (striking down state taxes designed to discourage the flow of immigrants). A badly fractured Court handed down eight separate opinions in *The Passenger Cases*, further evidence of a dissensus as to the source and extent of the federal government's authority over immigration.

22. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). Today these laws are widely understood to have racist origins. *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAWS (1995); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (attributing the plenary power doctrine to nineteenth-century racist practices); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862-63 (1987).

23. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893) ("It is a received maxim of international law that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it.") (quoting 1 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, ch. 10, § 220 (3d ed. 1879)).

24. 149 U.S. 698.

25. Chief Justice Fuller, Justice Brewer, and Justice Field dissented. Justice Field was particularly incensed by the Court's decision. *See* Alan Westin, *Stephen J. Field and the Headnote to* O'Neil v. Vermont*: A Snapshot of the Fuller Court at Work*, 67 YALE L.J. 363, 380-83 (1958).

ment to deference in the immigration arena by noting deportation "is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend."[26] From here, however, *Fong Yue Ting* went on to expand Congress's plenary authority over immigration beyond the scope established in the *Chinese Exclusion Case*. The *Fong Yue Ting* Court decreed that an "order of deportation is not punishment for a crime" and that an individual held for immigration purposes "has not . . . been deprived of life, liberty, or property without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."[27] Based on these passages, *Fong Yue Ting* is traditionally read both for the narrow proposition that the government may detain noncitizens in "civil" immigration detention incident to the valid exercise of the removal power and, along with the *Chinese Exclusion Case*, for the broader proposition that Congress has wide latitude to regulate immigration without judicial oversight.[28]

The plenary power doctrine did not appear out of thin air in the late nineteenth century; rather, the application of the plenary power doctrine to the immigration context fits with the Court's early understanding of Congress's authority to control international affairs. Sarah Cleveland has noted that the eighteenth-century Court applied the plenary power model to Congress's authority over Native American affairs and the governance of U.S. territories as well as to immigration regulation.[29] Moreover, Congress's exercise of full authority over land acquisition and Native American affairs in the days of the early Republic was far less politically contentious than its regulation of immigration.[30] The early Supreme Court largely upheld congressional action in each of

26. *Fong Yue Ting*, 149 U.S. at 730.

27. *Id.*; *see also* Wong Wing v. United States, 163 U.S. 228, 235 (1896) ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.").

28. *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 864-65 (1989).

29. *See* Cleveland, *supra* note 17.

30. One well-cited example is the Jefferson Administration's decision to acquire the Louisiana territory despite Jefferson's doubts that the Constitution conferred such authority onto the federal government. *See* Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 244 (Paul L. Ford ed., 1892); Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 247-48 (Paul L. Ford ed., 1892). Not all of his partisans shared Jefferson's doubts. Albert Gallatin, President Jefferson's Secretary of Treasury and a staunch Democratic-Republican, believed that "the existence of the United States as a nation presuppose[d] the power enjoyed by every nation of extending their territory by treaties." Letter from Al-

these realms, either on the basis of sovereign authority or by reading constitutional text broadly so as to provide Congress grants of authority in these areas.[31] Moreover, as the Court moved into the twentieth century, it yoked Congress's vast authority over immigration to a wider, twentieth-century theory of plenary federal power to conduct foreign affairs.[32] In short, Congress's plenary power over immigration is not *sui generis.* Rather, it is part of a judicial tradition of relying on international legal authorities and broad constructions of constitutional text in upholding congressional action in a number of spheres the Court understands to be not purely domestic.

B. Judicial Limitations and Scholarly Criticism

On the most aggressive reading of the plenary power doctrine, Congress would have untrammeled and unreviewable authority to regulate all activity concerning noncitizens in the United States. The Fuller Court itself rejected this broad proposition in 1896, holding that Congress could not impose criminal sanctions on an unlawfully present individual without providing the constitutional protections of a trial.[33] Over the last 125 years, the Court has handed down numerous opinions touching upon Congress's plenary power of immigration. The Court has sustained robust congressional authority over the border

bert Gallatin to Thomas Jefferson (Jan. 13, 1803), *in* SELECTED WRITINGS OF ALBERT GALLATIN 211, 213 (E. James Ferguson ed., 1967).

31. *E.g.*, United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (holding that Congress has unlimited jurisdiction to punish criminal conduct in Indian territory); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840) (permitting Congress to "make all needful rules and regulations" in the original territories "without limitation"); Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 531 (1832) (holding that the Constitution conferred exclusive control over affairs with Native Americans onto Congress); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 568-69, 572 (1823) (declining to adjudicate a case concerning Native Americans because whatever authority Congress had over Indian affairs derived from the law of nations); Sere v. Pitot, 10 U.S. (6 Cranch) 332 (1810) (permitting Congress to create territorial courts with broader jurisdiction than Article III allowed); *see* Cleveland, *supra* note 17, at 25-80, 163-250.

32. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318-20 (1936). *See generally* Cleveland, *supra* note 17 (discussing the relationship between nineteenth-century plenary powers cases and *Curtiss-Wright*). The larger debate surrounding *Curtiss-Wright*, not relevant for present purposes, centers on whether the so-called foreign affairs power is located in the executive or the legislative branch. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237-43 (2001).

33. Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("[W]hen Congress sees fit to further promote [its immigration] policy by subjecting . . . aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

itself—that is, admission and expulsion policy.[34] Cases constitutionalizing the field generally have invalidated state regulation of immigrants already within the United States,[35] as Congress retained leeway to "regularly make[] rules that would be unacceptable if applied to citizens."[36] The few cases imposing constitutional requirements on border regulation tended to implicate only the Due Process Clause, the application of which the Court left ambiguous.[37]

The courts have made somewhat clear that legal entry into the United States is an important trigger for a noncitizen's ability to invoke constitutional rights.[38] Hiroshi Motomura succinctly captures the general state of the doctrine:

> The key statutory question has always been whether an alien has "entered" the United States . . . . [A]liens "outside" the United States would continue to find it very difficult to raise any constitutional challenge to immigration decisions. Those "inside" the United States could have some success with procedural claims but would be likely to have none with substantive claims.[39]

Significant scholarly criticism of the plenary power doctrine centers upon the inside/outside distinction. Scholars have advanced a number of competing

34. *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); 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."); Nishimura Ekiu v. United States, 142 U.S. 651, 663 (1892) (upholding Congress's right to detain in exclusion proceedings).

35. *E.g.*, Plyler v. Doe, 457 U.S. 202, 202 (1982); Graham v. Richardson, 403 U.S. 365, 374 (1971); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that the government lacks statutory authority to indefinitely detain admitted noncitizens with final orders of removal when removal is not reasonably foreseeable); Clark v. Martinez, 543 U.S. 371 (2005) (applying the *Zadvydas* holding to inadmissible noncitizens).

36. Mathews v. Diaz, 426 U.S. 67, 80 (1976).

37. *E.g.,* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("We agree with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country, although we do not decide the contours of the process that is due or whether the process accorded Plasencia was insufficient."); Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953).

38. Entry is a legal concept decoupled from whether a person is physically present in the United States. An individual paroled into the United States without formal admission, for example, is said not to have entered. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958). Whether an individual who physically entered the country without inspection has legally "entered" is generally beyond the scope of this Note, especially in light of the Court's decision in *Clark v. Martinez*, 543 U.S. 371 (2005), which suggests that inadmissible and deportable noncitizens stand on equal footing with respect to their ability to challenge some forms of detention.

39. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 557-60 (1990).

triggers for the application of constitutional protections—including, in some cases, substantive claims to remain in the country—to noncitizens once present in the United States.[40] Others contend that no trigger is needed and that constitutional protections automatically apply to all government interactions with foreign nationals.[41] In general, these criticisms of the plenary power model aim to diminish Congress's authority over immigration by limiting which individuals Congress can regulate.

A second source of scholarly criticism of the plenary power doctrine is the Court's inability to root the theory in constitutional text. Cases such as the *Chinese Exclusion Case* and *Fong Yue Ting* fail to identify a textual basis for allowing Congress to regulate immigration. Calling it a "constitutional fossil" lacking any "foundation in principle," Louis Henkin asserts that the extratextual justifications for plenary power over immigration cannot be justified in the aftermath of the due process revolution.[42] Even if one assumes the legitimacy of the policy's origin,[43] Professor Henkin's point is that the due process revolution—

40. *E.g.* T. Alexander Aleinikoff, *Aliens, Due Process and 'Community Ties': A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983) ("What we 'owe' persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community).").

41. *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 34 (1985) ("The people of the United States ordained a compact which . . . applies to everything done by the community and its officials, in the United States and elsewhere, affecting citizens and aliens alike, and concerning immigration no less than other matters."); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 179-82 (1987) (discussing "individual rights"). Gerald Neuman refers to Professors Legomsky and Henkin's theories as "[u]niversalist approaches requir[ing] that constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place." Neuman, *supra* note 16, at 916.

42. Henkin, *supra* note 22, at 862-63. Professor Henkin is by no means the only scholar to push for the application of the Due Process Clause to federal regulation of the border. *See, e.g.*, Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012); *cf.* Motomura, *supra* note 39 (urging courts to directly confront constitutional norms when interpreting immigration laws).

43. Professor Henkin does not make any such concession, noting that the doctrine was created "in the oppressive shadow of a racist, nativist mood a hundred years ago" and "reaffirmed during our fearful, cold war, McCarthy days." Henkin, *supra* note 22, at 862; *see also* Chin, *supra* note 22 (attributing the plenary power doctrine to nineteenth-century racist practices).

rooted as it is in constitutional text—trumps the extratextual edifice that is federal power over immigration.[44]

In a similar vein, Owen Fiss argues that the plenary power doctrine must, in certain contexts, yield to the modern understanding of the Equal Protection Clause.[45] Assuming the validity of the plenary power doctrine,[46] Professor Fiss argues that the Equal Protection Clause prohibits government from imposing "social disabilities" upon noncitizens—even those without lawful authorization to be present in the United States.[47] In this sense, Professor Fiss accepts the inside/outside distinction and uses it to bifurcate the field of immigration law by arguing that the Fourteenth Amendment prohibits government from imposing special disabilities on noncitizens once in the country, even in a world where Congress has unfettered authority to regulate the nation's borders.

Professors Henkin and Fiss attempt to subordinate Congress's plenary power over immigration to our modern understanding of the Constitution's guarantees of individual liberty in the Due Process Clauses and the Equal Protection Clause. The Court has waded into this debate only tentatively, and with inconclusive results. The following Section reviews the statutory scheme governing immigration detention and the leading cases interpreting those statutes.

44. Professor Henkin calls the plenary power doctrine "a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects." Henkin, *supra* note 22, at 862. He notes that the doctrine was created in an era

> in which constitutional restraints were deemed inapplicable to actions by the United States outside its territory; . . . when the Bill of Rights had not yet become our national hallmark and the principal justification and preoccupation of judicial review. It was an era before . . . important freedoms were recognized as preferred, inviting strict scrutiny if they were invaded and requiring a compelling public interest to uphold their invasion. Since that era, the Supreme Court has held that the Bill of Rights applies to foreign as well as to domestic affairs, in war as well as in peace, to aliens as well as to citizens, abroad as well as at home.

Id. at 862-63.

45. Owen Fiss, *The Immigrant as Pariah*, *in* A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 3 (Joshua Cohen & Joel Rogers eds., 1999). Many other scholars join Professor Fiss in advocating for the application of the Equal Protection Clause to the regulation of immigration. *See* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996); *see also* Chin, *supra* note 22, at 70 (discussing judicial review of "racial classifications in the immigration context").

