1997

Judge, Jury and Executioner: INS Summary-Exclusion Power under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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Times are hard for people immigrating to the United States today. Borders that were once easy to cross are now patrolled by growing numbers of armed guards,[1] and legal permission to enter and remain here is much more difficult to obtain than it once was.[2] Aliens who finally do make it across the border, legally or illegally, are greeted by a nation that is hostile to them and unwilling to protect their interests. In 1996 Congress officially took in the welcome mat for all noncitizens when it passed two revolutionary immigration reform laws. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) was Congress's political response to the Oklahoma City bombing.[3] Congress constructed and passed it hastily so that President Clinton could sign the bill into law on the anniversary of that

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1. *See* Maria Puente, *Clinton Builds Up Border Patrol*, DETROIT NEWS, Feb. 21, 1997, at A7 (stating that the number of Border Patrol agents in the United States has increased by 75% since 1993).

2. *See* David Johnston, *Government Is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 22, 1996, at A20 (noting that lawyers have filed class-action lawsuits on behalf of thousands of aliens claiming that the INS unfairly denied them eligibility for legal residence).

3. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996). Among the AEDPA's most controversial terms are those prescribing a secretive court for aliens suspected of terrorist activity. *See id.* § 401. Another controversial provision requires the INS to deport legal permanent residents based on minor and very old criminal convictions *without judicial review*. *See id.* §§ 435, 440. Crimes serving as grounds for deportation in some states have included possession of marijuana, defacing a passport, and turnstile jumping—no matter how many years prior to deportation the conviction occurred. *See* Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at B5.

disaster.[4] Just six months later, Congress revised many of the AEDPA's ill-considered immigration provisions when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[5] The IIRIRA is a more comprehensive immigration reform, and the new restrictions it implements are likely to remain law for many years.[6]

Few would argue that the government's focus on immigration policy is misplaced. Congress has a legitimate interest in regulating U.S. borders and protecting its citizens from threats to national security. Many of the IIRIRA's new provisions are so draconian, however, that they appear to be less the product of legitimate policymaking than of national scapegoating. One such provision gives INS agents the power to deport some classes of suspected aliens without a trial or even an administrative hearing to determine whether they are, in fact, deportable under the law.[7] Instead, the INS simply removes a suspect from the country after a brief screening interview with no opportunity for appeal.[8] The new provision applies to all suspected aliens who seek entry at the border without valid immigration documents, and to any suspected alien without such documents who has been living in the United States for two years or less.[9] Because the new procedure contains inadequate mechanisms for detecting INS biases and mistakes, the INS potentially could apply it against any individual who looks "suspicious," including undocumented aliens, legal permanent residents, refugees, asylees, and even citizens. This "summary-exclusion" or "expedited removal" process is not only harsh, it

4. *See* 142 CONG. REC. S11,901 (daily ed. Sept. 30, 1996) (statement of Sen. Leahy). According to Carol Wolchok, staff liaison for the American Bar Association Coordinating Committee on Immigration Law, the new immigration provisions were made with no legislative debate: "Only a handful of people knew these provisions were slipped in there, and were changing law that's been around for decades." Richard C. Reuben, *McDeportation: The New Anti-terrorism Law Allows Border Guards to Summarily Exclude Aliens Without Documents*, A.B.A. J., Aug. 1996, at 34, 34.

5. *See* Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, 546-724 (1996).

6. Among its many prescriptions, this new law increases border patrol and enforcement, *see* IIRIRA §§ 101-125, strengthens criminal penalties for alien smuggling and document fraud, *see id.* §§ 201-215, reenacts and enhances AEDPA provisions relating to immigrants convicted of crimes, *see id.* §§ 321-334, and makes illegal aliens ineligible for most forms of public assistance, *see id.* §§ 500-591.

7. *See id.* § 302(a).

8. *See id.*

9. *See infra* notes 95-100 and accompanying text (describing the summary-exclusion provisions of the IIRIRA).

is also constitutionally suspect. By applying summary exclusion to aliens both inside and outside the United States borders, the IIRIRA eliminates bright-line, decades-old distinctions drawn in American immigration law between these two groups.[10] The IIRIRA's new provisions dramatically restructure the process through which the government expels or admits aliens.[11] In doing so, this law eviscerates procedural rights formerly guaranteed to specific classes of aliens and undermines the Due Process Clause of the Constitution.[12] While many American citizens support these reforms,[13] critics contend that 1996 was a pivotal year in which intolerance and isolationist fear rose to the fore and prompted Congress to enact legislation that turns a century of immigration jurisprudence on its head.[14]

This Note argues that the summary-exclusion provisions of the IIRIRA violate the procedural due process guarantees of the Constitution. Part One describes the political climate that gave rise to the AEDPA and the IIRIRA, illuminating the policy arguments behind immigration reform. Part One also provides a brief overview of the Supreme Court's procedural due process jurisprudence, outlines the historical progression of the Court's due process analysis in the context of immigration, and explains how the IIRIRA radically revises established law. Part Two questions the constitutional validity of the summary-exclusion provisions of the IIRIRA that deprive specific individuals of the right to a hearing in direct conflict with immigration law precedents. Part Three argues that the Supreme Court itself has defined the class of immigrants entitled to pro-

10. *See infra* notes 53-56 and accompanying text (introducing the "entry doctrine" distinction between deportable and excludable aliens).

11. *See infra* Part I.D (explaining how the IIRIRA reforms pre-existing law).

12. *See infra* Part II (arguing that the IIRIRA violates procedural due process).

13. *See* Amy Silverman, *Closed Door Policy: A Chilean National's Struggle Against Deportation Raises Fundamental Questions About the Constitutional Rights of Immigrants*, PHOENIX NEW TIMES, Jan. 9, 1997, at 4 (quoting proponents of the IIRIRA who argue that it does not limit aliens' constitutional rights, but simply streamlines existing law).

14. *See* Reuben, *supra* note 4, at 34 (quoting Jean Butterfield of the American Immigration Lawyer's Association, who commented that the AEDPA would literally "take us back decades"); *see also* Letter from Ana Williams Shavers, Professor, University of Nebraska College of Law, et al. to the Conference Committee on H.R. 2202 (July 29, 1996), *reprinted in* 142 CONG. REC. S11,906 (daily ed., Sept. 30, 1996) (arguing on behalf of 90 law professors that the IIRIRA's summary-exclusion provisions threatened "the most basic safeguards of due process").

cedural due process protection too narrowly. This Note concludes that the Court must harmonize its procedural due process analysis in the immigration context with its jurisprudence in other contexts by attaching due process protection to the physical liberty interest that the federal government threatens when it deports or excludes an alien from the country.

I. THE LAW AND POLITICS OF IMMIGRATION

People choose to leave their home countries for a variety of reasons. Some seek jobs, education, or higher standards of living, while others seek to rejoin their families or to escape persecution or war.[15] Whatever the reasons aliens have for migrating to the United States, many U.S. citizens fear that too many aliens are entering the country.[16] The INS legally admitted 974,000 aliens in 1992.[17] The number of illegal entrants is more difficult to determine, but statisticians estimate that in 1992 approximately 200,000 to 300,000 undocumented aliens entered the country.[18] The INS, however, also removes more than one million aliens from the United States each year. In 1992 the INS deported approximately 37,800 aliens and required more than 1,104,500 to depart under its supervision,[19] a process known as "voluntary departure."[20]

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15. *See* Somini Sengupta, *The Changing Face of Long Island*, NEWSDAY, Nov. 5, 1995, at A4 (enumerating the reasons several Long Island immigrants came to the United States).

16. *See* Richard Rayner, *What Immigration Crisis?*, N.Y. TIMES, Jan. 7, 1996, § 6 (Magazine), at 26 (describing public fears and arguing that there is no real immigration crisis in the United States).

17. *See* U.S. INS, 1992 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 3 (1992) [hereinafter INS YEARBOOK].

18. *See* MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 22 (1994). The INS does not maintain statistics on the number of foreign-born persons who emigrate from the United States; therefore, accurate data on the percentage of aliens who actually remain here is unavailable. *See* INS YEARBOOK, *supra* note 17, at 179.

19. *See* INS YEARBOOK, *supra* note 17, at 156. Of the 37,800 aliens whom the INS deported in 1992, approximately 31,800 (84%) illegally entered without inspection. *See id.* at 166. The group of aliens who are deportable because they entered without inspection is the largest group deported each year and is also one of the groups that the IIRIRA directly targets for summary exclusion.

20. For a definition of voluntary departure as set forth in the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1101-1533 (1994), see *infra* note 92.

A. THE POLITICS BEHIND IMMIGRATION REFORM

Immigration reform is one of the most politically volatile issues facing Congress today.[21] The American public manifests an escalating fear that the nation is undergoing a mass invasion of legal and illegal aliens.[22] Several commentators have documented a disturbing increase in brutal hate crimes against aliens,[23] and many white supremacist and paramilitary groups actively target aliens.[24] Even more disturbing are human rights group reports that border patrol agents and INS officials have violently assaulted aliens.[25] Commentators blame both the media and political rhetoric for inciting the public's fear of aliens.[26] In

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21. Recently, retiring Congressman Anthony Beilenson asserted that "the three most fundamental issues facing the nation [are] balancing the budget, reforming the campaign finance system and lowering levels of immigration." Anthony C. Beilenson, *Perspective on Government: Time is Right to Solve Key Issues: Washington Has a Prime Opportunity to Balance the Budget, Reform Campaign Financing and Curb Immigration*, L.A. TIMES, Jan. 26, 1997, at 17.

22. A classified ad placed by the California Coalition for Immigration Reform provides a strong example of America's animus towards aliens. The ad reads, "WANTED: TESTIMONY FROM U.S. citizens who have been victims of crimes either financial (welfare, unemployment, food stamps, etc.) educational (overcrowding, forced bilingual classes, etc.) or physical (rape, robbery, assault, infectious disease, etc.) committed by illegal aliens. Legal advice welcome—possible lawsuit pending." NAT'L REV., July 5, 1993, at 60, *quoted in* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration, Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1533 n.90 (1995).

23. *See, e.g.*, Marco E. Lopez, *Illegal Aliens: Defusing the Polemics*, 2 SAN DIEGO JUST. J. 75, 76-79 (1994) (detailing several violent attacks against legal and illegal Mexican aliens in Southern California, including one incident in which American citizens deliberately shot a Mexican child in the head as he crossed the border with his family).

24. *See* Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1576 (1992) (noting the activities of two such groups, the Civilian Material Assistance, a civilian paramilitary group patrolling the border, and the Ku Klux Klan).