46. *See* Fiss, *supra* note 45, at 16 ("In calling into question laws excluding immigrants from welfare and educational programs and barring them from working, I am not surreptitiously questioning the validity of laws regulating the admission of immigrants into this country.").

47. *Id.* at 15-21.

C. The Structure of Immigration Detention

Among the myriad manifestations of the plenary power doctrine in contemporary immigration law, Congress exercises substantial authority over the detention of noncitizens awaiting removal proceedings or deportation from the United States. The statutes governing immigration detention are complex and intimately related to the sometimes labyrinthine immigration removal process.[48]

A removal proceeding begins when an alleged noncitizen is served with a Notice to Appear in immigration court before an immigration judge.[49] In every case, the immigration judge is to determine if the respondent is removable from the United States.[50] If the immigration judge determines that the respondent is removable, the immigration judge enters a removal order against the respondent. Both the government and the respondent have the right to appeal an adverse decision of the immigration judge to the Board of Immigration Appeals (BIA).[51] The BIA issues the final administrative order in a given removal case by affirming or reversing the decision of the immigration judge. Only once the BIA has entered a final administrative order can the respondent enter the Article III courts by appealing directly to the courts of appeals, which have limited jurisdiction to review the orders of the BIA.[52]

48. "The statutory scheme governing the detention of aliens in removal proceedings is not static; rather, the Attorney General's authority over an alien's detention shifts as the alien moves through different phases of administrative and judicial review. This makes the task of determining where an alien falls within this scheme particularly difficult for a reviewing court, because the Attorney General's authority over the alien can present a moving target." Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 945-46 (9th Cir. 2008).

49. *See* 8 U.S.C. § 1229(a) (2012). Immigration judges are not Article III judges, but rather administrative adjudicators. *See* Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) (comparing and contrasting immigration judges with Article III judges); *see also infra* note 201 and accompanying text (discussing the independence of immigration judges).

50. *See* 8 U.S.C. § 1229a(c)(1)(A).

51. 8 C.F.R. § 1003.1(b) (2012). Like immigration judges, BIA board members are not Article III judges. *See* 8 C.F.R. § 1003.1 (creating the BIA). Together, the BIA and the immigration courts comprise the Executive Office for Immigration Review, or EOIR.

52. While the courts of appeal do have jurisdiction over petitions for review of the decisions of the BIA, that jurisdiction is not plenary. For example, Article III judges are statutorily barred from reviewing any discretionary decisions of the Attorney General and Secretary of Homeland Security. 8 U.S.C. § 1252 (2012). Constitutional review and review of questions of law is expressly preserved, at least on direct appeal of an administratively final removal order. 8 U.S.C. § 1252(b)(9). The government cannot appeal an adverse decision of the BIA.

Congress substantially transformed the statutes authorizing immigration detention in 1996.[53] During the pendency of litigation, most respondents are subject to *individualized* immigration detention—that is, the Department of Homeland Security (DHS) can weigh the individual's equities and order a person detained or released.[54] (A key exception to this individualized detention scheme during litigation is the mandatory detention of so-called "criminal aliens.")[55] The DHS decision can be appealed to the immigration judge and the BIA in a series of bond redetermination hearings.[56] After litigation terminates, by contrast, immigration authorities are categorically required by statute to detain all noncitizens subject to a final removal order for up to ninety days while the government makes the necessary travel arrangements.[57] If the individual cannot be removed from the United States within ninety days, detention reverts to being an individualized decision; authorities have statutory authority either to continue detention or to release the individual.[58] In short, immigration detention comes in three "phases"—permissive, mandatory, then permissive again.

The process varies for a group of individuals Congress has named "criminal aliens." The term is vacuous, and includes a wide variety of petty offenders.[59] These individuals are subject to mandatory, not permissive, detention during the pendency of their immigration case.[60] In practical terms, once immigration authorities arrest a noncitizen potentially deportable as a "criminal alien," they are required to detain them during proceedings and during the ninety-day removal period. The individual moves into the permissive detention category only if removal is not carried out after the removal period has expired.[61]

53. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 §§ 303, 305, 110 Stat. 3009 (codified at 8 U.S.C. §§ 1226, 1231). For a discussion of the change in the law and its motivation, see *Demore v. Kim*, 538 U.S. 510, 517-21 (2003), and Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44-45 (2010).

54. 8 C.F.R. § 236.1(c) (2012).

55. *See* 8 U.S.C. § 1226(c); *infra* notes 59-61 and accompanying text.

56. 8 C.F.R. § 236.1(d). Not everybody served with a Notice to Appear is eligible for release. As discussed above, so-called "criminal aliens" are subject to mandatory detention.

57. 8 U.S.C. §§ 1231(a)(1)-(3). The Court has effectively extended the removal period to six months. *See* Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

58. *See* 8 U.S.C. § 1231(a)(6).

59. *See infra* notes 162-166 and accompanying text for a description of the "criminal alien" category and a discussion of the category's overly capacious boundaries.

60. See 8 U.S.C. § 1226(c).

61. The Court has effectively extended the removal period to six months. *See supra* note 57.

Immigration detainees and public interest groups have challenged both the permissive and mandatory detention schemes. The first challenge, *Zadvydas v. Davis*,[62] came to Section 1231(a)(6),[63] which grants immigration authorities the discretion to continue the detention of noncitizens who are subject to final orders of removal, but who cannot be—for whatever reason—physically removed from the United States.[64] Applying the canon of constitutional avoidance,[65] the Court, in a 5-4 decision written by Justice Breyer, held that if the government has not removed the noncitizen six months after obtaining a final order of removal, then the noncitizen must be permitted to show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."[66] Upon such a showing, "the [reviewing] court should hold continued detention unreasonable and no longer authorized by statute."[67] Seeking to avoid cases of potentially indefinite immigration detention, the Court essentially rewrote Section 1231(a)(6) in what Justice Kennedy, writing in dissent, alarmingly referred to as a "systemic dislocation in the balance of powers."[68]

In one sense, *Zadvydas* is a startling case. The Court essentially ordered the release of noncitizens who had previously been ordered removed from the United States and determined to be a risk to public safety by the executive branch. This result is squarely at odds with the Court's nineteenth-century immigration jurisprudence. Indeed, Justice Scalia, dissenting in *Zadvydas*, vigorously defended the plenary power doctrine, saying "[d]ue process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will*. Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government."[69]

62. 533 U.S. 678 (2001).

63. All references to statutes and regulations are to Title 8 of the United States Code and the Code of Federal Regulations, respectively, unless otherwise indicated.

64. One petitioner, Kestutis Zadvydas, was stateless, and no country would grant him entry. 533 U.S. at 684. A second petitioner, Kim Ho Ma, was a Cambodian national, and Cambodia would not repatriate him. *Id.* at 686.

65. *See id.* at 689.

66. *Id.* at 701. Such a showing would create only a rebuttable presumption of release, which the government could counter. *Id.*

67. *Id*. at 699-700.

68. *Id*. at 705 (Kennedy, J., dissenting).

69. *Id*. at 703 (Scalia, J., dissenting) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 222-23 (1953) (Jackson, J., dissenting)) (emphasis added in *Zadvydas*). For further discussion of this passage of Justice Scalia's dissent, see *infra* Subsection II.B.2.

An alternative reading of *Zadvydas* emphasizes the triumph of a new theory of immigration control modeled on the claims of Professors Henkin and Fiss.[70] Against the backdrop of the plenary power doctrine, Justice Breyer emphasized the constitutional concerns raised by the prospect of indefinite immigration detention.[71] The majority pointed out Zadvydas had been lawfully admitted into the United States, suggesting that Congress's authority is diminished after admission.[72] But more critically, the Court expresses confidence in the judiciary's ability to review executive detention determinations in the immigration context notwithstanding the potentially sensitive foreign policy consequences of such decisions.[73] *Zadvydas*'s injection of the federal courts into reviewing immigration officials' detention decisions thus seems to cut against the plenary power doctrine, and indeed initial commentary on the *Zadvydas* decision foretold the end of Congress's plenary power over immigration.[74]

Any concern that the Court was drastically pruning the plenary power doctrine was extinguished, however, two years in later in *Demore v. Kim*.[75] Hyung Joon Kim, a legal permanent resident and citizen of South Korea, faced removal proceedings stemming from two criminal convictions for theft offenses, and immigration authorities ordered his detention under Section 1226(c), the mandatory detention statute for "criminal aliens."[76] Kim argued that a system of mandatory detention without any individualized "determination that he posed

70. *See supra* notes 43-47 and accompanying text; *see also* Demore v. Kim, 538 U.S. 510, 560 (2003) (Souter, J., concurring in part and dissenting in part) ("*Zadvydas* was an application of principles developed in over a century of cases on the rights of aliens and the limits on the government's power to confine individuals.").

71. *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *see supra* note 40 and accompanying text (discussing academic criticism of the entry fiction).

72. *Zadvydas*, 533 U.S. at 682 ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question."); *see also id.* at 693 (holding that the fact of admission "ma[k]e[s] all the difference"). Notwithstanding this qualification, in *Clark v. Martinez*, 534 U.S. 371 (2005), the Court extended the *Zadvydas* interpretation of Section 1231(a)(6) to cover all post-removal period detention, including the detention of inadmissible noncitizens.

73. *Zadvydas*, 533 U.S. at 700.

74. *E.g.*, Joshua W. Gardner, Note, *Halfway There:* Zadvydas v. Davis *Reins in Indefinite Detention, but Leaves Much Unanswered*, 36 CORNELL INT'L L.J. 177, 189-90 (2003); *cf.* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 71-72 (noting that the Court found the government's plenary powers argument to be "unavailing").

75. 538 U.S. 510.

76. *See supra* notes 59-61 and accompanying text.

either a danger to society or a flight risk" violated the Due Process Clause.[77] The Court considered two questions: first, whether it had jurisdiction to hear Kim's challenge,[78] and second, whether his detention was constitutional. After a majority of Justices found jurisdiction to hear the case, a different coalition of Justices then held that Section 1226(c) presented no due process concerns in authorizing the mandatory detention of noncitizens with certain criminal convictions even without any personalized assessment of risk or flight, with only Chief Justice Rehnquist in both majorities.[79] The Chief Justice, writing for the Court, relied on two observations to uphold Section 1226(c). First, the Court found persuasive the government's argument that detention under the challenged statute is "brief," usually measured in weeks or months.[80] Second, the Court found the statute to be a reasonable response to a large number of failures to appear in immigration court.[81] Stating "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal," the Court distinguished away *Zadvydas* and upheld Section 1226(c).[82]

As a doctrinal matter, *Demore* initially appears inconsistent with *Zadvydas*, and, indeed, such claims were the early focus of the academic commentary surrounding the later decision.[83] As a realist matter, however, the distinction between *Zadvydas* and *Demore* is somewhat easier to understand. The Justices are engaged in a now-ancient debate over the proper scope of Congress's plenary

77. *Demore*, 538 U.S. at 514.

78. The government had claimed that Section 1226(e) divested the Court of jurisdiction to hear Kim's challenge, an argument the Court rejected on statutory grounds. *See id.* at 516-18.

79. Justice Kennedy believed that Kim had been given adequate process. *Id.* at 532 (Kennedy, J., concurring); *see In re* Joseph, 22 I. & N. Dec. 799, 800 (BIA 1999). The goal of a *Joseph* hearing is not to determine eligibility for release, but rather to establish if the government has properly charged the respondent as a "criminal alien." In a *Joseph* hearing, the burden is on the respondent to show that his or her criminal conviction is insufficient to trigger a ground of removability on the basis of criminal history, and thus Section 1226(c) should not govern the respondent's detention. The *Joseph* inquiry is about whether the respondent is properly a member of the class contemplated by Section 1226(c). The hearing does not permit the respondent to challenge the fact of detention but only whether he or she is a member of the class.

80. *Demore*, 538 U.S. at 528-29.

81. *Id*. at 527-28.

82. *Id*. at 528.

83. *See* Suzanna Sherry, *The Unmaking of a Precedent*, 55 SUP. CT. REV. 231, 251 (2003) (calling *Zadvydas* and *Demore* "utterly inconsistent in tone and approach"); Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1498 n.23 (2003) (book review) (noting *Demore* "casts doubt on [the] trajectory" taken by the *Zadvydas* Court).

power over immigration and the relationship between that authority and regularly recognized constitutional rights, especially the rights to habeas review and due process. Largely absent from this debate is sufficient discussion of the historical availability of habeas corpus to challenge nonpunitive detention. The following Part turns to this topic.

II. Why a Constitutionalized Theory

Scholars challenging the plenary power doctrine seek to constitutionalize immigration law. In the previous Part, I presented the writings of Professors Henkin and Fiss as exemplars of this approach, though they are far from the only scholars advocating it. The purpose of this Part is not to replicate their argument, but rather to apply it to the immigration detention paradigm.

A. Habeas Corpus, Noncitizens, and Nonpunitive Detention

We start with constitutional text and the preratification legal practices that inform it. Though the precise contours of the Suspension Clause remain unsettled, the modern understanding of the Suspension Clause is that—at a minimum—it protects whatever jurisdiction habeas courts enjoyed in 1789.[84] Starting from this point of departure, Justice O'Connor, writing separately in *Demore*, argued that "it appears that in 1789, and thereafter until very recently, the writ [of habeas corpus] was not generally available to aliens to challenge their detention while removal proceedings were ongoing."[85] Justice O'Connor acknowledged that, because there is no direct analogue to immigration proceedings in the early days of the United States, this question is difficult to answer.[86] But the Justice stops there, without turning to suitable analogies that

84. INS v. St. Cyr, 533 U.S. 289, 301 (2001); *see also* Boumediene v. Bush, 553 U.S. 723, 746 (2008) ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ. But the analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." (quoting *St. Cyr*, 533 U.S. at 301) (citation omitted)); *id.* at 815 (Roberts, C.J., dissenting) (citing approvingly to *St. Cyr*). Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens's *St. Cyr* opinion. Justices Scalia and Thomas joined Justice O'Connor's *Demore* opinion; all three Justices dissented in *St. Cyr* but appear to have acquiesced to its reasoning by 2004. There thus appears to be general acceptance among the Justices that habeas jurisprudence in 1789 is the appropriate starting point for determining the scope of the Suspension Clause's protections. The remaining disagreement is as to whether 1789 also represents the ending point of the inquiry. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 543-45 (2010).

85. *Demore*, 538 U.S. at 539 (O'Connor, J., concurring in part and concurring in the judgment).

86. *See id.* at 538.

may shed light on the Founding generation's understanding of the writ they enshrined directly into the Constitution. Instead of focusing on the narrow example of deportation proceedings, the proper inquiry focuses on noncitizens' access to habeas review and on the availability of habeas review for nonpunitive detention.

The development of habeas corpus is well researched and thoroughly debated, and I do not seek involvement in the ongoing discussion of why the writ developed as it did in England.[87] My claim here is merely descriptive: habeas review of imprisonment was available to noncitizens held in what we would today recognize as regulatory, as opposed to punitive, detention.[88]

87. For collecting many of the sources in this section, I owe a significant debt to Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2521-22 (1998). Recent scholarship on early English practice is voluminous. *See, e.g.*, PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010); Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. UNIV. L. REV. 961 (2009); Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT'L L. 551, 552-58 (2009); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 923-54 (2012).

88. Modern doctrine distinguishes between punitive and regulatory detention. *See* United States v. Salerno, 481 U.S. 739, 746-47 (1987). Whether incarceration is punitive or regulatory turns on legislative intent in fashioning the sanction, *see id.*, and, if intent is not dispositive, a number of other factors. These include whether there is a scienter requirement, the historic understanding of the sanction, the relationship between the sanction and criminal activity, and, importantly for present purposes, whether the sanction is not excessive of its assigned purpose. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

As a formal matter, immigration enforcement and detention are regulatory, or civil, in nature. Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . ."); Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional To Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1489-90 (2011); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1015-21 (2002); *cf. United States v. Guevara-Umana*, 538 F.3d 139, 141-42 (2d Cir. 2008) (holding that absent collusion with criminal authorities, civil immigration and enforcement is civil); Wishnie, *supra* note 42, at 417 ("[i]mmigration law . . . is formally civil but functionally quasi-criminal . . . ."). Chelgren argues that though formally regulatory, immigration detention has in effect become punitive due to the increasingly harsh conditions found in immigration detention facilities and the prolonged nature of much immigration detention. *See* Chelgren, *supra*, at 1489-1490. *See generally* Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281 (2010) (noting the growing focus on the convergence of the immigration and criminal justice systems). Without discounting these arguments, I continue to approach immigration de-

English courts did not have statutory authority to review noncriminal detention until 1816.[89] But because habeas jurisdiction was a long-standing common law check on unlawful executive detention, that lack of statutory authority at the time of the Founding is largely irrelevant. Prior to 1787, English courts routinely reviewed noncriminal, that is, regulatory, detention. English courts reviewed the impressment of sailors,[90] child custody disputes,[91] confinement to insane asylums,[92] incarceration ordered due to failure to repay debt,[93] and even a husband's unlawful restraint of his wife's freedom.[94] These are not isolated cases; Paul Halliday's survey of habeas petitions issuing from the court of the King's Bench every four years during the period from 1502 to 1798 showed that slightly more than ten percent of habeas returns alleged no criminal basis for detention, but rather noncriminal explanations such as "'lunacy,' family custody disputes, and impressment."[95] Ninety-six percent of prisoners held for noncriminal reasons were ordered released.[96]

Not only were individuals able to challenge regulatory detention, habeas relief was also recognized to be available to non-Englishmen. According to *Halsbury's Laws of England*:

> In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the judges on habeas corpus. The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but *also to all persons within the realm who are under the protection of the Crown . . . and this whether they are alien friends or alien enemies*.[97]

Halsbury's Laws of England primarily draws on both statutes and cases from the twentieth century, but even prior to 1787,[98] English courts exercised jurisdiction

tention as a civil matter, largely because it is the more difficult claim to make, at least with respect to the historical evidence presented in this Part.

89. *See* Habeas Corpus Act, 1816, 56 Geo. 3, 100 (Eng.).

90. *E.g.*, Goldswain's Case, (1778) 96 Eng. Rep. 711 (C.P.).

91. *E.g.*, R. v. Delaval, (1763) 97 Eng. Rep. 913 (K.B.).

92. *E.g.*, R. v. Turlington, (1761) 97 Eng. Rep. 741 (K.B.).

93. *E.g.*, R. v. Nathan, (1730) 93 Eng. Rep. 914 (K.B.).

94. *E.g.*, Lister's Case, (1721) 88 Eng. Rep. 17 (K.B.).

95. Halliday, *supra* note 87, at 319.

96. *Id.*

97. 11 Halsbury's Laws of England 25 (3d ed. 1955) (emphasis added) (footnotes omitted); *see also* Halliday & White, supra note 87, at 605 ("[I]n the many cases of foreigners using habeas corpus the issue of their foreignness was almost never discussed, much less used to bar review of detention orders.").

98. *See supra* note 88 and accompanying text.

to adjudicate noncitizens' challenges to their status as prisoners of war[99] and slaves[100] as well as forms of private custody.[101] In short, neither noncitizens nor noncriminal detainees faced jurisdictional bars to habeas relief at English common law in 1789. The Founding generation in America was aware of the availability of habeas relief to noncitizens and in noncriminal cases in England.[102]

The early Republic's habeas jurisprudence confirms the availability of the writ to noncitizens and to individuals challenging nonpunitive detention. In a 1797 case, *United States v. Villato*, the circuit court granted habeas relief to a Spanish citizen; indeed, the question in *Villato* was whether the defendant had naturalized and could therefore be convicted of treason in an American court.[103] In *Ex Parte Bollman*, the Court ordered the pretrial release of a criminal detainee after finding such detention to be unjustified.[104] And in *United States v. Green*, Justice Story, riding circuit, entertained a habeas petition in a family custody dispute case without questioning the court's jurisdiction to hear a habeas challenge to private custody.[105] These cases yield a simple distillate: American judicial practice in the generation immediately proceeding the Founding confirms the English tradition of hearing habeas petitions brought by noncitizens and in noncriminal cases.

In an important sense, this historical evidence simply bolsters *Demore*'s initial holding that the Court had jurisdiction to hear the habeas petition. *Demore*, however, went on to uphold a system of mandatory detention for a large category of noncitizens with criminal convictions. The following Section links the history of Great Writ with the text of the Due Process Clause to show where the *Demore* analysis misses the mark.

99. *E.g.*, R. v. Schiever, (1759) 97 Eng. Rep. 551 (K.B.) (entertaining, but ultimately denying, a noncitizen's habeas petition seeking a declaration that the petitioner was not a prisoner of war).

100. *See, e.g.*, Somerset v. Stewart (*Somersett's Case*), (1772) 98 K.B. 449 (granting habeas relief to an African slave purchased in Virginia and transported to England, which had outlawed slavery by that time).

101. The most famous such challenge occurred just after the Founding. *See Ex parte* Hottentot Venus, (1810) 104 Eng. Rep. 344 (K.B.) (entertaining a habeas petition of a "female native of South Africa" allegedly held in private custody).

102. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *131. In particular, *Somersett's Case*, handed down in 1772, was well known throughout the colonies. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 147 (1952).

103. 28 F. Cas. 377 (C.C.D. Pa. 1797) (No. 16,662).

104. 8 U.S. (4 Cranch.) 75, 100 (1807) ("[A] court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise of that power.").

105. 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256).

B. Due Process at the Founding

Habeas review allows the detainee to seek judicial review of his detention. But what is the content of that review? Here, the Court has taken a bifurcated approach. In *Demore*, it first held that the courts had habeas jurisdiction to hear Kim's constitutional challenge; in other words, habeas was treated as the procedural vehicle for the litigation.[106] The *Demore* Court then turned to the Due Process Clause for the substantive standards it used to judge the constitutionality of the statute.[107] In *Demore*, the resulting judicial scrutiny was limited to little more than rational basis review of the statute.[108] In this Section, I argue that the Due Process Clause precludes the government from subjecting wide swaths of noncitizens to preventive detention without individualized review of the executive branch's decision to incarcerate the individual.

1. "No person . . ."

The Fifth Amendment, framed in terms of the individual person rather than a larger notion of the body politic, can be analyzed by reference to other provisions of the Bill of Rights.[109] The Second and Fourth Amendments speak of "the people."[110] Professor Akhil Amar has advanced a "republican reading" of the word "people" in these amendments.[111] Amar argues that "the people" is a direct reference to the militia;[112] it is precisely because "the people" form the militia that the Constitution secures their right to bear arms and repel illegal searches. These amendments aim to check government tyranny; by ensuring the government could not confiscate the militia's weapons, the militia would re-

106. Demore v. Kim, 538 U.S. 510, 516-17 (2003).

107. *See id.* at 528 ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.").

108. The Court never states what standard of review it employs, but its inquiry mirrors the rational basis test. *See id.* at 527-31.

109. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

110. U.S. CONST. amends. II & IV.

111. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 323-24 (2005).