25. INS officials claim that complaints of abuse are actually decreasing and that incidents of violence are isolated. *See* Nancy Nusser, *Beating of Mexicans by California Police Renews Debate Over Rights: Anti-immigrant Feeling Cited amid Cry of Abuse*, ATLANTA J. & CONST., Apr. 14, 1996, at 13A (explaining that such abuse is not a common occurrence). Human rights groups paint a different picture. Mexico's human rights commission states that during a three month period in 1994 along the California border Mexican aliens reported 67 cases of beatings and two cases of rape by INS and Border Patrol agents. *See id.* (disagreeing with assertions of INS officials).

26. *See* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU. L. REV. 1139, 1169-70, 1172-73 (suggesting that political speeches on

turn, public attitude has encouraged politicians' efforts to restrict immigration.[27]

Some of the most common complaints allege that aliens import crime and drugs,[28] displace American workers,[29] and unjustifiably burden public benefits programs.[30] Immigrant-rights advocates question the empirical validity of these concerns on a number of grounds. Some argue that the per-capita percentage of aliens in prison is no higher than that of citizens.[31] Others contend that anti-immigrant commentators have vastly overstated the impact of immigration on job displacement.[32] Finally, immi-

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crimes committed by legal and illegal aliens and news stories associating the World Trade Center bombing with abuse of asylum laws are factors contributing towards anti-immigrant public attitudes).

27. For an argument that anti-immigrant public attitudes have also influenced the judiciary, see *id.* at 1771 n.117.

28. Representative Lamar Smith, a key supporter of the IIRIRA, cited drug enforcement as a primary reason for his support, arguing "if we cannot control who enters our country, such as illegal aliens, we cannot control what enters our country, such as illegal drugs." *Statement of Rep. Lamar Smith (R-Tx) on the Conference Report OT, H.R. 2202, The Illegal Immigration Reform and Immigrant Responsibility Act*, Fed. Document Clearing House, September 24, 1996, *available in* LEXIS, New.curnws file.

29. *See* William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L. J. 1, 11 (1995) (arguing that African-American anti-immigrant attitudes result from the perception that aliens are squeezing African-Americans out of the job market). Others criticize the IIRIRA for its failure to enact stronger penalties for employers who hire illegal aliens. *See* 143 CONG. REC. S704-05 (daily ed. Jan. 28, 1997) (statement of Sen. Kennedy) (proposing an amendment to the IIRIRA which would create stronger penalties for employers who hire illegal aliens).

30. Public benefits were a key point of contention between the House and Senate during debates on the IIRIRA. *See Immigration Politics*, ST. PETERSBURG TIMES, Sept. 25, 1996, at 10A (noting that, because of a House amendment that would have denied aliens access to public education, the IIRIRA faced a filibuster in the Senate and a veto by President Clinton).

31. *See* David E. Hayes-Bautista & Gregory Rodriguez, *The Criminalization of the Latino Identity Makes Fighting Gangs That Much Harder*, L.A. TIMES, Sept. 15, 1996, at M1 (citing Anne Piehl, Professor at the Harvard University Kennedy School of Government, who found that Latino aliens have lower incarceration rates than do U.S.-born individuals); *see also* Ardy Friedberg & Mary C. Williams, *Newcomers Pay for Crimes of Others*, SUN-SENTINEL (Ft. Lauderdale), Oct. 30, 1994, at 8S (citing statistics showing that aliens were arrested at a rate lower than their representative proportion in Florida's population).

32. The General Accounting Office (GAO) reports that recent national studies generally conclude that job displacement associated with illegal immigration is either minimal or non-existent. *See* U.S. GAO, GAO/HEHS 95-133, ILLEGAL ALIENS—NATIONAL NET COST ESTIMATES VARY WIDELY 17 (1995) [hereinafter GAO REPORT].

grant-rights advocates argue that most of the aliens using public benefits are either elderly, capable of naturalizing and receiving benefits as citizens, or refugees fleeing persecution who are understandably in need of temporary assistance.[33]

The cost of immigration is a primary concern for proponents of immigration restrictions, especially in states where large numbers of aliens settle.[34] These states foot the bill for many of the public services that benefit aliens, including education, medical care, housing assistance, infrastructure improvements, and prison costs.[35] Yet aliens also generate state and federal revenue, including income, sales, property, Social Security, and gasoline taxes.[36] Some analysts have concluded that aliens generate more revenue at local, state, and national levels combined than the total cost of services they receive.[37] They argue that when all costs and benefits are considered together, the federal government receives an excessive portion of the surplus.[38] As a result, aliens generate a net gain for the federal government and a net loss for many states and localities.[39] This discrepancy may contribute significantly to the anti-immigrant atmosphere in border states such as California.

The administration of immigration hearings is another significant public cost, although politicians and reform advocates do not cite it often as a major concern behind immigration reform.[40] Language in the IIRIRA suggests that the new summary-

33. *See* FIX & PASSEL, *supra* note 18, at 63-67 (indicating that the 1994 welfare reform proposal would likely generate little net welfare savings from changes to immigrant eligibility because refugees and the elderly would still be eligible and the those capable of naturalizing constitute a large percentage of aliens losing eligibility).

34. Forty percent of all illegal aliens live in California. *See* Note, *Unenforced Boundaries: Illegal Immigration and the Limits of Judicial Federalism*, 108 HARV. L. REV. 1643, 1645 (1995).

35. *See id.*

36. *See* GAO REPORT, *supra* note 32, at 17 (listing the types of revenues illegal aliens generate).

37. *See* FIX & PASSEL, *supra* note 18, at 57.

38. *See id.* at 57-58.

39. *See id.*; *see also* Note, *supra* note 34, at 1643 (noting the inequity of the distribution between the states and the federal government of the costs and benefits of illegal immigration).

40. Congress appropriated $109,519,000 to the Executive Office for Immigration Review for fiscal year 1997. *See* 142 CONG. REC. H11,843 (daily ed. Sept. 28, 1996) (Joint Explanatory Statement of the Committee of Conference) (detailing the appropriations agreed on in Conference Committee for the 1997 budget). Over six million dollars of that amount will facilitate hiring 24 additional immigration judges. *See id.*

exclusion provisions directly target this expense by attempting to reduce the time necessary to process aliens' cases.[41] Whether the new procedures will result in direct, significant cost savings by reducing the cost of hearings and immigration-related detention is a question open for empirical study.[42]

B. PROCEDURAL DUE PROCESS

The Fifth and Fourteenth Amendments prohibit state and federal governments from depriving any person of "life, liberty, or property, without due process of law."[43] The Supreme Court has interpreted these clauses to guarantee individuals the right to fair procedures to determine the legality of government action depriving them of an important interest.[44] To bring a successful procedural due process challenge, a claimant must demonstrate that the Constitution protects a legally or constitutionally cognizable interest that is at issue.[45] An interest is cognizable only if it falls within very narrow court-made definitions of life, liberty, or property.[46] When a claimant successfully demon-

41. The IIRIRA commands the Comptroller General to complete a study on the operation and costs of expedited alien removal procedures. *See* IIRIRA, Pub. L. No. 104-208, div. C, § 302(b), 110 Stat. 3009-546, 584 (1996).

42. *See id.* at § 302(b)(1)(B) (indicating that one aspect of the study is to determine the resources saved by the new expedited removal procedures).

43. U.S. CONST., amends. V, XIV. Importantly, this text is inclusive of any person with a life, liberty, or property interest. It does not refer only to citizens, as do other provisions in the Constitution, including the Privileges and Immunities Clause, *see* U.S. CONST., amend. XIV, and those relating to the qualifications for legislators and president, *see* U.S. CONST., art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5.

44. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (explaining the procedural component of the Due Process Clause).

45. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (noting that before due process requirements apply, the interest must be within the Constitution's protection).

46. *See id.* at 569-70 (stating that the range of interests protected by the procedural component of the Due Process Clause is not "infinite"). The Due Process Clause most clearly guarantees fair procedure when the government physically restrains an individual and deprives her of an important liberty interest. The Court has held 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." Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

While the definitions of life and liberty arise from the Constitution itself, the Court has held that "[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. An individual's "unilateral expectation" of a benefit creates no recognized property interest in it without some "legitimate claim of entitlement to it" under law. *Id.* Some courts have attempted to

strates that the Due Process Clause protects a given interest, the court determines which precise procedural guarantees apply by balancing the government's interest in reducing administrative burdens against the private interest involved and the risk of an erroneous deprivation of that interest.[47]

The Supreme Court recognizes that aliens in some circumstances have a right to procedural due process and has applied this standard test in the immigration context to determine what process is due.[48] Before applying this balancing test, however, a court must initially find that there are factual issues in dispute.[49] Although it does not compel a judicial trial in all cases, due process at a minimum requires the government to give a claimant the opportunity to be heard "at a meaningful time and in a meaningful manner."[50] An essential element of due process in all circumstances is that a fair and impartial decisionmaker adjudge the parties' claims.[51]

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limit the scope of cognizable property interests by suggesting that a person must already receive a benefit or have a recognized claim to it before a property interest in it will arise. *See, e.g.*, Gregory v. Town of Pittsfield, 479 A.2d 1304, 1307-08 (Me. 1984) (finding an individual must already be qualified and eligible to receive a benefit from the government before gaining a property interest in it). This "present enjoyment" requirement is not a clearly established doctrine. *See* Gregory v. Town of Pittsfield, 470 U.S. 1018, 1021 (1985) (O'Connor, J., dissenting) (arguing that the state court's conclusion that a claimant had no cognizable property interest in public benefits she had not yet received was "unsettling" and contrary to "the weight of authority among lower courts"), *denying cert. to* Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984).

47. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (identifying the factors involved in the balancing test).

48. *See* Landon v. Plasencia, 459 U.S. 21, 34-37 (1982) (applying the *Mathews* balancing test to determine whether the exclusion hearing given to a returning legal permanent resident met procedural due process requirements).

49. The Court has held that the Due Process Clause requires no formal procedure when there are no factual issues to resolve. *See, e.g.*, Codd v. Velger, 429 U.S. 624, 626-27 (1977) (per curiam).

50. *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

51. The Supreme Court has held that "[n]ot only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.'" Withrow v. Larkin, 421 U.S. 35, 47 (1975) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

C. THE DEVELOPMENT OF IMMIGRATION LAW'S ENTRY DOCTRINE

The Supreme Court has held that no alien has a substantive constitutional right to enter or remain in the United States.[52] Some aliens, however, have constitutionally protected procedural rights in connection with the immigration process. The Supreme Court's holdings over the last century have resulted in a sharp division between the procedural rights of aliens inside and aliens outside U.S. borders. Those inside the country are entitled to procedural due process in immigration proceedings, while those outside the country are not.[53] Commentators have criticized this doctrine, known as the "entry doctrine," because it creates a confusing anomaly—aliens who break the law to enter the country have due process rights, while those who comply with federal law and present themselves at the border for inspection do not.[54] Nonetheless, the Court has upheld the distinction consistently on the ground that an alien who gains admission develops stronger ties with the United States as a result of establishing a residence.[55] In compliance with the entry doctrine, the government provides more extensive administrative procedures when it "deports"

52. *See Landon*, 459 U.S. at 32 (stating that "the power to admit or exclude aliens is a sovereign prerogative").

53. "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing . . . ." Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (internal citations omitted).

54. *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 867 (1989) (arguing that the distinction cannot withstand analysis because aliens inside and outside the border may both have family or job-related ties to the United States and, therefore, have similar interests at stake); Tamara J. Conrad, Comment, *The Constitutional Rights of Excludable Aliens: History Provides a Refuge*, 61 WASH. L. REV. 1449, 1478 (1986) (concluding that the aliens outside the United States should be afforded due process rights similar to those of aliens physically present).

55. *See Landon*, 459 U.S. at 32. Commentators assert that another possible rationale for the entry doctrine is that the Constitution has no territorial force beyond U.S. borders and, therefore, cannot protect aliens who are not physically present. *See,e.g., Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1320 (1983) (noting that the rationale of a lack of extra-territorial jurisdiction originated in the earliest exclusion cases).

aliens already inside the country than when it "excludes" those outside the country.[56]

1. Immigration Law Until 1950

The Supreme Court began defining whether and how the Constitution restricts the government's power to exclude or deport aliens in the late 1800s.[57] In 1882 Congress enacted a federal statute restricting admission of persons with Chinese ancestry.[58] The first immigration cases the Supreme Court heard were challenges to this legislation, laying the foundation upon which all immigration jurisprudence rests.

The Supreme Court upheld the Chinese exclusion statute in 1889, thereby establishing the federal government's power to place substantive restrictions on the admission of aliens stopped at or outside U.S. borders.[59] The Court found federal authority to regulate immigration in the federal power to negotiate with other countries as an independent sovereign nation.[60] The executive and legislative branches traditionally have plenary authority over foreign affairs. Therefore, the immigration

56. *See* Philip Geller, Annotation, *Procedural Due Process Requirements in Proceedings to Exclude or Deport Aliens—Supreme Court Cases*, 74 L. ED. 2D 1066, 1069-70 (1996). The process of removing an incoming alien is called "exclusion," and the term "excludable" describes an incoming alien who is subject to removal under immigration law. The process of removing an alien within U.S. borders is called "deportation," and the term "deportable" describes such an alien who is subject to removal under substantive immigration law.

57. *See* James A. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L 804, 835 n.168 (1983) (explaining that active federal involvement in immigration regulation began in 1875 with the passage of statutes against the immigration of criminals, prostitutes, "idiots, lunatics, and those likely to become public charges"); *see also* INA, 8 U.S.C. § 1182 (1994) (indicating that admission restrictions on these grounds still exist).

58. *See* Nafziger, *supra* note 57, at 835 n.168 (identifying congressional statutory restrictions on Chinese immigration).

59. *See* The Chinese Exclusion Case, 130 U.S. 581, 606-07 (1889) (establishing the federal government's power to restrict alien admission to the United States). The *Chinese Exclusion Case* upheld the exclusion of a Chinese national who had legally resided in the United States for 12 years. He left the country legally, yet officials subsequently denied his reentry. *See id.* at 609.

60. *See id.* at 603-04 (highlighting the Court's notion that a more limited power would be indicative of national weakness). The Court re-emphasized the plenary character of the Legislature's power over immigration issues, stating that " '[o]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

power rests virtually exclusively in the political branches[61]—almost as far beyond judicial review as a decision to go to war.[62] In 1893 the Court broadened the scope of the federal government's power to substantively limit immigration and held that Congress has authority to deport aliens who are already residents inside U.S. borders.[63]

In 1892 the Supreme Court decided *Nishimura Ekiu v. United States*,[64] the first significant case governing the procedural rights of aliens subject to exclusion from the United States. The *Nishimura Ekiu* opinion contained several highly significant holdings. Although the Court found that an imprisoned alien could obtain a writ of habeas corpus to ascertain the validity of her imprisonment, it also held that the judiciary has no power to review an administrative determination that an alien is "excludable."[65] In a related finding, the Court held that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[66] The Court additionally held that an excludable alien acquired no right to land in the United States simply because authorities detained her inside the border during immigration proceedings.[67]

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61. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (clarifying the source of the political branches' immigration power). Executive authority to regulate immigration arises from the power to make treaties; legislative authority arises from the power to regulate commerce with foreign nations, to establish a uniform rule of naturalization, and to declare war. *See id.*

62. *See The Chinese Exclusion Case*, 130 U.S. at 606-07 (analogizing the presence of unwanted or dangerous aliens to the invasion of a foreign army during war).

63. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (upholding the deportation of a Chinese immigrant who, upon his arrest, could not produce documentation confirming his right to remain). The *Fong Yue Ting* court additionally found that deportation is not a criminal punishment, but a civil matter. *See id.* at 730. This finding has had an enormous impact on the procedural rights of deportable immigrants, as none of the safeguards required in criminal trials are applicable to deportation hearings *See id.*

64. 142 U.S. 651 (1892).

65. *See id.* at 660 (holding that the judiciary is without power to review administrative determinations that an alien is "excludable"). *See also supra* note 56 (offering definitions of the terms "excludable" and "deportable").

66. *Id.* (citations omitted). The Court offered this statement to justify upholding the administrative officer's decision even though he had not taken or recorded the alien's testimony before excluding her. *See id.*

67. *See id.* at 661.

The Court dramatically curbed the trend towards unlimited legislative and executive control over immigration law and procedure in a landmark 1903 decision, the *Japanese Immigrant Case*.[68] In this case, the Supreme Court held that the government could not deport an alien without affording her procedural due process protections, including the right to a hearing,[69] even though the claimant allegedly entered the country illegally and had only been in the United States for four days when immigration officials stopped her.[70] Citing and clarifying its earlier opinion in *Nishimura Ekiu*, the Court held that government officials may not ignore due process principals when personal liberty is at stake.[71] The decision guaranteed only minimal due process protection, however, because the Court also held that the required hearing need not be a judicial trial.[72] The Court further found that an administrative hearing without the assistance of an interpreter was sufficient to meet due process requirements.[73]

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68. 189 U.S. 86 (1903).

69. *See id.* at 100-101.

70. *See id.* at 87.

71. *See id.* (clarifying the Court's position that personal liberty is protected under due process). The Court stated:

> Now, it has been settled that . . . the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law . . . .' But this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' . . . .

Id. at 100 (citations omitted).

72. *See id.* at 100-02 (indicating that a judicial trial is not necessary to satisfy the due process protection afforded to immigrants).

73. *See id.* at 101-02. In accordance with notions of due process at the beginning of the century, the Court upheld the procedures officials exercised in the case at bar even though the same immigration officer both investigated and heard the case. The alien had no assistance of counsel. *See id.* at 88. Moreover, because she had no access to an interpreter she claimed she did not understand that the investigation related to deportation. *See id.* at 88, 100-02. The Court noted, however, that the alien did have an unexercised right to appeal the immigration officer's decision to the Secretary of the Treasury. *See id.* at 102.

Today's notions of due process are substantially more protective. For example, courts acknowledge that a deportable alien's right to counsel at his own expense is a constitutional due process right. *See* Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985). Moreover, courts recognize that due process requires the presence of a competent interpreter for non-English speaking aliens. *See* Gonzales v. Zurbrick, 45 F.2d 934, 937 (6th Cir. 1930). Commentators argue that courts significantly expanded the due process requirements

2. Immigration Law from 1950-1996

Both deportable and excludable aliens' procedural rights gradually expanded following the *Japanese Immigrant Case*, but, beginning with *Knauff v. Shaughnessy*[74] in 1950, the Supreme Court radically reversed this trend.[75] In *Knauff* the Court relied on *Nishimura Ekiu* to assert that the government had unlimited, unreviewable power to regulate procedure in exclusion cases.[76] *Knauff* upheld the exclusion of an alien married abroad to an American soldier, stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[77] Three years later, in a broad extension of the rule that excludable aliens have no procedural due process rights, the Court found that where the government sought to exclude an alien, but no other country would accept him, it could imprison him at the border indefinitely without a hearing.[78] The alien's prior resi-

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for civil matters in general during the 1970s, resulting in a concomitant increase in the due process protections granted in immigration proceedings. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632 (1992).

74. 338 U.S. 537 (1950).

75. *See* Conrad, *supra* note 54, at 1455 (arguing that the Court in *Knauff* ignored an expansion in procedural due process rights for excludable aliens that occurred in the early 1900s, and that the *Knauff* decision was partially responsible for a major shift in the Court's jurisprudence reversing that expansion).

76. *See Knauff*, 338 U.S. at 543-44.

77. *Id.*, 338 U.S. at 544. The Court in *Knauff* based its decision, in part, on a declaration that admission is a privilege rather than a right. *See id.* at 542. A few decades ago, courts sharply categorized individual interests into protected "rights" and unprotected gratuitous government benefits or "privileges." *See* Bailey v. Richardson, 182 F.2d 46, 57-58 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951) (holding that a public employment is not a right, and therefore, procedural due process is inapplicable to such claims). Modern courts have rejected the rights/privileges distinction in traditional civil cases. *See* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (explaining that the Constitutional safeguards of life, liberty, and property no longer turn on being classified as "rights" rather than "privileges"). The Supreme Court has failed, however, to move immigration law forward at a pace comparable to other areas of law. It recently reaffirmed the rights/privileges rationale set forth in *Knauff*. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (classifying an immigrant's pursuit of admission into the United States as a privilege and not a constitutional right).

78. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 214-16 (1953). *Mezei* involved an alien whom government officials considered to be a security risk. *See id.* at 208. Officials would not disclose the basis of the decision to exclude him on the ground that the information was confidential, and its disclosure would injure the public interest. *See id.* The district court re-

dence in the United States for over twenty years had no impact on his constitutional standing.[79] In another 1958 case, the Court, relying on *Nishimura Ekiu*, held that aliens detained pending administrative proceedings or removal are stopped outside the border.[80] As a result of this legal construction, such aliens are legally excludable and therefore are not entitled to due process even though they are physically inside the border.[81]

Although the Supreme Court severely restricted the procedural due process rights of excludable aliens in the 1950s, it preserved the holding in the *Japanese Immigrant Case* that aliens facing deportation are entitled to a hearing.[82] As a result, deportable aliens have substantially greater constitutional protections than aliens facing exclusion.[83] Congress may not deport aliens without a fair and impartial hearing but may exclude aliens with no process at all. These dual holdings form the foundation of the entry doctrine.