112. *Id.* at 322-26.

main a viable check on government overreach.[113] This collective, republican reading of the Second and Fourth Amendments fits with the purpose of the Bill of Rights—namely, the creation of a structural restraint on government authority.[114]

In contrast to the Second and Fourth Amendments, the Fifth Amendment's command that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" is phrased in individual, rather than collective, terms.[115] This command has three relevant elements. First, the drafters of the Amendment chose to frame it as a broadly applicable individual guarantee. Inclusion among "the people" was predicated upon exercise of the franchise, but being a legal "person" was not.[116] Though Amar's exegesis is silent as to the relationship between noncitizens and the Fifth Amendment, the early Court was not. In *Murray's Lessee v. Hoboken Land and Improvement Comp.*, the Court stated that

> to ascertain whether [a] process, enacted by Congress, is due process . . . we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[117]

I do not invoke *Murray's Lessee* for its doctrinal authority.[118] Rather, I point to the practice at English common law of exercising jurisdiction over noncitizens' habeas petitions[119] to suggest that noncitizens would have been understood to

113. *See id.* at 323.

114. *Cf.* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2-3 (1998) (distinguishing between structural restraints on governmental authority and individually secured rights intended to promote individual freedom).

115. U.S. CONST. amend V.

116. *Cf.* AMAR, *supra* note 111, at 324 (noting women were not among "the people" but could be legal "persons" at the time of the Founding).

117. 59 U.S. (18 How.) 272, 276-77 (1855).

118. The Court would later abandon interpreting the Fifth Amendment in light of English common law. Hurtado v. California, 110 U.S. 516, 528 (1884) ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law."); *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 422 (2010) (discussing *Murray's Lessee* and subsequent Fifth Amendment jurisprudence).

119. *See supra* notes 97-101 and accompanying text.

be juridical "persons" between 1789 and 1791, when the Fifth Amendment was proposed and ratified.[120]

2. ". . . liberty . . ."

Similarly, the liberty interest protected by the Due Process Clause must protect an individual's freedom from regulatory detention (to include immigration detention) without due process of law. Again, it is helpful to interpret the word "liberty" with reference to other forms of individual freedom.

In its larger immigration jurisprudence, the Court frequently notes that noncitizens do not have a due process right to remain in the United States.[121] On this reading, the Constitution does not protect the noncitizen's right to stay. This debate is, to be sure, unsettled, with some recognition that removal from the United States is a penalty[122] and that at least long-term permanent residents may have a weighty liberty interest in their ability to remain in the United States.[123] But the law is clear—while a noncitizen may be entitled to procedural due process in an immigration hearing,[124] he has no substantive right to remain in the country.[125]

Plenary power theorists, however, have conflated this second-order liberty interest—the right to remain—with a constitutionally protected first-order liberty interest—the right to freedom from detention. Citing *Shaughnessy v. Mezei*, a Cold War-era case upholding the government's ability to prohibit the entry of a noncitizen into the country, Justice Scalia's dissent in *Zadvydas* is a helpful example of plenary power theorists' approach to immigration detention:

> "Due process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will.* Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government." Insofar as a claimed legal right to release into this country is concerned, an alien

120. There is a dearth of legislative history concerning the Fifth Amendment's drafting and ratification. *See* Williams, *supra* note 118, at 445 n.149 (collecting sources).

121. *E.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950) ("Whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.").

122. *E.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010); Bridges v. Wixon, 326 U.S. 135, 154 (1945); *see also* Wishnie, *supra* note 42, at 424-35 (describing the increasingly punitive nature of immigration laws).

123. *See* Demore v. Kim, 538 U.S. 510, 548 (2003) (Souter, J., concurring in part and dissenting in part).

124. *See supra* note 37 and accompanying text.

125. *See supra* note 121 and accompanying text.

> under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right.[126]

Justice Scalia starts with the premise that an inadmissible alien may assert neither substantive nor procedural due process rights at the gate to the country. Indeed, in *Mezei* the Court held that Mezei, a noncitizen stranded on Ellis Island seeking admission into the United States, had neither a substantive right to enter the country nor a procedural right to challenge the government's decision not to admit him.[127]

In extrapolating from this doctrinally uncontroversial premise, however, Justice Scalia's argument loses force. How does Mezei's lack of a substantive right to *enter the country* bear on Zadvydas's claim to *freedom from incarceration* once lawfully admitted into the United States? Justice Scalia offers no justification for the conflation of these two distinct liberty interests. Indeed, it would be difficult to do so. The former interest is nowhere mentioned in the Constitution; that document's silence with respect to any right of entry facilitated the development of the extratextual plenary power doctrine upon which Justice Scalia relied. By contrast, the Founding generation specifically incorporated a habeas corpus guarantee into the Constitution and recognized a liberty interest in the Fifth Amendment. The historical availability of habeas relief from nonpunitive and even private detention suggests that the "liberty" protected by the Fifth Amendment must encompass freedom from any government-ordered restraint.[128] Constitutional text thus cuts against Justice Scalia's argument by expressly protecting the first-order liberty interest—freedom from incarceration—while leaving successive generations less direction with respect to the second-order liberty interest—freedom to be present.

3. ". . . due process of law . . ."

While I turn to constitutional text and historical practice to show that a noncitizen's right to challenge regulatory detention falls within the scope of the Fifth Amendment's Due Process Clause, I rely on modern practice to guide the structuring of the ensuing review. With the growth of the administrative state

126. Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting) (citation omitted) (quoting *Mezei*, 345 U.S. at 222-23). Though written in dissent, the logic of Justice Scalia's dissent carried the day in *Demore*.

127. 345 U.S. at 212-16.

128. This is not a case of seeking constitutional protection for a life, liberty, or property interest that was not recognized in 1789, but is understood to fit within the modern conception of any of those terms. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing for constitutional protection of entitlement payments as "property" protected by the Due Process Clause). Without expressing any opinion on such an argument, I do not seek to expand the boundaries of what "liberty" encompassed at the time of the Founding.

and in the wake of the due process revolution, our modern conception of due process has changed. Take, for example, tax collection. In the early Republic, petitions for relief from penalties on unpaid taxes were presented to a federal judge, who had statutory authority to create a record of the taxpayer's appeal.[129] The judge then forwarded the record onto the Secretary of the Treasury, who adjudicated the petition.[130] The Secretary's decision was final; there was no judicial review.[131] Contrast that relatively simple system with today's method of adjudicating taxation disputes: an Article I Tax Court reviews unpaid deficiencies while refund claims can be brought either in the district court or the Court of Federal Claims. Then, depending upon which lower court heard the initial litigation, appellate review may lie either in the Court of Appeals for the Federal Circuit or one of the twelve non-specialized courts of appeals.[132] This shift to more process, both administrative and judicial, can also be seen in the provision of veterans' benefits,[133] entitlement programs,[134] and public employment decisions,[135] among other facets of life in the administrative state. In short, our modern understanding of the level of process "due" varies significantly from the Founding generation's conception.

Nevertheless, I need not completely abandon my commitment to drawing on historical practice. Habeas review of nonpunitive detention prior to 1789 provides a strong analogy to the modern Court's preventive detention jurisprudence. The remainder of this Section seeks to draw the analogy between these ancient cases and modern judicial practice.

One case in particular merits special discussion. In *Rex v. Turlington*, a husband committed his apparently sane wife, Deborah D'Vebre, to an asylum in the midst of a marital dispute.[136] Lord Mansfield issued a writ of habeas corpus,

129. An Act To Provide for Mitigating or Remitting the Forfeitures and Penalties Accruing Under the Revenue Laws, in Certain Cases Therein Mentioned, ch. 12, § 1, 1 Stat. 122, 123 (1790); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1331-32 (2006).

130. Mashaw, *supra* note 129, at 1331-32.

131. *Id.*

132. MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 85, 88 (6th ed. 2009).

133. Many Revolutionary War veterans had to petition Congress directly for their benefits, which would only be conferred upon approval of a private bill. *Cf.* Mashaw, *supra* note 129, at 1332-33 (describing judicial objections to the 1792 Pension Act). Today, claims are adjudicated by the Board of Veterans' Appeals, with appellate review by the Court of Appeals for Veterans Claims and then the Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 7104, 7252, 7292 (2012).

134. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970).

135. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972).

136. R. v. Turlington, (1761) 97 Eng. Rep. 741 (K.B.).

ordered a neutral doctor to examine Mrs. D'Vebre, and, as "[s]he appeared absolutely free from the least appearance of insanity," ordered her release.[137]

Turlington bears strong resemblance to contemporary regulatory detention cases. It presages a line of cases reviewing civil commitment of the mentally ill. In *Foucha v. Louisiana*, the Court reviewed that state's mechanism for ordering the civil commitment of a criminal defendant acquitted by reason of insanity.[138] The Court noted that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"[139] and further stated that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[140] In *Addington v. Texas*, another civil commitment case, the Court noted that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[141] While neither *Foucha* nor *Addington* bans civil detention, they do link the loss of civil confinement to the liberty interest protected by the Due Process Clause.

Foucha and *Addington* are only two in a line of preventive detention cases. Perhaps most relevant is *United States v. Salerno*,[142] in which the petitioners brought a constitutional challenge to the Bail Reform Act,[143] which permits pretrial detention of criminal defendants. The *Salerno* Court ultimately upheld the Act, but did so even while seeking "not [to] minimize the importance and fundamental nature" of an individual's liberty interest.[144] In recognition of the fundamentally important nature of the infringement, the *Salerno* Court sustained the Bail Reform Act only after noting that the government provided detainees a number of safeguards.[145] In another quasi-criminal context, specifically the detention of delinquent minors, the Court has also recognized the funda-

137. *Id.*

138. Foucha v. Louisiana, 504 U.S. 71 (1992).

139. *Id.* at 80 (quoting Jones v. United States, 463 U.S. 354, 361 (1983)).

140. *Id.* (citing Youngberg v. Romero, 457 U.S. 307, 316 (1992)); *see also id.* at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.").

141. 441 U.S. 418, 425 (1979); *see also Foucha*, 504 U.S. at 77-80 (describing the liberty interest in civil commitment hearings for the mentally ill).

142. 481 U.S. 739 (1987).

143. *See* 18 U.S.C. § 3142 (2012). Pretrial detention is regulatory detention. *Salerno*, 481 U.S. at 746.

144. *Salerno*, 481 U.S. at 750; *see also id.* at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

145. For a discussion of these safeguards, see *infra* Section IV.B.

mental liberty interest at stake and specifically held that the Due Process Clause governs the applicable detention scheme.[146]

In this Part, I have sought to link pre-1789 English habeas practice to the Supreme Court's modern regulatory detention jurisprudence. The Due Process Clause and habeas corpus review have historically been available to noncitizens and to individuals challenging regulatory detention (including noncitizens). The Due Process Clause constitutionalizes the liberty interest implicated in these early English cases, a point recognized in the modern cases. In Parts III and IV, I return to the Court's modern regulatory detention jurisprudence to describe the operation of a constitutionalized immigration detention system.

III. Constitutionalizing Mandatory Immigration Detention

Broadly speaking, statutes authorizing immigration detention can be classified as either mandatory or permissive. Mandatory detention statutes require the government to detain certain groups of noncitizens, usually based on a criminal conviction[147] or the status of their immigration proceeding.[148] Permissive detention statutes confer large discretion to the government by allowing law enforcement to set bond for noncitizens in immigration proceedings.[149] Because of their different modes of operation, the constitutional analysis of each category of statutes differs. In this Part, I discuss the implications of a constitutionalized immigration detention theory for mandatory detention. In Part IV, I discuss the implications for permissive detention.

A. *The Statutory Scheme*

Two statutes authorize categorical immigration detention. Sections 1226(c) and 1231(a)(6) require the government to detain noncitizens without any inquiry into individual circumstances. Group membership, either as an alleged "criminal alien" or as the subject of an unreviewable final order, suffices to trigger mandatory detention.

Section 1226(c) requires the government to detain "criminal aliens" during the pendency of their immigration proceedings.[150] Ordinarily, after initiating removal proceedings against an individual, administrative adjudicators determine if the person will be detained, released on bond, or released on their own

146. *See* Schall v. Martin, 467 U.S. 253, 265 (1984) (describing a juvenile's interest in "freedom from institutional restraints" as "substantial").

147. 8 U.S.C. § 1226(c) (2012).

148. 8 U.S.C. § 1231(a)(2) (2012) (mandating detention for individuals with judicially final removal orders).

149. These initial bond determinations are later reviewed by immigration judges. *See infra* Part V.

150. 8 U.S.C. § 1226(c).

recognizance.[151] But the situation is different for most individuals who are deportable on the basis of criminal convictions. Congress requires the government to detain these so-called "criminal aliens" while the respondent's immigration case is litigated in the immigration court, the BIA, and then the court of appeals.[152] Section 1226(c) does not entitle the noncitizen to any process weighing the traditional bail factors, including his risk of flight and ties to the community.[153] This is the statute upheld in *Demore v. Kim*.[154]

After the litigation is over and a final removal order is entered against the noncitizen, Section 1231(a)(2) requires the government to arrest the individual. Unlike Section 1226, which treats individuals with criminal records differently than all other respondents, Section 1231(a)(2) applies to any person subject to a final removal order. Once a removal order is entered, the "removal period" begins. The statute defines the removal period as a ninety-day window in which the government is supposed to effectuate the detainee's deportation from the United States.[155] Approximately eighty percent of all final orders of removal are executed within the anticipated ninety-day window.[156] The Supreme Court implicitly upheld the constitutionality of Section 1231(a)(2) in *Zadvydas v. Davis*, when it found that immigration detention can be considered prolonged (and thus presumptively unconstitutional) six months after a removal order becomes final.[157]

B. *Constitutional Analysis*

In *Schall v. Martin*, the Court faced a challenge to a New York statute authorizing pretrial detention of juveniles. Writing for the Court, Chief Justice Rehnquist noted that such detention is regulatory in nature, and then went on to state the test for evaluating regulatory detention schemes:

> The question before us is whether preventive detention of juveniles . . . is compatible with the "fundamental fairness" required by due process. Two separate inquiries are necessary to answer this question. First, does

151. *See* 8 U.S.C. § 1226(a); *see supra* notes 54-58 and accompanying text (describing the general bond process for noncitizens without criminal convictions).

152. *See supra* notes 58-61 (describing mandatory detention of noncitizens with criminal convictions). See *infra* note 163 for a description of the composition of the "criminal alien" class.

153. Respondents charged as "criminal aliens" are entitled to a *Joseph* hearing. *See supra* note 79.

154. *See* 538 U.S. 510, 529 (2003).

155. 8 U.S.C. § 1231(a)(1)(A) (2012).

156. Office of Inspector General, Department of Homeland Security, ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States 10 (2007).

157. 533 U.S. 678, 701 (2001).

> preventive detention under the . . . statute serve a legitimate state objective? And, second, are the procedural safeguards contained in the [statute] adequate to authorize the pretrial detention of at least some juveniles charged with crimes?[158]

This passage represents a succinct statement of the law at the time,[159] and subsequent regulatory detention cases applied it.[160]

When considering Sections 1226(c) and 1231(a)(2), the answer to the first *Schall* question is a resounding "no." In *Demore,* the government defended Section 1226(c) by arguing that the statute furthered two important governmental interests: protecting the public from dangerous noncitizens and ensuring compliance with the immigration laws by preventing flight.[161] But closer examination makes plain the true governmental interest at play in Section 1226(c): administrative convenience.

Section 1226(c) makes no effort to determine which noncitizens are flight risks or a danger to public safety. Instead, the section uses a single, overbroad criterion as a proxy for these characteristics. Given the misalignment between past criminality on one hand and either a propensity to flee or to be dangerous on the other, the governmental interest behind Section 1226(c) must be to ease the administrative burden of determining which individuals will be detained during immigration proceedings.[162]

Not all noncitizens with criminal convictions are potentially dangerous or flight risks. Any individual removable on the basis of a conviction of an "aggravated felony" or a "crime involving moral turpitude" must be detained under

158. Schall v. Martin, 467 U.S. 253, 263-64 (1984) (citations omitted).

159. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (holding that regulatory detention is permissible when, among other satisfied inquiries, the state's asserted interest "to which [the detention] may rationally be connected is assignable for it, and whether [such detention] appears excessive in relation to the alternative purpose assigned" to it).

160. *E.g.*, United States v. Salerno, 481 U.S. 739, 747-52 (1987) (citing and applying the test elaborated in *Schall*).

161. Brief for the Petitioner at 12-22, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560, at *10-14. For a discussion of these rationales, see *infra* Section IV.A.

162. Legislative history provides some support for the idea that Congress saw Section 1226(c) as administratively convenient. *See* Brief for the Petitioner at 21, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31016560, at *14 ("'Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those "criminal aliens" released on bond.'") (quoting S. Rep. No. 104-48, at 32 (1995)). Instead of determining which individuals might be "no-shows," the mentality is to lock down anyone Congress thought *might* flee.

Section 1226(c). The definitions of these phrases are overly broad,[163] and include many minor crimes that neither involve dangerous activity nor imply that the individual may flee when faced with immigration proceedings.[164] The statute

163. Certain convictions for shoplifting, gambling crimes, and failure to appear in court are "aggravated felonies." 8 U.S.C. § 1101(a)(43) (2012). *See also* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV 1936, 1939-40 (2000) (criticizing the "Alice-in-Wonderland-like definition of the term 'aggravated felony'"); Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provisions of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 296-314 (2003) (tracing the expansion of deportation of criminal noncitizens from its nineteenth-century origins through its rapid transformation in the 1990s). An aggravated felony need not be "aggravated" or even a felony, as many misdemeanors under state law "count" as an aggravated felony for immigration purposes. Morawetz, *supra*, at 1939; *see, e.g.*, Biskupski v. Attorney Gen., 503 F.3d 274, 280 n.10, 281 (3d Cir. 2007) (holding that a conviction for theft, a misdemeanor at state law, constituted an "aggravated felony" and listing similar holdings from the courts of appeals); *In re* Small, 23 I. & N. Dec. 448, 449 (BIA 2002) ("[W]e conclude that the offense, although a misdemeanor, meets the definition of an 'aggravated felony.'").

The "crimes of moral turpitude" category embraces nearly any crime involving fraud or malice. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 689 n.1 (A.G. 2008) (defining crime involving moral turpitude as involving "reprehensible conduct and some degree of scienter"). Crimes involving moral turpitude include Pell Grant fraud, Izedonmwen v. INS, 37 F.3d 416 (8th Cir. 1994), and even "failure to stop and render aid," Garcia-Maldonado v. Gonzales, 491 F.3d 284, 287 (5th Cir. 2007). Even the broad provision establishing removability for nearly any drug offense is more expansive than most might predict. The Immigration and Nationality Act grants the government authorization to deport any noncitizen "who is, or at any time after admission has been, a drug abuser or addict." 8 U.S.C. § 1227(a)(2)(B)(ii) (2012). In other words, no conviction is necessary to remove on these grounds; the government must only prove addiction. These examples establish that the term "criminal alien" goes far beyond violent or repeat offenders, and includes the pettiest of offenses.

164. Individuals are routinely placed in removal proceedings on the basis of decades-old criminal history. *See, e.g.*, Elise Foley, *Deportation Looms for 50-Year Legal Resident*, HUFFINGTON POST (Dec. 20, 2010), http://www.huffingtonpost.com/2010/12/20/deportation-looming-for-5_n_799434.html (describing Immigration and Custom Enforcement's attempt to deport a legal permanent resident over a subsequently expunged 1978 misdemeanor conviction for the theft of an eight-track tape). The sociological literature around the age-crime curve suggests that youthful criminal activity bears little relationship to an individual's later-in-life propensity to commit violent or dangerous acts. *See* Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, *in* 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 1, 18 (Albert J. Reiss & Jeffrey A. Roth eds., 1994); Travis Hirschi & Michael R. Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552 (1983); *see also* John H. Laub, Daniel S. Nagin & Robert J. Sampson, *Trajecto-*

defines a class using a single criterion that may fail to suggest a risk of future dangerous activity or propensity to abscond.

Moreover, while past criminal activity may in some situations be an appropriate guide for determining "dangerousness" or if an individual is a flight risk, judges setting bond in the immigration detention context should consider cross-cutting factors as well. *Salerno* endorses including "the history and characteristics" of the putative detainee.[165] An individual's "history and characteristics" may well augur in favor of release or in favor of detention. A judge should be able to consider factors such as a person's length of residence in the United States, family responsibilities, age, employment, military service, and health when determining if an individual is a flight risk or a danger to public safety. By failing to consider such information in ordering detention, the statute creates an overbroad class that fails to "bear some reasonable relation to the purpose for which the individual is committed."[166]

Like Section 1226(c), Section 1231(a)(2) is overinclusive. The statute requires up to ninety days of detention for noncitizens awaiting actual removal. It is true that the incentives to flee may increase, sometimes drastically, during the removal period. In 2008, Immigration and Customs Enforcement (ICE) estimated that there were approximately half a million people living in the United States with old deportation orders;[167] many of these individuals presumably failed to report to the immigration authorities at the commencement of the removal period.[168] But even if the overall proportion of persons eligible for release during the removal period is low, the government's interest in preventive detention will not be sufficient to deny individualized process to all.[169] Like Sec-

ries of Change in Criminal Offending: Good Marriages and the Desistance Process, 63 AM. SOC. REV. 225, 230 (1998) (showing models of the age-crime curve).

165. *Salerno*, 481 U.S. at 751.

166. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

167. Margot Mendelson, Shayna Strom & Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*, MIGRATION POL'Y INST. 3 (Feb. 2009), http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

168. Not all individuals with old orders fail to report for deportation. A tremendous number of removal orders are issued in absentia, see 8 U.S.C. § 1229a(b)(5) (2012), which presents the possibility of due process deprivations in immigration court. For general background, see *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), and Rebecca Feldmann, Note, *What Constitutes Exceptional? The Intersection of Circumstances Warranting Reopening of Removal Proceedings After Entry of an In Absentia Order of Removal and Due Process Rights of Noncitizens*, 27 WASH. U. J.L. & POL'Y 219 (2008).

169. Young children, the elderly, and the sick and hospitalized are all examples of groups of individuals who may be particularly sympathetic candidates for release from custody during the removal period. And even outside those groups, the courts may find that the government can show no particularized finding of dangerousness or risk of flight for a given individual.

tion 1226(c), Section 1231(a)(2) sweeps too broadly in infringing on a fundamental right. Both assumptions—that "criminal aliens" and those subject to removal are flight risks—are flawed.

Mandatory prevention statutes fail to "serve a legitimate state objective" by drawing a broad conclusion on the basis of a single criterion for the sake of administrative convenience.[170] The flawed assumptions embedded in the provisions offer insufficient justification for statutes authorizing the detention of thousands of people without any individualized process.[171] Left without a sufficiently heightened or compelling interest to justify these classifications, the government is unable to distinguish mandatory detention in the immigration context from other forms of regulatory detention, all of which require individualized review. The next Part examines the implications of the regulatory detention case law in the immigration detention context.