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leased the alien on bond after he was detained at Ellis Island for almost two years. *See id.* at 209. The court of appeals affirmed but the Supreme Court reversed, holding that the court had no power to authorize his release, particularly since he presented a security risk. *See id.* at 216.

79. *See id.* at 213. The Supreme Court cited *Mezei* with approval as recently as 1982. *See Landon*, 459 U.S. at 33.

80. *See* Leng May Ma v. Barber, 357 U.S. 185, 186 (1958); *see also supra* note 67 and accompanying text (reciting *Nishimura Ekiu's* holding that an excludable alien's right to enter the United States remained unchanged although officials detained her inside the country).

81. *See Conrad*, *supra* note 54, at 1452-53 (explaining the status of entering aliens detained inside the border).

82. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950). *Wong Yang Sung* held that deportable aliens must receive a hearing, although not necessarily in a judicial court. *See id.* It further cautioned that administrative hearings must be impartial. *See id.* The Court held that the practice of permitting inspection officers to serve the dual functions of investigating cases and presiding over deportation hearings did not comport with current standards of impartiality as defined by the Administrative Procedure Act under which the appellant brought his claim. *See id.* at 42. The Court later held that the INA rather than the Administrative Procedure Act set the procedural standards in deportation hearings. *See* Marcello v. Bonds, 349 U.S. 302, 306-10 (1955). Its holding did not affect the *Wong Yang Sung* impartiality rule, however, because the pre-reform INA provided that "[n]o special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions." 8 U.S.C. § 1252(b) (1994).

83. *See supra* note 53 (quoting *Mezei*, 345 U.S. at 215-16).

3. Differences in Deportation and Exclusion Proceedings Under the Immigration and Nationality Act

Regardless of its apparent peculiarity, the entry doctrine has persisted. As a result, statutory immigration law developed two distinct procedures for removing aliens from the United States.[84] The Immigration and Nationality Act (INA), enacted in 1952 and modified by the AEDPA and the IIRIRA, constitutes the main corpus of United States immigration law.[85] Until Congress enacted the AEDPA last year, the INA afforded all deportable aliens a recorded, impartial administrative hearing.[86] The INA also granted these protections to excludable aliens,[87] although they are not required pursuant to Supreme Court precedents.[88] An alien in deportation proceedings, however, could appeal any adverse administrative finding directly to a federal Court of Appeals, while an alien in exclusion proceedings could only appeal to the judiciary through a writ of habeas corpus.[89]

The INA granted a number of privileges to aliens in deportation proceedings not accorded to aliens in exclusion proceedings. It gave aliens in deportation the express right to counsel and required immigration officials to provide them with lists of pro bono attorneys; aliens in exclusion had no guaranteed right to counsel.[90] Aliens in deportation received at least fourteen days' notice of the charges against them; aliens in exclusion were not entitled to express notice under the statute.[91] Furthermore,

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84. *See supra* note 56 and accompanying text (defining deportation and exclusion).

85. *See* 8 U.S.C. §§ 1101-1533 (1994).

86. *See id.* § 1252(b). The immigration judges who conduct immigration hearings are not a part of the judiciary. They function instead under the Attorney General through the Executive Office for Immigration Review (EOIR), an arm of the Department of Justice. *See* Elaine Song, *Leaving the Land of the Free*, CONN. L. TRIB., July 8, 1996, *available in* LEXIS, News.Curnws file. Immigration hearings are thus administrative and not judicial in nature. The INS, also a branch of the Department of Justice, operates independently from the EOIR. *See id.* This structure separates the authorities responsible for enforcing and those responsible for interpreting the immigration laws, while permitting the executive to retain primary control over both functions.

87. *See* 8 U.S.C. § 1226.

88. *See supra* notes 64, 77-78 and accompanying text (citing the *Nishimura Ekiu*, *Knauff*, and *Mezei* holdings that due process does not require a hearing in exclusion cases).

89. *See* 8 U.S.C. § 1105a.

90. *See id.* §§ 1252b, 1226.

91. *See id.* The statute required deportation notices to be printed in Eng-

deportable aliens could seek specific forms of relief unavailable to excludable aliens, including "voluntary departure" and "suspension of deportation."[92]

D. THE REFORMING PROVISIONS OF THE NEW LAW

The IIRIRA effectively obliterates the entry doctrine by redefining the language of immigration law, obfuscating its effects on the constitutional rights of aliens. Under the new Act, deportation and exclusion procedures are no longer different—the IIRIRA eliminates the separate concepts of "deportation" and "exclusion" and, in their place, adopts the term "removal hearing" to describe the only forum in which aliens may present their immigration claims.[93] As a result, an alien's status as either newly arriving or already present in the United States no longer conclusively determines what kind of procedural protection she will receive. With few exceptions,[94] the IIRIRA guarantees a removal hearing only to those aliens whom the INS has already "admitted" with valid immigration documents,[95] or those who can demonstrate that they have lived in

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lish and in Spanish. *See id.* § 1252b(a)(3)(A).

92. *See* 8 U.S.C. § 1254(e), (governing voluntary departure); § 1252(e) (governing suspension of deportation). An alien awarded voluntary departure is allowed to leave the country using his own resources within a given period of time. *See id.* § 1254(e). The IIRIRA repeals the voluntary departure provisions of the INA and replaces them with new provisions. *See* IIRIRA § 304(a)(3). The IIRIRA permits voluntary departure either in lieu of a removal hearing, or in lieu of removal after an adverse determination at the hearing. *See id.* An alien seeking voluntary departure must be able to prove that he has been a resident of the United States for a least one year, is of good moral character, and has the financial means to effect his own departure. *See id.*

Suspension of deportation is a discretionary form of relief available to aliens who have resided in the United States for a number of years, are of good moral character, and would suffer extreme hardship from deportation. *See* 8 U.S.C. §1254(a). Suspension of deportation allows an alien to receive status as a lawful permanent resident. *See id.* The pre-reform INA required seven years' residence. *See id.* § 1252(e). The IIRIRA has a ten-year residence requirement and terms the relief "cancellation of removal." IIRIRA § 304.

93. *See* IIRIRA § 304. This section of the Act replaces the INA's deportation provisions, 8 U.S.C. § 1252(b), but omits language contained therein prohibiting a hearing officer from also conducting investigative or prosecuting functions in the same case. *See* IIRIRA § 304. The removal hearing procedures of the IIRIRA are thus less protective than the deportation procedures of the INA. *See supra* note 82 (discussing Court precedents prohibiting immigration officers from serving investigative and judicial roles in the same case, and quoting the INA's provision prohibiting the same).

94. *See infra* notes 103-106 and accompanying text (enumerating classes of aliens excepted from the summary-exclusion provisions).

95. The IIRIRA defines a legal entry into the United States with valid

the United States for more than two years.[96] All others are subject to summary exclusion.[97] Consequently, the two primary determinants of what process the government will grant are the legality of the alien's entry and the length of time during which the alien has resided in the United States.

The summary-exclusion process begins with the inspection officer's general screening of all aliens.[98] The officer automatically orders the summary exclusion of aliens whom the officer believes to be arriving with fraudulent immigration documents or no documents at all.[99] Moreover, the IIRIRA permits summary exclusion of all aliens who allegedly have entered illegally and lived in the United States continuously for two years or less.[100] The statute thereby permits the INS to subject deportable aliens to removal without a hearing even if they have lived in the United States for many months.

Application of the summary-exclusion provisions against this class of aliens is within the Attorney General's discretion, and she decided not to implement them on the IIRIRA's effective date of April 1, 1997.[101] The Department of Justice explicitly reserves the right to apply summary exclusion to such aliens immediately, however, if "operationally warranted."[102]

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immigration documents as an "admission." IIRIRA § 301(a). Following from this definition, undocumented arriving aliens, aliens who entered without inspection (EWI), and those who entered with fraudulent documents are deemed to be "seeking admission." *See id.* This language abolishes physical presence as an important factor and focuses attention instead on whether the alien entered legally. It is important to note that aliens who illegally overstay a temporary visa are already "admitted." A distinction thus arises between aliens who entered illegally and those illegally here by some other means. All EWI aliens (with the exception of battered women and children) are presumed "inadmissible" and are consequently subject to summary exclusion under the terms of the statute. *See id.* §§ 301(c), 302(a).

96. *See id.* § 302(a).

97. *See id.* The statute refers to summary exclusion as "expedited removal." *Id.* See *supra* text accompanying note 8 for a definition of summary exclusion.

98. *See* IIRIRA § 302(a).

99. *See id.*

100. *See id.*

101. The Department of Justice announced this decision in a supplementary comment to the interim regulations governing application of the IIRIRA. *See* Aliens and Nationality, 62 FED. REG. 10,311, 10,313-14 (1997). The stated rationale for this decision is that "application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage." *Id.*

102. *Id.* If and when the Attorney General decides to implement these provisions she will publish a notice of her decision in the Federal Register. *See id.* The Attorney General's decision is not subject to judicial review. *See*

The statute creates a few important exceptions to the standard summary-exclusion rules. If during the screening process an alien indicates either an intent to apply for asylum or a well-founded fear of persecution, the officer must refer that individual to an asylum officer for further review.[103] Summary exclusion also does not apply to aliens who arrived by aircraft and are citizens of countries in the Western Hemisphere with whom the United States does not have full diplomatic relations.[104] Moreover, battered women and children are not subject to summary exclusion if they can demonstrate that their illegal entry into the United States is related to their experiences with domestic abuse.[105] Finally, if an alien claims under oath and penalty of perjury to be a legal permanent resident, refugee, or asylee, the screening officer's removal order is subject to administrative appeal.[106] Aside from these exceptions, a screening officer's decision to summarily exclude an alien is not reviewable by any administrative or judicial tribunal.[107]

IIRIRA § 302(a).

103. *See* IIRIRA § 302(a).

104. *See id.* This exception excludes Cuban refugees from summary-exclusion provisions. *See* Aliens and Nationality, 62 FED. REG. at 10,355. During congressional debates on the Act, Senator Leahy surmised that "this exception shows that the majority does not trust the procedures that they are imposing on refugees from all other countries in the world." 142 CONG. REC. S11,902 (daily ed. Sept. 30, 1996).

105. An alien who illegally entered the country may rebut the presumption that she is inadmissible by demonstrating that she is a battered woman, an abused child, or the non-abusive parent of an abused child and that there is a substantial connection between the alien's unlawful entry and the abuse. *See* IIRIRA § 301(c). The statute offers additional protections for battered women and children whose abusers are citizens or legal permanent residents of the United States. *See id.* § 304(a)(3). An illegal alien who has suffered such abuse and who has lived in the United States for at least three years may apply for cancellation of removal and adjustment to the status of legal permanent resident. *See id.* In addition, the law permits abused women and children to self-petition for immediate relative status (legal admission based on close familial relationship to a citizen or legal permanent resident) without the cooperation of the abusive spouse or parent. *See* 8 U.S.C. §§ 1151(b)(2), 1154(a)(1) (1994).

106. *See* IIRIRA § 302(a).

107. *See id.* The IIRIRA expressly limits habeas corpus review to claims asserting that a suspect is not an alien, was not ordered removed under the summary-exclusion provisions of the Act, or is a legal permanent resident, refugee, or asylee. *See id.* § 306(a)(2). A suspected alien may not argue in habeas corpus proceedings that he is actually admissible or that he is entitled to relief from removal. *See id.*

II. THE IIRIRA VIOLATES AN ALIEN'S RIGHT TO PROCEDURAL DUE PROCESS

The IIRIRA violates the procedural component of the Due Process Clause in a number of ways. It directly conflicts with Supreme Court immigration decisions that have stood for close to a century.[108] Furthermore, the IIRIRA fails the Court's standard procedural due process balancing test.[109] Lastly, the new immigration law cannot withstand judicial scrutiny because it does not rest on a rational, coherent legal theory.

A. THE IIRIRA CONFLICTS WITH SUPREME COURT IMMIGRATION LAW PRECEDENT

The Supreme Court cannot uphold the IIRIRA against a procedural due process challenge without overruling the *Japanese Immigrant Case*. Although the *Japanese Immigrant Case* held that the Due Process Clause guarantees all deportable aliens the right to a hearing,[110] the IIRIRA permits removal of some deportable aliens without hearing or review.[111]

The *Japanese Immigrant Case* guaranteed very little in its holding that deportable aliens must receive a hearing. It upheld the constitutional adequacy of the hearing even though the same inspector had investigated and adjudged the claim and even though the alien had no access to counsel or an interpreter.[112] The government could argue that the screening interview afforded an alien under the IIRIRA is no less cursory

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108. As recently as 1993, the Supreme Court cited with approval the 1903 *Japanese Immigrant Case* holding that aliens in deportation are entitled to procedural due process. *See* Reno v. Flores, 507 U.S. 292, 306 (1993).

109. *See supra* note 47 and accompanying text (reciting the Court's balancing test as articulated in *Mathews*).

110. *See supra* note 69 and accompanying text (recounting the *Japanese Immigrant Case* holding that an alien in deportation has the right to a hearing).

111. *See supra* notes 95-97 and accompanying text (enumerating the terms of the IIRIRA's summary-exclusion provisions). Summary exclusion is applicable to some EWI aliens at the unreviewable discretion of the Attorney General. *See supra* notes 101-102 and accompanying text (explaining the Attorney General's discretionary role in applying summary exclusion to illegal entrants living in the United States for two years or less). This analysis assumes for the purpose of argument that the Attorney General will sometime exercise her discretion to apply summary exclusion to EWI aliens who have lived in the United States for less than two years.

112. *See supra* notes 72-73 (describing the procedure upheld in the *Japanese Immigrant Case*).

than that upheld in the *Japanese Immigrant Case*.[113] This assertion is unsound, however, because in the *Japanese Immigrant Case* the Court based its decision in part on the claimant's failure to exercise her right to appeal to a higher administrative authority.[114] The IIRIRA's summary-exclusion process strictly prohibits either judicial or administrative appeal.[115] Consequently, failures on the part of an inspecting officer to investigate an alien's claim adequately will stand almost totally unchecked.[116] The lack of opportunity to appeal significantly differentiates the process deemed mandatory in the *Japanese Immigrant Case* from that afforded an alien under the summary-exclusion provisions of the IIRIRA. Therefore, summary exclusion does not satisfy the procedural requirements for deportation hearings set forth in the *Japanese Immigrant Case*.

Moreover, courts interpret the requirements of due process differently now than they did in 1903, when the Supreme Court decided the *Japanese Immigrant Case*. For example, courts now recognize a right-to-counsel requirement in deportation hearings.[117] Today's courts also require an impartial decisionmaker[118] and the presence of a competent interpreter in deportation hearings.[119] This gradual shift toward more pro-

113. *See supra* notes 98-99 and accompanying text (explaining the summary-exclusion procedure).

114. *See supra* note 73 (noting the importance of the alien's unexercised right to appeal to the Court's determination of the *Japanese Immigrant Case*).

115. *See supra* note 107 and accompanying text (stating the IIRIRA's prohibition against judicial or administrative review of summary-exclusion determinations and explaining its prohibitions against habeas corpus collateral attacks).

116. A cursory check on screening officers' decisions is required by Department of Justice regulations. *See* Aliens and Nationality, 62 FED. REG. 10,311, 10,357 (1997). These regulations provide that INS officers must record all screening interviews and obtain sworn statements from aliens before removing them. *See id.* at 10,355. A screening officer's supervisor must then review this record and approve the removal order before summary exclusion takes place. *See id.* at 10,357. This superficial review is an inadequate limitation on screening officers' otherwise unqualified authority to decide immigration claims. Supervisory officers usually will base their determinations solely on what is contained in the record, and therefore, any supportive information *missing* from the record will not be considered in this supervisory review.

117. *See supra* note 73 (citing precedent holding that due process requires the right to obtain private counsel in deportation hearings).

118. *See supra* note 82 (citing precedent holding that due process requires impartiality in deportation proceedings).

119. *See supra* note 73 (citing precedent holding that due process requires an effective interpreter to assist at deportation hearings when the alien does

tective due process requirements appears to reflect a greater understanding of how specific procedures may encourage or obstruct fundamental fairness.[120] Until the enactment of the AEDPA and the IIRIRA, the INA codified many of these protections, guaranteeing the rights to counsel, notice, and an impartial decision by someone other than the officer investigating or prosecuting the case.[121] Recent court decisions[122] and the statutory codification of these requirements demonstrate that the restrictive view of due process set forth in the *Japanese Immigrant Case* has since been expanded. The IIRIRA's summary-exclusion provisions fail to provide deportable aliens the procedural guarantees that modern courts hold constitutionally imperative.

The government could try to overcome unfavorable precedents by arguing that the Court should overrule them. The government might contend, for example, that aliens are a class of persons undeserving of any constitutional protection because it is citizenship that gives rise to an individual's rights and responsibilities under the Constitution.[123] This argument ignores the plain text of the Constitution, however, which differentiates between "citizens" and "persons" and specifically guarantees due process rights to all "persons."[124] Because the Constitution's Framers carefully preserved this distinction, it follows that they would have made the Due Process Clause applicable only to

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not understand English).

120. *See supra* note 73 (relating the theory that a shift in general procedural due process requirements occurred during the 1970s, resulting in an increase in the procedure courts required at deportation hearings).

121. *See supra* note 90 and accompanying text (describing the statutory right to counsel at deportation hearings under the INA); note 91 and accompanying text (describing the statutory right to notice of deportation hearings under the INA); note 82 (describing the statutory right to an impartial decisionmaker at deportation hearings under the INA).

122. *See supra* notes 73, 82 (citing precedents holding that due process requires the right to obtain counsel, impartiality, and an effective interpreter in deportation proceedings).

123. This argument analogizes government to a contractual relationship in which citizens relinquish a part of their individual autonomy to the sovereign in exchange for the benefits of living in an organized society, including constitutional protections. It asserts that aliens are not parties to the "contract," and therefore, are not entitled to due process. This assertion fails to recognize that the rights enumerated in the Bill of Rights are not protections offered by the government to its people, but rather restrictions on the government's ability to violate the human rights that all people possess as a matter of natural law.

124. U.S. CONST., amends. V, XIV; *see also supra* note 43 and accompanying text (parsing the Due Process Clause of the Constitution).

citizens had it been their intent to exclude noncitizens from its protection.[125]

The government could also argue that the *Japanese Immigrant Case* is inconsistent with the plenary power of the political branches to regulate immigration as a matter of national foreign policy.[126] It requires a significant leap of logic, however, to conclude that the legislature's interest in foreign relations is somehow injured by the Constitution's requirement of procedural due process in deportation hearings. Procedural safeguards do not weaken legislative control over immigration, but instead strengthen that control by ensuring that the executive branch faithfully carries out the legislature's substantive guidelines. These safeguards also do not improperly shift executive power to the judiciary, because the executive conducts the review process through immigration judges within the Executive Office for Immigration Review.[127] The procedural due process requirements set forth in the *Japanese Immigrant Case*, therefore, do not conflict with the plenary power of the political branches to determine the grounds for admission or expulsion of aliens. The government's interest in protecting that power is, consequently, an inappropriate basis for overruling the *Japanese Immigrant Case*.

If faced with a procedural due process challenge, the Court could not uphold the summary-exclusion provisions of the IIRIRA without overturning the *Japanese Immigrant Case*, and it could not reasonably overturn that precedent. It must, therefore, hold that aliens in deportation are entitled to procedural due process and strike down those sections of the summary-

125. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (stating that the Constitution affords due process not only to "citizens" but to all "persons" within United States territory).

126. *See supra* notes 60-62 and accompanying text (explaining the Court's rationale in upholding the federal government's plenary power over immigration). The Constitution allocates control over such matters to the Legislature and the Executive. *See supra* note 61 (noting the origins of legislative and executive power over immigration). In upholding these branches' unlimited power to exclude arriving aliens, the Court argues that the United States, as a sovereign nation, must have virtually unlimited power to restrict the entry of foreigners if it is to maintain its independence and resist the controlling influences of foreign nations. *See supra* notes 60-62 and accompanying text (enumerating the Court's arguments that immigration authority is grounded in the foreign relations power). The government might argue that its important interest in withstanding the influence of foreign nations is even more compelling when the citizens of those nations are already residing illegally on American soil.

127. *See supra* note 86 (explaining the role of the Executive Office for Immigration Review within the branches of government).

exclusion provisions affecting aliens found inside the nation's borders.

B. THE IIRIRA CONFLICTS WITH THE COURT'S PROCEDURAL DUE PROCESS ANALYSIS

The IIRIRA fails the Supreme Court's standard procedural due process balancing test, which requires courts to weigh the government's interest against the threat to the interests of individuals and the risk of error in the decisionmaking process.[128] Although procedural due process applies only if there are preliminary factual issues in dispute, the IIRIRA system creates enough potential grounds for factual disagreements that procedural rights should be triggered.[129]

1. The Government's Interest in Avoiding Immigration Hearings

Immigration law before the passage of the IIRIRA required the government to conduct hearings in both deportation and exclusion cases.[130] The INS has provided such hearings for years, which suggests that the burden of conducting hearings in all deportation cases is not too great for the government to manage effectively. Nevertheless, deportation hearings are expensive to conduct,[131] and the government has a legitimate interest in minimizing costs. Summary exclusion disposes of immigration cases very quickly, potentially reducing the costs associated with case administration and the time aliens spend in detention. Any potential cost reduction is speculative, however, because no empirical data demonstrates that summary-exclusion procedures actually reduce costs.[132] Advocates of

128. *See supra* note 47 and accompanying text (describing the *Mathews* due process balancing test); *see also supra* note 48 (noting that the Supreme Court applies the *Mathews* balancing test in the immigration context).