IV. Constitutionalizing Permissive Immigration Detention

In the preceding Part, I argued that statutes authorizing categorical immigration detention are unconstitutional. I do not contend that immigration detention itself is unconstitutional; in fact, I acknowledge that in many cases the government should be able to detain noncitizens both during the pendency of immigration proceedings and during the removal period. The remaining task is to discern when such detention is appropriate and which procedural safeguards must be in place for it to occur.

A. *Defining the Government's Interest*

The rationales for immigration detention must be "rationally . . . connected"[172] to "legitimate state objective[s]."[173] The government defends immi-

170. Schall v. Martin, 467 U.S. 253, 264 (1984).

171. Categorical immigration detention statutes are also invalid under the irrebuttable presumption doctrine. Though the courts have largely abandoned the doctrine in favor of scrutiny review, the irrebuttable presumption doctrine would prohibit the use of criminal history as a proxy for dangerousness or flight risk. In *Cleveland Board of Education v. LaFleur*, the Court considered the policies of two different school districts that compelled pregnant schoolteachers to cease working and to draw on sick time as they reached a certain point in their pregnancies. The majority held that presumptions "sweep[ing] too broadly" that are justified solely on the basis of "administrative convenience [are] insufficient to make valid what is otherwise a violation of due process of law." 414 U.S. 632, 644, 647 (1974). The doctrine was later limited to apply only to "affirmative Government action which seriously curtails important liberties cognizable under the Constitution." Weinberger v. Salfi, 422 U.S. 749, 785 (1975). The act of jailing an individual is certainly an "affirmative Government action" and thus the irrebuttable presumption doctrine is sufficiently vital to proscribe categorical immigration detention.

172. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

gration detention statutes by asserting its interest in ensuring compliance with the immigration laws and the public's safety. While these interests are certainly legitimate, the harder question to answer is whether immigration detention is "rationally . . . connected"[174] to them in such a way that immigration detention is not excessive.[175]

Preventing flight is reasonably related to enforcement of the immigration laws. If an individual is going to flee the jurisdiction of the immigration court or the execution of a removal order, the government should be able to detain that individual to ensure compliance with its laws. This compliance rationale provides the historical justification for bail and pretrial detention in the criminal justice context.[176]

Although enforcement of the immigration laws is a civil matter, and detention is abnormal in civil law, immigration differs from a run-of-the-mill torts action. Incentives to flee an immigration proceeding can be great.[177] The efficacy of the nation's immigration laws depends on the government's ability to achieve compliance with those laws, and in some cases detention may be necessary to ensure that compliance.

The flight risk rationale is limited, however, by the government's ability to effectuate an individual's removal from the United States. This is the intuition guiding *Zadvydas*: when the government cannot enforce its immigration laws, those same laws cannot justify an individual's detention. There are a variety of situations in which the subject of a final, unreviewable removal order cannot be physically removed from the United States. Removal may be withheld in accordance with international refugee conventions.[178] His home country may refuse repatriation; he may be stateless;[179] or removals to that country may be sus-

173. 467 U.S. at 264 (1984).

174. *Kennedy*, 372 U.S. at 168-69.

175. Both the *Kennedy* and *Salerno* Courts specifically focus on the question of "excessiveness." *See* United States v. Salerno, 481 U.S. 739, 747 (1987) ("Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve."); *Kennedy*, 372 U.S. at 168-69.

176. *See* Carbo v. United States, 82 S. Ct. 662, 665 (Douglas, Circuit Justice 1962).

177. The relatively high number of individuals who fail to comply with removal orders underscores this point. *See* Demore v. Kim, 538 U.S. 510, 562-64 (2003).

178. The United States withholds or defers removal when repatriation would be a violation of the Refugee Convention of 1951, 8 U.S.C. § 1231(b)(3)(A) (2012), or the Convention Against Torture, 8 U.S.C. § 1231 note; 8 C.F.R. §§ 1208.16-.18 (2012). *See generally* Committee Against Torture, *Status of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Reservations, Declarations and Objections Under the Convention*, U.N. Doc. CAT/C/2/Rev.3 (Mar. 1994).

179. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001).

pended during wartime[180] or a natural disaster.[181] In these situations the flight risk, or compliance, rationale must therefore be limited by the foreseeability of actual removal from the United States, at least after a removal order is entered against the noncitizen.[182]

The public safety rationale presents a closer call. The plenary power doctrine permits Congress to consider criminal history in regulating immigration—that is, to decide whether an individual can remain in the country on the basis of criminal misconduct. But that is an entirely different endeavor from using past criminality to prospectively regulate an individual's conduct once a criminal sentence is served.[183] Other circumstances under which an individual may be detained prospectively are narrow.[184] While the government is free to subject noncitizens to the same civil commitment regimes that confine citizens,[185] principles of fundamental fairness prohibit the government from making an end-run around the strong presumption, enshrined in the Suspension Clause and Fifth Amendment, against prospective detention.

The nation's intricate criminal justice system—including police, criminal courts, prisons, parole, and probation—seeks to regulate public safety. These institutions do not discriminate based on alienage; noncitizens can be investigated, tried, convicted, and incarcerated for criminal misconduct just as citizens can.[186] The institutions protecting public safety are distinct from the nation's vast immigration system, which is charged with the enforcement of civil law.[187]

180. *See* 8 U.S.C. § 1231(b)(2)(F) (anticipating difficulties removing noncitizens during wartime).

181. *See, e.g.*, Julia Preston, *In Quake Aftermath, U.S. Suspends Deportations to Haiti*, N.Y. Times, Jan. 13, 2010, http://www.nytimes.com/2010/01/14/world/americas/14deport.html.

182. In situations where removal is only temporarily impossible, the government may have an independent interest in obtaining a removal order even if removal is unforeseeable. In these situations, detention may be justified on the compliance rationale during immigration proceedings. This situation demonstrates the need for continuous review of immigration detention.

183. *See supra* Subsection II.B.2.

184. *See, e.g.*, 18 U.S.C. § 3142 (2012) (release or detention of a defendant pending trial); 42 U.S.C. § 16971 (2012) (civil commitment for persons alleged to be sexually dangerous).

185. *See* Andrew Bramante, *Ending Indefinite Detention of Non-Citizens*, 61 Case W. Res. L. Rev. 933, 967 (2011).

186. This norm—requiring criminal law to operate on all persons equally—is sufficiently strong that Congress prohibits the government from removing a convicted criminal before the expiration of his criminal sentence, albeit with certain exceptions. *See* 8 U.S.C. § 1231(a)(4) (2012).

187. Indeed, the generally robust plenary power doctrine has little bite in the criminal justice context. *Compare* Fong Yue Ting v. United States, 149 U.S. 698 (1893), *with* Wong Wing v. United States, 163 U.S. 228 (1896).

Immigration law's historical focus on civil law cuts against bringing public safety concerns within the ambit of immigration enforcement.

Indeed, the increasing conflation of the immigration and criminal justice systems has been the subject of much scholarly criticism[188] as well as tentative judicial skepticism.[189] Nevertheless, immigration authorities should not be categorically denied any ability to detain a noncitizen who poses a threat to public safety. To meet the requirement that regulatory detention not be "excessive," such detention must be limited to exceptional cases. This system may represent a significant departure from the current method of determining which individuals are subject to immigration detention.

Though a constitutionalized system of immigration detention would look different from the current regime, the governmental interests in both are the same, and they are permissible under the Court's preventive detention jurisprudence. From here, the next Section examines the procedures required to fully constitutionalize judicial review of immigration detention.

B. Procedural Protections

There is no reason to deny law enforcement officials or immigration administrators their current ability to make a preliminary detention determination. With the exception of categorical detention schemes, DHS officials already have the power to release, detain, or set bond.[190] Law enforcement officials should be able to release an arrestee on a promise to appear and should be able to set bond. Conferring this authority onto law enforcement ensures that law enforcement officers will expedite some releases from detention. Also in the interest of expeditious adjudication, immigration judges and the BIA should retain their current authority to administratively review the initial custody determination made by law enforcement. The alterations I propose do not change the current administrative practice.

The process of appealing an adverse administrative decision would also remain the same. Currently, the BIA's detention determination is reviewed in the district court, where it becomes an ordinary federal action susceptible to review in the courts of appeals and the Supreme Court.[191] Constitutionalizing immigration detention would not disturb this pathway to appellate review.

188. *See* Chelgren, *supra* note 88; Eagly, *supra* note 88.

189. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) ("[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." (citation omitted)).

190. *See supra* notes 54-56 and accompanying text.

191. *See, e.g.*, Leonardo v. Crawford, 646 F.3d 1157, 1160 (9th Cir. 2011) (reviewing for constitutional and legal error); Nnadika v. Attorney Gen., 484 F.3d 626 (3d Cir. 2007); *see also* Hernandez v. Gonzales, 424 F.3d 42 (1st. Cir. 2005) (mem.).

The procedures at each step of the process would change. Most importantly, the Article III courts would undertake de novo review of administrative detention decisions.[192] This Section offers a justification for such a standard of review while examining additional procedures necessary to ensure that review is adequate: the provision of counsel and requiring the government to bear the burden of persuasion.

1. De Novo Review in the Federal Courts

Administrative adjudicators are inadequate protectors of fundamental individual liberties. General principles of administrative law are motivated by efficiency—not liberty—concerns, and tribunals organized to further efficiency are poorly designed to safeguard individual rights. Moreover, the Executive Office for Immigration Review (EOIR) has proven itself particularly unable to exercise its authority independent of high-level political officials. These concerns cut in favor of permitting the Article III courts to give administrative detention determinations a hard, fresh look under the de novo standard.

Opponents of Article III review of immigration detention might stress the unique nature of such detention, claiming that EOIR adjudicators possess expertise in all immigration matters including detention determinations and further arguing that the Article III courts should either defer to (or abstain from reviewing) agency decisions concerning immigration detention. Indeed, the purported purpose behind the *Chevron* doctrine is to permit agencies to bring their expertise to bear on thorny areas of public law on the theory that generalist judges lack the capacity to develop.[193]

Chevron represents a shift in interpretive authority from the countermajoritarian courts to the politically responsive executive branch.[194] Such a preference for administrative adjudication may be permissible when sub-constitutional public or social rights are adjudicated or even encouraged in the name of efficiency.[195] Majoritarian rule, however, cannot be justified when the

192. The circuit courts are presently split over which standard to employ in reviewing immigration detention decisions, but none uses a purely de novo standard to evaluate risk of flight and danger to the community. For a detailed discussion of this circuit split, see *infra* Part V.

193. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45, 865-66 (1984).

194. Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 74-75 (2000).

195. *See* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1002 n.21 (2005) (collecting sources noting that efficiency is a "traditional ground[] for judicial deference to administrative decisions").

right adjudicated is constitutional.[196] The entire "purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities."[197] Given the Founding generation's textual commitment to preserving robust review of detention,[198] administrative adjudication of questions of physical liberty without robust judicial review is never appropriate, particularly given the proclivity of administrators to render politically popular adjudications.[199]

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196. Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 O.J.L.S. 235, 245 (2006) ("[F]or liberties . . . guaranteed by the Constitution itself . . . the individual is entitled to a hearing before a federal court on his or her claim."); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953) ("[A] necessary postulate of constitutional government [is] that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained."). While this position from Hart's Dialogue is not universally accepted, it represents the dominant view among federal jurisdiction scholars. *See, e.g.*, Richard H. Fallon, Jr., *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2038-39 (2007).

197. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 583 (1978) (arguing that the function of the judicial branch "is to protect dissenters from a majority's tyranny"); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 287 (1983) (declaring that courts "restrain the majority's worst excesses, in the name of the constitutional values that define our national community").

198. *See supra* Part II.