129. *See supra* note 49 and accompanying text (noting the factual dispute requirement).

130. *See supra* text accompanying notes 86-87 (describing the INA's requirement that a hearing take place in both deportation and exclusion proceedings).

131. *See supra* note 40 (reporting the dollar amount allocated to the EOIR in 1997); *see also* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (describing the government's interest in reducing the administrative costs of immigration as "weighty").

132. *See supra* notes 41-42 and accompanying text (noting the IIRIRA's requirement that the GAO complete a report assessing whether summary exclusion results in a reduction in administrative costs).

summary exclusion might further argue that nonadministrative costs associated with aliens, such as increased crime and unemployment rates, justify deporting them as quickly as possible. That aliens actually increase these costs, however, is unsupported by empirical evidence.[133] Even if future research finds that the new procedures reduce administrative and other costs, that reduction cannot justify eviscerating procedural protections that both the courts and prior immigration statutes have mandated for years.[134] As argued below, the alien's interests, and the risk of error in deportation hearings, significantly outweigh the government's interest in cost reduction.[135]

2. The Immigrant's Interest in Receiving a Hearing

In contrast with any arguable government interest, the individual alien's interest in the procedural protections mandated by the old immigration statute is enormous. The deported alien may lose her home, her job, and her relationships with friends and family in the United States.[136] Deportation also jeopardizes physical liberty during the period of incarceration that frequently precedes removal, and during the removal process itself.[137] These costs are even greater for an alien who came to the United States to seek asylum, because she risks torture or even death upon return to her home country. The alien's interests in family, freedom, safety, and life itself are extremely important and thus strongly counter the government's interest in reducing costs.[138]

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133. *See supra* notes 31-33 (arguing that public perceptions about the negative impact of aliens on crime, unemployment, and welfare programs are unsubstantiated).

134. *See supra* note 69 and accompanying text (describing the Court's holding in the *Japanese Immigrant Case*); *supra* text accompanying note 86 (citing Court precedent and INA provisions requiring a hearing in deportation proceedings).

135. *See infra* Parts II.B.2-3 (discussing the alien's interest and the high risk of error in deportation hearings).

136. *See supra* note 15 and accompanying text (enumerating these interests as some of the reasons why aliens come to the United States).

137. Physical liberty is one of the most significant interests the Due Process Clause protects. *See supra* note 46 (explaining the importance of physical liberty interests under the procedural due process guarantee).

138. *Cf.* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (describing the claimant's interests in living and working in the United States and rejoining with her family as "weighty").

3. The Risk of Error in the Decisionmaking Process

The risk of error in the summary-exclusion process is also enormous. Because of language barriers, aliens are much more likely than natural-born citizens to fail to communicate their claims to a decisionmaker accurately and independently.[139] Procedural protections, including the rights to written notice and access to counsel, significantly decrease the risk of miscommunication.[140] Furthermore, summary exclusion introduces a high risk of bias in the decisionmaking process because it requires the same immigration official to both investigate and decide an individual claim. Even the most rational and circumspect immigration officer may be unable to execute these roles simultaneously without prejudice to the claimant.[141]

The assumption that all inspection officers are impartial is also questionable. Aliens have reported numerous cases of violent physical abuse by immigration officials.[142] While these reports reflect the actions of a small number of officers, they suggest a high probability of anti-immigrant bias among some immigration officers. The broad discretion INS officials have during summary exclusion and the absence of any appeals process allow those officers who are biased to misreport facts and make erroneous decisions repeatedly without detection.[143]

Because the risk of error in immigration proceedings is so high, and the alien's interest in a hearing so significant, the government's interest in reducing administrative costs fails to outweigh them. Summary exclusion therefore fails the Supreme Court's procedural due process balancing test. An impartial hearing should be required when an alien alleges facts

139. Immigrants frequently do not speak English and are even less likely than citizens to understand the intricacies of the American legal system. These handicaps introduce great risk that an individual will neither understand the charges against him nor be able to convey facts that are essential to the decisionmaking process.

140. Notice is necessary for an alien to have the time to obtain counsel or assistance from nonlawyer volunteers. The right to counsel may be essential not only as a matter of advocacy in the immigration court, but also as a matter of educating aliens about their legal rights.

141. *See supra* note 82 (describing how the adoption of dual roles by an immigration officer threatens the fairness and impartiality of a deportation hearing).

142. *See supra* note 25 (citing reports of assaults against aliens committed by immigration officials and border patrol agents).

143. *See supra* note 116 (discussing the limited role supervisors play in detecting the mistakes and biases of the screening officers).

sufficient to state a claim for admission under substantive immigration law.

4. The Possibility of Factual Disputes Under the Substantive Law of the IIRIRA

Because the IIRIRA creates very few substantive rights, the possible grounds for factual dispute in an immigration hearing are limited. Several grounds for dispute do exist, however, and all aliens should thus have access to a full and fair hearing in order to address those issues when they arise.[144] For example, an alien might dispute the factual basis of a screening officer's determination that she is "inadmissible."[145] A screening officer might erroneously decide that an alien is inadmissible by incorrectly finding that a valid visa is fraudulent[146] or that a battered woman was never abused.[147] Such mistakes would infringe on both the substantive and the procedural rights of an affected alien because a screening officer's determination of admissibility serves both as a substantive

144. Threshold determinations about an individual's immigration status are of foremost importance. The procedural process must ensure that individuals who claim to be here legally have an opportunity to present evidence supporting their claims. Otherwise summary exclusion could result in the arbitrary deportation of legal permanent residents, asylees, refugee, or even citizens. Fortunately, the IIRIRA guards against this possibility. It provides that any alleged alien may obtain a hearing if that individual claims, in the face of possible criminal penalty, to be a legal permanent resident, refugee, or asylee. *See supra* text accompanying note 106 (describing the IIRIRA's administrative review provision for aliens claiming to have legal immigration status).

145. The IIRIRA classifies immigrants who entered the country without inspection or valid documents as inadmissible and automatically subject to removal. *See supra* note 95 (setting forth the IIRIRA's definitions of "admission" and "inadmissible"). Although an alleged alien in custody may bring a habeas corpus claim on the grounds that she is not an alien, unless she is a legal permanent resident, refugee, or asylee, she may not challenge a screening officer's determination on the threshold question of her admissibility. *See supra* note 107 (noting the IIRIRA's habeas corpus provisions).

146. The statute considers aliens with current visas and those with expired visas to be already admitted. *See supra* note 95 (setting forth the IIRIRA's definitions of "admission" and "inadmissible").

147. The statute deems battered women, abused children, and the non-battering parents of abused children to be admissible if they can demonstrate a connection between the abuse and their illegal entry into the United States. *See supra* note 105 (describing the IIRIRA's special exceptions for battered women and children).

basis for the officer's decision to remove the alien and as grounds for applying the summary-exclusion procedure.[148]

Screening officers decide other issues that directly affect only procedural rights. For example, a screening officer might erroneously deny access to a hearing by incorrectly concluding that an alien entered a year ago, when, in fact, the individual entered two years ago without inspection.[149] The injury caused when an inspection officer erroneously excludes a person without a hearing is not just academic. The IIRIRA permits both legal and illegal aliens to apply for various forms of discretionary relief, but an alien cannot qualify for some of these forms of relief without a hearing. For example, the IIRIRA permits an alien to request voluntary departure either in lieu of a removal hearing or after a removal hearing, but not in lieu of summary exclusion.[150] Voluntary departure is therefore contingent on the right to a removal hearing. Similarly, a battered woman whose abuser is a U.S. citizen may request adjustment of status to that of a legal, permanent resident if she has resided in the United States for at least three years.[151] This form of relief would be unavailable to her if a screening officer erroneously subjected her to summary exclusion.

In a variety of circumstances aliens might dispute whether a screening officer has accurately applied the law during the screening process to their factual circumstances. Because factual disputes will inevitably arise, the screening process must guarantee an avenue for the fair and impartial resolution of those disputes. The summary-exclusion procedures of the IIRIRA cut off all such avenues and thereby deny aliens who are present in the United States the procedural protections promised to them in the *Japanese Immigrant Case*.

148. *See supra* notes 95, 97 (defining admissibility and explaining the effect of an INS officer's determination that an alien is inadmissible). Summary exclusion is therefore dangerously circular: it is because the alien was found inadmissible that she is deprived of a hearing on the issue of her admissibility.

149. Aliens who entered illegally are not subject to summary exclusion if they have resided continuously in the United States for more than two years. *See supra* text accompanying note 96 (describing the IIRIRA's two year residence provision).

150. *See supra* note 92 (describing the IIRIRA's voluntary departure provisions).

151. *See supra* note 105 (discussing the IIRIRA's special provisions for battered women and children).

C. THE IIRIRA DOES NOT REFLECT A COHERENT LEGAL THEORY

In addition to contradicting immigration law precedent and procedural due process jurisprudence, the IIRIRA is also theoretically incoherent. It applies summary exclusion to undocumented excludable aliens and deportable aliens with less than two years' residence in the United States who entered illegally.[152] The IIRIRA, therefore, makes length of residence and legality of entry determinative of whether an individual is entitled to an administrative hearing. These criteria reflect a moral judgment that the United States should not reward illegally entering aliens with a hearing, unless they have lived here long enough to develop the close ties associated with long-term residence.[153] The IIRIRA thus balances the government's interest in deterring illegal entry against the long-term illegal alien's strong interests in admission.

The supposition that long-term residence necessarily correlates with the strength of an alien's legitimate ties to the United States is ill-founded. A short-term resident illegal entrant with close family members in the United States may have a stronger and more legitimate interest in admission than a long-term resident with no family. Because many aliens come to the United States to reunite with resident family members, length of residence is not sufficiently calibrated to the strength of an alien's interest to serve as a proxy for close ties to the United States. The criterion of long-term residence is thus both over- and under-inclusive because it inquires into an alien's length of stay rather than more probative factors, like actual family ties. In addition, the *Japanese Immigrant Case* contradicts any suggestion that due process applies only to long-term residents—the Court mandated due process in that case for an alien who had been in the United States for only four days.[154] In sum, the length of an alien's stay in the

152. *See supra* notes 94-97 and accompanying text (generally defining summary exclusion under the IIRIRA). This discussion leaves aside special exceptions for battered women, asylees, and aliens arriving by aircraft from western states with whom the United States does not have full diplomatic relations.

153. This analysis mirrors the Supreme Court's "close ties" rationale for upholding the entry doctrine. *See supra* note 55 and accompanying text (explaining the "close ties" rationale). For arguments against the "close ties" rationale as it applies to the entry doctrine, see *infra* Part III.A.

154. *See supra* text accompanying note 70 (describing the facts of the *Japanese Immigrant Case*).

United States is not a valid criterion for determining whether that individual deserves a full and fair hearing on the issue of deportability.

The government's interest in deterring illegal immigration is also an illegitimate basis for assigning due process rights to aliens. Superficially this criterion appears rational. By attaching the right to a hearing to a claimant's legal status, the IIRIRA eliminates the most controversial element of the entry doctrine[155]—that aliens who enter illegally receive better process than those who present themselves at the border in compliance with the law. Now neither group receives a removal hearing.[156] In reality, however, the IIRIRA is as arbitrary as the entry doctrine because it imposes summary exclusion on aliens who entered illegally but not on aliens who obtained illegal residence by overstaying a visa.[157] Both groups of aliens maintain their residence in the United States in defiance of immigration laws and neither group has a recognizably greater interest in admittance than the other. If obedience to the law is a valid prerequisite to obtaining due process, then no illegal alien should have the right to a hearing.

Obedience to the law, however, should not be a prerequisite to obtaining due process when the substantive issue to be decided by the process is whether a claimant actually broke the law. One could not rationally uphold a criminal justice system in which only innocent people have a right to a trial while guilty people must go immediately to jail. Yet, this is precisely the effect that the summary-exclusion provisions have on the immigration process.[158] The Constitution does not allocate procedural due process to people on the basis of good behavior; it is not a reward but a neutral means of assuring that the government distributes rewards and punishments according to law. The integrity of the system depends on the application of fair process to all individuals. Legal status is therefore not a

155. *See supra* note 54 and accompanying text (relating commentators' criticisms of the entry doctrine).

156. *See supra* notes 94-97 and accompanying text (defining generally summary exclusion under the IIRIRA).

157. *See supra* note 95 (explaining the IIRIRA's distinction between illegal entrants and other aliens with illegal immigration status).

158. Summary exclusion requires the INS to remove inadmissible ("guilty") aliens immediately, while admissible ("innocent") aliens are entitled to a hearing on the issue of their right to enter or remain in the country. *See supra* note 95 (setting forth the IIRIRA's definitions of "admission" and "inadmissible").

valid criterion for defining the scope of due process in the context of immigration.

The terms of the IIRIRA are not developed out of a comprehensive legal theory but appear to spring from Congress's desire to address the inconsistencies inherent in the entry doctrine without risking the political backlash likely to result from expanding aliens' procedural rights.[159] These terms conflict with both Supreme Court precedent governing immigration law and with the Court's procedural due process analysis in other contexts. Revision of the law set forth in the IIRIRA is therefore imperative.

III. CREATING CONSTITUTIONAL IMMIGRATION REFORM

Although Congress and the Executive have almost complete authority to regulate substantive immigration law free of restraint,[160] the Supreme Court has, with the entry doctrine, carved out a narrow sphere of constitutional rights for deportable aliens that Congress cannot permissibly transgress.[161] The restriction of these rights to this class of individuals is arbitrary and inconsistent with the Court's procedural due process analysis in other legal contexts. In other contexts the Court has focused on the significance of the individual interest threatened rather than on the classification of the individual.[162] To harmonize its holdings the Court must cease to recognize a category of persons who are excluded from due process protection and instead concentrate on the nature of the protected interest. Congress has indicated its disapproval of the entry doctrine by legislatively eliminating it through the IIRIRA.[163] Instead of expanding the group of aliens entitled to due process, however, this statute narrows the sphere of protected individuals even further. As a result, Congress succeeded not only in drawing another arbitrary distinction but also in directly encroaching

159. The IIRIRA developed in response to a strong anti-immigrant sentiment growing in American society. *See supra* Part I.A (discussing the political climate in which the IIRIRA developed).

160. *See supra* notes 60-62 and accompanying text (explaining the authority of the legislative and executive branches to regulate immigration).

161. *See supra* Part I.C (defining the entry doctrine and discussing its impact on aliens' rights).

162. *See supra* text accompanying notes 44-46 (discussing generally the Court's definition of the interests that procedural due process protects).

163. *See supra* Part I.D (explaining how the IIRIRA eliminates the entry doctrine).

upon the rights of those individuals whom the Court deems constitutionally protected.

A. THE SUPREME COURT SHOULD RENOUNCE THE ENTRY DOCTRINE

Congress's unwillingness to respect the entry doctrine will make it necessary for the Supreme Court to take inventory of its decisions and to consider whether the doctrine deserves preservation in the face of clear legislative disapproval.[164] In granting a hearing to aliens who enter illegally while denying process to those who faithfully present themselves for inspection at the border, the entry doctrine seems patently unfair.[165] Courts and commentators have offered several justifications for this anomaly, but none withstands rigorous analysis. For example, the Supreme Court has argued that aliens in deportation develop close ties through continued residence that aliens in exclusion do not share.[166] This argument does not withstand close scrutiny, because an alien on the threshold of entry may also have strong familial, economic, or property interests waiting for her in the United States.[167] The Court does not explain why it rejects the new arrival's right to protect those interests but strains to defend them when the claimant is an illegal alien resident. An alien who comes to this country to be reunited with his children surely has a greater interest in admittance on the threshold of entry than does a resident of many years who remains in the United States only to benefit from its high standard of living. The "ties" that come with residence are thus insufficient to justify the entry doctrine.

Another argument in support of the entry doctrine asserts that the Constitution's authority extends only to our national boundaries,[168] and, therefore, individuals seeking admission lack the protections of the Due Process Clause. This argument implies that deportable aliens are entitled to due process solely

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164. *See supra* Part I.D.

165. *See supra* note 54 and accompanying text (relating commentator's criticisms of the entry doctrine).

166. *See supra* note 55 and accompanying text (citing Supreme Court precedent for the "close ties" rationale). For an argument that the "close ties" rationale is also an inappropriate basis for the length of residence requirement of the IIRIRA, see *supra* Part II.C.

167. *See supra* note 54 (describing arguments against the entry doctrine).

168. *See supra* note 55 (setting forth a territorial rationale for the entry doctrine).

because they are inside national boundaries. This rationale is fundamentally flawed, however, because the entry doctrine denies procedural due process to aliens who are actually within U.S. territory. This result is achieved through a basic tenet of the entry doctrine that when INS officials stop an alien at the border and then forcibly detain her inside, she is as unprotected by the Constitution as if she had never crossed the boundary line.[169] The Constitution, therefore, does not reach her even though she is within its territorial scope. Consequently, the entry doctrine itself conflicts with the theory that territorial boundaries determine the scope of Constitutional protection.

An additional justification for the entry doctrine argues that presence within United States borders is the precondition that triggers procedural due process. This theory conceptualizes presence itself as the liberty or property interest an alien seeks. Illegal aliens inside the nation's borders already have a possessory interest in this benefit; aliens on the verge of entry do not.[170] The alien seeking entry requests a privilege, while the resident alien seeks to protect a possessory right. This view relies on a distinction between rights and privileges that the Court has abandoned in every context except immigration law.[171] The Court offers no reason for continuing to apply this outdated construct to immigration law and should cease to recognize it altogether.

All of these justifications for upholding the entry doctrine appear to be the post-hoc speculations of courts and commentators trying to rationalize how immigration law developed. The Court's distinction between deportation and exclusion proceedings began with *Knauff v. Shaughnessy*[172] and its incorrect interpretation of *Nishimura Ekiu v. United States*[173] and the *Japanese*

169. *See supra* notes 80-82 and accompanying text (explaining the legal construction by which an excludable alien detained inside the border is deemed to be outside the border).

170. Some courts have suggested that when a property interest is at stake, a claimant must already enjoy its benefits to successfully challenge its denial without due process. *See supra* note 46 (discussing the procedural due process "present enjoyment" requirement). The entry doctrine may reflect such a requirement, as aliens inside the United States' borders already receive the benefits of presence here, while incoming aliens do not. This "present enjoyment" requirement, however, is not a firmly established doctrine. *See id.*

171. *See supra* note 77 (discussing the rights/privileges distinction and its application to immigration law).

172. 338 U.S. 537 (1950).

173. 142 U.S. 651 (1891).

Immigrant Case.[174] The *Knauff* Court misread the *Nishimura Ekiu* precedent as explained in the *Japanese Immigrant Case*, denied that due process applies to exclusion, and thereby expanded the power of the political branches to regulate immigration beyond the limits of the Constitution.[175] Neither *Nishimura Ekiu* nor the *Japanese Immigrant Case* explains why deportation and exclusion should be treated differently. The entry doctrine assumes that the Supreme Court intentionally distinguished deportation and exclusion from each other. A plain reading of the *Japanese Immigrant Case* demonstrates that this assumption is unsound.[176] It affirms *Nishimura Ekiu*'s holding that a government officer's order concerning an immigrant's right to "enter" or "remain" in the country constitutes due process of law.[177] The *Japanese Immigrant Case* immediately qualifies that statement, however, with the proviso that an officer may not disregard due process principles when executing a statute that affects the "liberty of persons."[178] A plain interpretation of the text is that this proviso qualifies the entire statement that preceded it. The *Japanese Immigrant Case* assumes that removal affects the liberty of persons and thus holds that the Due Process Clause limits government authority to regulate *both deportation and exclusion*. The entry doctrine, therefore, has no rational basis, but is the result of the *Knauff* Court's misreading of established precedent. It is high time for the Court to renounce it.[179]

B. THE NEED FOR LEGITIMATE REFORM

The entry doctrine's fundamental weakness is that it developed without the benefit of a coherent legal theory. The Court should renounce the entry doctrine and replace it with a strong legal theory defining how procedural due process should apply to immigration proceedings. This new theory may then serve as the basis for constitutionally permissible statutory reform.

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174. 189 U.S. 86 (1903).

175. *See supra* notes 76-77 and accompanying text.

176. *See supra* note 71.

177. *See supra* note 71.

178. *See supra* note 71.

179. Because the entry doctrine is no longer codified in any statute, the Court will not face any direct challenges to its validity. The Court could indirectly reject the doctrine, however, by treating deportable and excludable aliens' challenges to summary exclusion similarly.