199. Agencies tend to pursue their missions aggressively regardless of their statutory (and constitutional) mandates:

> History clearly shows that, except in highly unusual circumstances, agencies read their authority expansively and often pursue agendas far beyond that envisioned when the agencies were created. These many causes include: pressure from the President or congressional committees; bureaucratic imperatives; and public (i.e., interest group) demands. Neither the President nor Congress is likely to narrow agency discretion to limit such tendencies when it is in their self-interest not to do so.

Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 992 (1999).

This explanation raises the prospect that interest groups have played a role in the drastic growth of the immigration detention system. While any discussion of interest groups is far beyond the scope of this Note, scholars have suggested that increasing immigration detention has "sav[ed] the private prison industry from the brink of bankruptcy." Spencer Bruck, Note, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 491 (2011); *see also* Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 439-40 (2011) ("[P]rivate companies managing contract detention facilities also operate the nation's private prisons.

Even if this were not so, however, general principles of administrative law would still suggest that administrative detention determinations should be judicially reviewed. *Chevron*'s emphasis on agency expertise is unavailing in a context in which Article III judges possess expertise at least equal to the agency in question. The district courts routinely consider evidence of flight risk, community ties, and other traditional bail factors when deciding whether and at what amount to set bail for criminal defendants.[200] Immigration judges do have similar experience, but *Chevron* does not contemplate deference to decisions made by administrators with expertise equal to that of the federal judiciary.

Turning to a specific analysis of EOIR, the agency exhibits a systemic lack of institutional independence and an inability to apply the law in an even fashion. Any independence EOIR adjudicators formally have from the political process is largely illusory.[201] Examples of political pressure abound. EOIR personnel are subject to summary removal by the Attorney General—a power Attorney General John Ashcroft utilized to undermine the independence of immigration judges.[202] Attorney General Ashcroft also altered BIA procedures, a move widely viewed (and condemned) as an attempt to prohibit EOIR adjudicators from issuing pro-immigrant decisions.[203] The EOIR hiring process has been criticized as biased and partisan.[204] DHS officials reportedly have engaged

These companies lobby simultaneously for the privatization of prisons and the expansion of the immigration detention facilities."); Robert Koulish, *Blackwater and the Privatization of Immigration Control*, 20 St. Thomas L. Rev. 462, 476-79 (2008) (tracing the growth of immigration detention to the political power of the private prison lobby).

200. *See* Alli v. Decker, 644 F. Supp. 2d 535, 541-42 (M.D. Pa. 2009).

201. EOIR adjudicators are not administrative law judges (ALJs), who enjoy significant protections from political influence. For a comparison of immigration judges and ALJs, see Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. Nat'l Ass'n Admin. L. Judiciary 471 (2008). For a discussion on proposed reforms to the structure of the EOIR administrative process, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 444-73 (2007), and Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 Duke L.J. 1847 (2010).

202. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 371-79 (2006); *see also Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing before the Subcomm. on Immigration and Border Sec., H. Comm. on the Judiciary*, 107th Cong. 57-61 (2002) (statement of Dana Marks Keener) (arguing, on behalf of the National Association of Immigration Judges, that EOIR should remain within DOJ rather than move to DHS to preserve the independence of immigration adjudicators from enforcement authorities).

203. *See* Legomsky, *supra* note 202, at 376-79.

204. *Id*. at 372-75; Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, Nat'l L.J. (May 30, 2007).

in ex parte communications with supervisory EOIR personnel for the purpose of winning a reversal of decisions adverse to the government.[205] The government also claims authority to reassign an EOIR adjudicator to a lower status job without providing that individual any process before the Merit Systems Protection Board.[206] Finally, the Attorney General can overturn any decision by an immigration judge or the BIA,[207] and also claims the authority to ignore an immigration judge's release order even when the respondent has established to the satisfaction of the immigration court that he is not a flight risk or a danger to the community.[208] These observations illustrate EOIR's inability to insulate individuals' core constitutionally protected rights from political preferences.

EOIR adjudication is uneven. One study suggests that the single most predictive factor of the ultimate outcome of asylum cases is the identity of the immigration judge who hears the case. This finding is particularly problematic because DHS officials may, in some cases, game the judge assignment lottery to select a preferred adjudicator.[209] No mass adjudication system can deliver uniform justice in every case, and the circuit split discussed in Part V of this Note is evidence of disuniformity within Article III adjudication. Nevertheless, mass administrative adjudication routinely leads to uneven results—results that are largely opaque to the public.[210] Such a system falls short of providing a "stable bulwark of our liberties" consistent with the Constitution's emphasis on due process and habeas corpus review.[211]

205. *See* Legomsky, *supra* note 202, at 373.

206. Legomsky, *supra* note 202, at 374.

207. 8 C.F.R. § 1003.1(h) (2012).

208. Matter of D-J-, 23 I. & N. Dec. 572 (A.G. 2003) ("INS may (*but is not required to*) grant release under that provision if the alien demonstrates to its satisfaction that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." (emphasis added)). Attorney General Ashcroft's opinion overturned a BIA decision that ordered the release of a Haitian asylum seeker who had proved that he was neither a flight nor a safety risk simply because release was contrary to the national interest. *Id.* at 573. Taken to its logical extreme (a short step from its actual position), the Attorney General's decision in *Matter of D-J-* permits executive detention of any noncitizen regardless of the bond provisions currently mandated by statute. *See* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 164-68 (2004).

209. *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

210. JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS, at xxi-xxii (1978). By contrast, circuit splits are visible and routinely resolved by the Supreme Court.

211. 1 WILLIAM BLACKSTONE, COMMENTARIES *137.

While administrative adjudication is not designed to check government encroachment on individual liberties, this is precisely the institutional role of the Article III courts.[212] Coupled with the importance of the individual interest at stake, these observations surrounding institutional capacity suggest little reason for Article III courts to defer to administrative detention determinations. Instead, the Article III courts ought to make de novo findings as to risk of flight and public safety.

2. Access to Counsel and the Burden of Persuasion

The government is required to provide counsel in a number of civil proceedings that may lead to incarceration.[213] That rule, however, is not categorical; counsel is not required in at least some administrative proceedings leading to incarceration.[214] The challenge here is to derive the principle at work in the Court's cases concerning the provision of counsel in civil proceedings and determine the implications for immigration detention proceedings.

The recent case of *Turner v. Rogers*[215] presents perhaps the most formidable obstacle to any theory that the Constitution requires counsel to be provided in immigration detention hearings. In *Turner*, the petitioner, an indigent parent, was held in civil contempt for failure to pay child support. The *Turner* Court ultimately held the petitioner's detention to be unlawful on an unrelated basis. *En passant* to its disposition of the case, the Court held that Turner had no right to government-provided counsel in the civil contempt hearing that led to his year-long incarceration.[216] The boundary between civil and criminal contempt is thin, and the duration of Turner's detention was significant, making *Turner* at least somewhat analogous to the immigration detention context.

Turner, however, speaks little to immigration detention. The Court intentionally states its holding narrowly, cabining its effect to "civ-

212. *See supra* notes 196-199 and accompanying text.

213. *See In re* Gault, 387 U.S. 1, 35-42 (1967) (requiring provision of counsel in civil juvenile delinquency proceedings); Vitek v. Jones, 445 U.S. 480, 496-97 (1980) (plurality opinion) (requiring the provision of counsel in an administrative hearing to determine if a criminal inmate can be transferred to a mental health institution); *cf.* 18 U.S.C. § 3142(f)(2)(B) (2012) (providing counsel for criminal defendants challenging pretrial detention).

214. *See, e.g.*, Turner v. Rogers, 131 S. Ct. 2507 (2011) (holding that the Due Process Clause does not require state-provided counsel in at least some civil contempt proceedings); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that the Due Process Clause does not require provision of counsel in probation hearings); *see also* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18 (1981) (holding that the state is not required to provide counsel in hearings to terminate parental rights).

215. 131 S. Ct. 2507.

216. *Id.* at 2520.

il contempt proceedings [concerning] an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."[217] Moreover, the Court disposes of *Turner* by pointing out that Rogers, the party bringing the contempt action, was not the state, but rather an unrepresented private litigant to whom Turner owed child support. The Court specifically noted:

> We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*" (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate.[218]

The implications of this passage for immigration detainees are clear. In immigration detention proceedings, an attorney always presents the government's case. More importantly, determining whether an individual is a flight risk or a potential danger to the community is complex, a point Congress itself acquiesced to in providing attorneys to pretrial detainees held according to those same governmental interests.[219]

Similarly, the government must bear the burden of persuasion in justifying immigration detention. As with the provision of counsel, there is no principled justification to deviate from the normal presumption against detention[220] when reviewing confinement incident to immigration proceedings. The government traditionally bears the burden in habeas proceedings that attack detention;[221] several courts of appeals have already held that the government has the burden of persuasion in habeas challenges to immigration detention.[222] Moreover, the

217. *Id.*

218. *Id.* (internal quotation marks and some internal citations omitted).

219. *See* 18 U.S.C. § 3142(f)(2)(B) (2012); *cf.* United States v. Salerno, 481 U.S. 739, 751 (1987) (noting, in upholding the Bail Reform Act, hat the provision of counsel is a procedural safeguard).

220. *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

221. This applies when a habeas proceeding is conducted under 28 U.S.C. § 2241 as opposed to a post-conviction habeas proceeding under 28 U.S.C. § 2254.

222. *See infra* notes 241-254 and accompanying text.

preventive detention cases require the government to meet a heightened burden of proof before any court can order civil confinement.[223] The Constitution's aversion to detention without sufficient process demands that immigration detainees be treated no differently than other subjects of regulatory detention.

Given the limited scope of *Turner* and the potentially lengthy course of immigration detention, there is no principled reason to accord immigration detainees fewer rights in challenging their regulatory detention than pretrial,[224] juvenile,[225] and mental health detainees.[226] Judicial review of administrative immigration detention decisions must occur in an Article III proceeding at which counsel is provided to the detainee and the government bears the burden of showing the individual is either a flight risk or potentially dangerous to society.

V. Current Practice in the Federal Courts

Zadvydas opened the door to limited judicial review of immigration detention.[227] In response to *Zadvydas*, the courts of appeals have had to grapple with critical questions surrounding the scope of review, leading to a circuit split on questions such as picking an appropriate forum and determining the scope of review. In this Part, I analyze the resulting circuit split among the U.S. Courts of Appeals for the Fifth, Ninth, and Tenth Circuits, and then compare the law in these circuits with the constitutionalized theory of immigration detention that I advanced above.[228]

Central to the circuit split are several regulations that the INS hastily promulgated shortly after *Zadvydas* in an effort to limit the scope of that decision.[229] The regulations created a system of administrative review[230] that takes place largely outside the jurisdiction of the immigration courts and entirely outside the jurisdiction of the federal courts.[231] Under the regulations, DHS officials

223. *E.g.*, Foucha v. Louisiana, 504 U.S. 71, 81 (1992) (overturning a civil commitment order where an individual was not "entitled to an adversary hearing at which the State must prove by *clear and convincing evidence* that he is demonstrably dangerous to the community" (emphasis added)).

224. *See* 18 U.S.C. § 3142(f)(2)(B).

225. *See In re* Gault, 387 U.S. 1, 34-35 (1967).

226. *See* Kansas v. Hendricks, 521 U.S. 346, 353 (1997) (evaluating the constitutionality of a Kansas civil commitment statute).

227. For a discussion of *Zadvydas*, see *supra* Section I.C.

228. These are not the only circuits to interpret *Zadvydas*, but these circuits' conclusions are broadly representative of the spectrum of post-*Zadvydas* litigation in the lower courts.

229. 8 C.F.R. §§ 241.1, 241.13, 241.14 (2012).

230. *Id.*

231. *See id.* § 241.14(a)(2).

begin to consider a detainee's case "prior to the expiration of the removal period."[232] If removal remains foreseeable, DHS continues to detain the individual.[233] If removal is not foreseeable, the government asks if there are various "special circumstances," which may include certain criminal convictions, that might justify continued detention.[234] The regulations purport to authorize the government to continue the detention of any person presenting "special circumstances" and do not contemplate any review of that detention beyond that provided by DHS.

The Tenth Circuit, in *Hernandez-Carrera v. Carlson*, deferred to the post-*Zadvydas* regulations, permitting the government to order immigration detention without any judicial supervision.[235] The *Hernandez-Carrera* Court reversed a district court's grant of a habeas petition for Santiago Hernandez Arenado, who had been detained for over a decade pursuant to Section 1231(a)(6).[236] Writing for the Tenth Circuit, Judge McConnell held that the government's interpretation of the statutes was entitled to *Chevron* deference, specifically finding that the post-*Zadvydas* regulations are reasonable interpretations of Section 1231(a)(6).[237] The Tenth Circuit relied on *National Cable & Telecommunication Ass'n. v. Brand X Internet Services*,[238] which held that agencies have the authority to interpret statutes in a manner inconsistent with previous court decisions so long as the last-in-time agency interpretation is a reasonable interpretation of the statute.[239] The Tenth Circuit found *Zadvydas* had interpreted an ambiguous statute, and, because the new regulations were reasonable and not constitutionally suspect, they were entitled to deference.[240]

The Ninth Circuit, by contrast, has held that the post-*Zadvydas* regulations are due no deference. In *Diouf v. Napolitano*,[241] the Ninth Circuit considered whether the nearly twenty-three-month detention of Amadou Diouf was unreasonable under *Zadvydas*. As discussed earlier in this Note, the government de-

232. *Id.* § 241.4(h)(1).

233. *Id.* § 241.3, 241.13.

234. *Id.* § 241.14.

235. 547 F.3d 1237 (10th Cir. 2008).

236. Brief for Appellees at 1-8, Hernandez-Carrera v. Carlson, 547 F.3d 1237 (10th Cir. 2008) (No. 08-3097), 2008 WL 2964463 at *1-8.

237. 547 F.3d at 1246.

238. 545 U.S. 967, 982-83 (2005).

239. *Id.* In other words, a court's interpretation of the statute is definitive only if it interprets the statute at *Chevron* step one. If a reviewing court moves onto *Chevron* step two and interprets a statute, an agency is later entitled to provide a differing interpretation of the same statute so long as it is reasonable. *Id.*

240. *Hernandez-Carrera*, 547 F.3d at 1256.

241. 634 F.3d 1081 (9th Cir. 2011).

tained Diouf after entry of a removal order.[242] Judge Fisher, writing for the panel, noted that *Chevron* deference is unavailable "to DHS regulations interpreting Section 1231(a)(6) . . . if they raise grave constitutional doubts," and so declined to defer to the post-*Zadvydas* regulations.[243] To avoid a head-on collision with the regulations, the *Diouf* court held that "the DHS regulations are appropriate but not alone sufficient to address the serious constitutional concerns raised by continued detention"[244] because "the private interests at stake are profound."[245] This language permits the Ninth Circuit to require more process prior to permitting prolonged detention under Section 1231(a)(6).

The Ninth Circuit turned to the famous three-factor *Mathews v. Eldridge* test[246] and ordered the government to provide Diouf a bond hearing before an immigration judge and an opportunity to appeal the immigration judge's determination to the BIA.[247] The Ninth Circuit ordered the district court to grant the habeas petition "unless the government establishes that the alien poses a risk of flight or a danger to the community" in a hearing before an immigration judge.[248] The Ninth Circuit's approach to the case is not to allow the federal court to review the noncitizen's detention directly, but rather to supervise additional administrative process not contemplated by the post-*Zadvydas* regulations.[249]

242. *See supra* notes 3-5 and accompanying text.

243. *Diouf*, 634 F.3d at 1090; *see id.* (quoting Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001)) ("Although we recognize that, in general, the Attorney General's interpretation of the immigration laws is entitled to substantial deference . . . *Chevron* principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe.").

244. *Id.* at 1091.

245. *Id.* at 1092; *see also id.* at 1087 (stating that an "important interest is at stake—freedom from prolonged detention").

246. *Id.* at 1090-91 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

247. *Id.* at 1092; *see id.* at 1091 (quoting Casas Castrillon v. DHS, 535 F.3d 942, 951 (9th Cir. 2008)). That the Ninth Circuit was ordering a hearing in Diouf's case is a fiction; the agency had already released Diouf from custody. *Id.* at 1084. The Ninth Circuit specifically held that the case was not moot on the voluntary cessation doctrine. *Id.* at 1084 n.3.

248. *Id.* at 1092. These factors depart from the *Zadvydas* standard, which looked only to the foreseeability of actual removal from the United States and not to characteristics of the individual.

249. The Ninth Circuit has held that "a federal district court has habeas jurisdiction under 28 U.S.C. § 2241 to review bond hearing determinations for constitutional claims and legal error." Singh v. Holder, 638 F.3d 1196, 1200 (9th Cir. 2011). This language implies that a habeas court in the Ninth Circuit does not review factual determinations or take new evidence.

The Fifth Circuit goes a step further than the Ninth Circuit and layers *judicial* process on top of the DHS regulations *and* the administrative review contemplated in *Diouf*. In *Tran v. Mukasey*, Judge Stewart upheld a district court's decision to grant habeas relief to Ha Tran, a mentally ill refugee convicted of manslaughter after killing his wife in the presence of their seven-year-old child.[250] According no deference to the BIA, which had ordered Tran's continued detention, the district court ruled that the government could not show that removal to Tran's native Vietnam was foreseeable, and therefore further immigration detention was unjustified. The *Tran* court took a stronger stance than either the Ninth or Tenth Circuits by endorsing the district court's direct, de novo review of Tran's six-year detention that followed his removal order.[251]

The *Tran* court held that the post-*Zadvydas* DHS regulations were impermissible constrictions of Section 1231(a)(6). On this point, *Tran* offers little analysis; the panel mentioned *Chevron* only in passing and failed to discuss *Brand X* at all.[252] Though it does not explicitly invoke the *Chevron* two-step process, the Fifth Circuit relied on the fact that the Supreme Court had twice considered the meaning of Section 1231(a)(6) and "twice held that Section 1231(a)(6) does not authorize indefinite detention for any class of aliens."[253] Taking that interpretation as the definitive construction of the statute, the Fifth Circuit permitted the court below to grant habeas relief to Tran. In other words, the Fifth Circuit understood *Zadvydas* to be interpreting Section 1231(a)(6) at *Chevron* step one, foreclosed further agency interpretation of the statute, and permitted the immigration detainee to litigate directly in the district court.[254]

The circuit split highlights different conceptions of the proper role of the federal judiciary in reviewing immigration detention, and each decision shows

250. 515 F.3d 478 (5th Cir. 2008). The Sixth Circuit has also determined that the district courts, and not EOIR, should hold the post-*Zadvydas* hearing. *Ly v. Hansen*, 351 F.3d 263, 272-73 (2003). Several district courts have also directly granted habeas relief. *E.g.*, Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455 (D. Mass. 2010); Monestime v. Reilly, 704 F. Supp. 2d 453 (S.D.N.Y. 2010).

251. The Tenth Circuit had not handed down *Hernandez-Carrera* at the time of *Tran*. The Ninth Circuit had not handed down *Diouf* either, but had essentially arrived at the *Diouf* holding in *Thai v. Ashcroft*, 389 F.3d 967 (9th Cir. 2004). *Tran* expressly adopts the logic of *Thai*. *Tran*, 515 F.3d at 483.

252. *See id.* The Fifth Circuit's failure to grapple with *Brand X* and ordinary principles of administrative law more generally may be traced to the government's briefs, which fail to mention *Brand X* and contain only a cursory analysis of administrative law. *See* Brief for Petitioner, *Tran* 515 F.3d 478, (No. 06-30361) 2006 WL 5721813 (failing to mention *Brand X*).

253. *Tran*, 515 F.3d at 484. The Supreme Court's second consideration of Section 1231(a)(6) occurred in *Clark v. Martinez*, 543 U.S. 371 (2005). In *Zadvydas*, the Court limited its holding that Section 1231(a)(6) does not authorize prolonged detention of noncitizens who have been admitted to the United States. The *Clark* Court extended *Zadvydas* to apply to any noncitizen described by the statute.

254. *See Tran*, 515 F.3d at 484.

the limitations of the plenary power doctrine in the immigration detention context. The Tenth Circuit's reliance on regular principles of administrative law conforms to the plenary power doctrine by permitting the government to exercise virtually unfettered discretion to detain noncitizens with valid removal orders. The Ninth Circuit has limited the role of the federal judiciary to the supervision of the administrative process, rather than providing a fundamentally fair proceeding within the Article III system. The Fifth Circuit, which has effectively adopted the de novo review I advocate for in Part IV, continues to judge the legality of detention by reference to the foreseeability of the detainee's removal, a criterion decoupled from the legitimate governmental aims advanced by the immigration detention system. Instead of adopting one of these models, a constitutionalized theory of immigration detention would employ the Fifth Circuit's procedural safeguards—the standard of review and burden of persuasion—and the Ninth Circuit's inquiry into dangerousness and flight risk.

Conclusion

Throughout this Note, I have aimed to develop and justify a constitutionalized theory of immigration detention. Such a system differs in some significant respects from our current plenary power-inspired administrative system by providing for true review of immigration detention decisions in fundamentally fair, Article III court proceedings.

While I have articulated a substantive theory of a constitutionalized immigration detention system, I have not suggested an appropriate agent of change for the reforms I present. Despite triumphant references to the federal courts as protectors of individual liberty,[255] I acknowledge that the courts are often institutionally constrained from effecting systemic reforms, such as altering vast, national administrative adjudication systems. Rather than the courts, it is Congress that has a primary role to play in immigration detention reform.[256] While proposals for comprehensive immigration reform have remained stalled in the legislative process, President Obama and several prominent Republicans have signaled a renewed interest in enacting meaningful, comprehensive immigration reform.[257] The sheer magnitude of the immigration detention system, the

255. *See, e.g.*, *supra* note 197.

256. By way of example, the expansion of due process in the veterans' benefits and tax adjudication contexts was established by Congress without judicial intervention. *See supra* notes 132-133 and accompanying text.

257. *See, e.g.*, Brian Bennett, *Obama Expects Immigration Reform "Very Soon" After Inauguration*, L.A. Times, Nov. 14, 2012, http://www.latimes.com/news/politics/la-pn-obama-immigration-reform-inauguration-20121114,0,3758450.story (quoting President Obama as "very confident we can get immigration reform done"); Melanie Mason, *Schumer, Graham Bringing Back Immigration Reform Plan*, L.A. Times, Nov. 11, 2012, http://www.latimes.com/news/politics/la-pn-schumer-graham-immigration-reform-20121111,0,6619152.story; Jeremy B. White, *Another Republican for Immigration Reform: McCain*, Int'l Bus. Times, Nov. 26, 2012,

Supreme Court's failure to apply the standards of its regulatory detention jurisprudence to immigration detention, and the importance of ensuring that the nation's immigration policy is implemented via "constitutionally permissible means" demand that Congress consider reforming the immigration detention system as part of comprehensive immigration reform.[258]

http://www.ibtimes.com/another-republican-immigration-reform-mccain-899662.

258. INS v. Chadha, 462 U.S. 919, 941 (1983).