1. The Development of a New Legal Theory

To survive judicial scrutiny, immigration legal theory must be in harmony with the Court's procedural due process analysis outside the immigration context. Procedural rights should not depend on a person's nationality, geographic location, length of residence, legal status, or any other demographic classification. Rather, immigration due process analysis must focus, as the Court's general procedural due process analysis focuses, on the individual interest government action threatens to undermine.[180]

Accurate identification of the interests immigration orders threaten is extremely important. Removal orders may deprive aliens of an infinite number of specific interests, including freedom from persecution, job opportunities, families, homes, social contacts, and education. The importance of these interests varies in each individual case. Congress would face an impossible task if it attempted to write a uniform law that could separately calibrate all of these interests and balance them against the government's interest in minimizing the costs of administrative procedures. Deprivation of these interests is an indirect, secondary effect of the immigration removal process. While these secondary interests are important, the possibility that government action might threaten them is not a solid basis for constructing a uniform law. Unfortunately, the Court's application of procedural due process principles to immigration proceedings has focused entirely on these variable, secondary deprivations rather than on those deprivations that are the direct, proximate result of government action.[181] An alien's loss of physical liberty in the removal process is such a direct deprivation. Procedural due process arguably protects all aliens' liberty interests when the government takes them into custody and forcibly transports them back to their countries of origin.[182] These deprivations affect excludable aliens and deportable ali-

180. *See supra* text accompanying notes 44-46 (discussing generally the Court's definition of the interests that procedural due process protects).

181. For example, the Court's "close ties" rationale is based entirely on consideration of secondary interests.

182. If the INS responded to unwanted arriving aliens by simply stopping them at the border and refusing entry, the deprivation of liberty would be much less clear. Once an alien is detained, however, the INS only allows him to withdraw his application for admission and return home not as a matter of right but at the discretion of the INS. *See* Aliens and Nationality, 62 FED. REG. 10,311, 10,358 (1997) (stating the current regulation on withdrawal of applications).

ens with equal force, and therefore, no basis exists for distinguishing between them. Because physical liberty is one of the most significant interests protected by the Due Process Clause,[183] it weighs heavily against the government's interest in reducing administrative costs. Given the vehemently anti-immigrant political climate[184] and an entrenched legal tradition of overlooking the liberty restrictions on detained aliens,[185] however, the Supreme Court is currently unlikely to recognize that excludable aliens have a constitutional right to due process. Hopefully, the Court will one day look beyond politics and tradition and hold that incarcerating any human being without a hearing is constitutionally impermissible.

2. Statutory Reform

The pre-reform INA protected excludable aliens' liberty interests by granting them the right to a hearing, in spite of the Supreme Court's failure to recognize a constitutional basis for that right.[186] The IIRIRA took that protection away not only from excludable aliens, but also from some deportable aliens whose constitutional right to an administrative hearing was recognized almost a century ago.[187] The revised law will continue to undermine the Constitution until Congress wholly repeals the IIRIRA's summary-exclusion provisions. Congress should then reinstate the INA's pre-reform removal process provisions with one major modification—deportation and exclusion proceedings should be combined, as the IIRIRA suggests, into a single removal proceeding.[188] This change would

183. *See supra* note 46 (explaining the importance of physical liberty interests for procedural due process analysis).

184. *See supra* Part I.A (describing the public animus towards legal and illegal aliens precipitating the enactment of the AEDPA and the IIRIRA).

185. The Supreme Court's failure to acknowledge the liberty interests of aliens led to an unconscionable result in *Mezei*, where the Court held that the government could keep an alien in prison indefinitely when no other nation would admit him. *See supra* notes 78-79 and accompanying text (detailing the facts of *Mezei*).

186. *See supra* notes 86-87 and accompanying text (enumerating the IIRIRA's exclusion and deportation procedure provisions).

187. *See supra* text accompanying note 100 (explaining that summary exclusion applies to deportable aliens who entered without inspection and resided in the United States for two years or less); *supra* text accompanying note 69 (stating the *Japanese Immigrant Case* holding that due process guarantees deportable aliens the right to a hearing).

188. The combination of deportation and exclusion processes into a single proceeding would require Congress to decide whether to preserve or eliminate

eliminate the arbitrary distinction imposed by the entry doctrine. In contrast with the IIRIRA, however, this proceeding must grant an impartial hearing, as the pre-reform INA did, to all applicants regardless of their status as incoming aliens or prior arrivals.

Granting hearings to excludable aliens will not by itself increase administrative costs because such hearings were mandatory under pre-reform law.[189] The overall cost of immigration administration may nonetheless significantly increase. The IIRIRA's new draconian restrictions and strong enforcement mechanisms might precipitate a mass exodus of unwanted aliens from the country.[190] Because of these new restrictions, the Executive Office For Immigration Review (EOIR)[191] may soon witness a substantial influx of removal orders requiring review. The efficient but unconstitutional summary-exclusion provisions could potentially offset the flood of cases that otherwise might overrun the EOIR's capacity.[192]

Nonetheless, summary exclusion is not the only possible means of resolving this problem. Congress should substitute constitutionally permissible docket control methods in its place. For example, the INS could slow the processing of cases involving aliens who are self-supporting, non-threatening to the public, and cooperative with immigration authorities.[193]

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those protections formerly granted only in deportation proceedings. Congress should consider government costs and judicial precedents in making such decisions. For example, deportable aliens' right to retain counsel is constitutionally protected. *See supra* note 72-73 (defining current notions of what protections due process requires in deportation proceedings). Guaranteeing excludable aliens the right to retain counsel would minimally increase government costs as long as exercising that right did not delay the removal process. The combined removal proceeding, therefore, should preserve the right to retain counsel for both classes of aliens within given time limits.

189. *See supra* note 87 and accompanying text (citing the pre-reform INA provision granting hearings to excludable aliens).

190. *See supra* notes 3, 6 (stating that the new law requires the INS to deport even long-term legal permanent residents with convictions for very minor crimes, and noting that it substantially increases border patrol and enforcement).

191. *See supra* note 86 (defining the roles of the EOIR and the INS in the immigration system).

192. Congress alluded to this concern when it ordered the GAO to perform a cost-benefit analysis of the IIRIRA's summary-exclusion procedures. *See supra* note 41 (detailing the IIRIRA provisions mandating this study).

193. The class of aliens who meet these requirements may be quite large under the new law, because the IIRIRA requires the INS to deport legal permanent residents with long past convictions for many non-violent crimes. *See supra* note 3 (describing the grounds for deportation under the new law).

The government's interest in removing such aliens is not urgent, and placing them on a protracted hearing schedule would do little public harm.

Emergency situations may require Congress to apply more restrictive measures. In such situations Congress should consider implementing summary-hearing processes that are more protective of aliens' rights than the summary-exclusion provisions of the IIRIRA. The most troubling aspect of the IIRIRA's summary-exclusion provisions is that they place the entire decisionmaking process under the control of INS officials. Separating the investigative and prosecutorial roles of the INS and the judicial role of the EOIR is an essential safeguard against bias and miscommunication.[194] Screening interviews conducted by the EOIR would thus raise fewer concerns. The government could further alleviate the possibility of bias by requiring EOIR screening officials to ask standardized questions designed to ascertain whether claimants allege facts upon which an application to remain in the United States could be granted.[195] Aliens who allege facts to support any colorable claim would automatically receive an adversarial hearing before an immigration judge. The INS could immediately remove all others without infringing on their due process rights.[196]

These docket control methods would make the EOIR's system of processing cases more efficient. In addition, Congress should also consider long-term solutions aimed at reducing the EOIR's overall caseload. The IIRIRA prescribes new increases in border patrol and enforcement, which will discourage illegal entry and prevent many aliens from entering the administrative process in the first place.[197] Hopefully, these provisions

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Some of these aliens have stable jobs, families, and homes in the United States. They would present little threat to the public and low risk of flight, enabling the INS to release them on bail rather than tax INS detention facility capacities.

194. *See supra* note 82 and accompanying text (setting forth precedent to support the conclusion that adoption of dual roles by an immigration officer threatens the fairness and impartiality of immigration hearings).

195. EOIR screening officials should ask, for example, whether aliens under their review have a history of persecution, allege possession of valid immigration documents, or claim to have a spouse or children living legally in the United States.

196. Procedural due process is satisfied without a formal hearing when a claimant presents no factual issues to resolve. *See supra* note 49 and accompanying text (stating that due process requires no formal procedure when there are no factual issues to resolve).

197. *See supra* note 6 (discussing the IIRIRA's provisions for increased border patrol).

will offset some of the anticipated increases in immigration cases. Removing job opportunities and other incentives to immigrate to the United States should also decrease the number of people seeking admission. Critics of the IIRIRA argue that it fails to set forth sufficient penalties against employers who hire illegal aliens.[198] In time, enhancing these penalties would decrease the number of aliens entering the United States and result in a long-term reduction in immigration cases and administrative costs.

Congress' desire to minimize the impact of the IIRIRA's new substantive restrictions on the administrative system is understandable. By prescribing summary exclusion, however, Congress blindly answered this problem without considering constitutionality or fairness. In doing so, Congress overlooked reasonable alternatives that would allow the government to avoid increased administrative costs without abrogating the procedural rights of people who, if given the opportunity to speak, could demonstrate a compelling reason under substantive immigration law for the government to allow them to live in the United States.

CONCLUSION

The IIRIRA is an unconstitutional invasion of aliens' procedural due process rights. Longstanding Supreme Court precedent holds that the government may not deport people without giving them hearings, regardless of whether they entered legally or illegally, and regardless of how long they have lived here. The IIRIRA violates that precedent by permitting the INS to deport some classes of aliens without granting them either a hearing or an appeal. The brief interview which these aliens receive under the IIRIRA's summary-exclusion provisions is insufficient to meet the procedural standards that modern courts have held necessary in deportation hearings. The IIRIRA also fails the standard balancing test which the Court uses to adjudicate procedural due process challenges outside the context of immigration law. The government's interest in summary exclusion's cost-saving possibilities is outweighed by the alien's compelling interests in avoiding deportation and the significant risks of error associated with immigration proceedings. Moreover, the IIRIRA reflects no co-

198. *See supra* note 29 (citing Senator Kennedy's recent criticism of the IIRIRA on these grounds).

herent legal theory and thus has no rational basis for undermining the procedural rights of particular classes of aliens.

While federal case law is more protective of aliens' rights than the IIRIRA, it, too, fails to adequately safeguard their interests. For decades the Supreme Court has held that aliens entering the United States for the first time have no procedural due process rights, even if the INS detains them indefinitely. The Court's decision to deny due process to these aliens, but grant it to those found inside the border is arbitrary and unjustifiable. The INS frequently incarcerates aliens during the immigration process and, in doing so, takes away their physical freedom by forcing them to leave the country. The Court should recognize that procedural due process must attach whenever such important liberty interests are threatened, and therefore, it should apply to all aliens whom the INS intends to incarcerate or relocate regardless of where they are when the INS finds them. A revision of the IIRIRA based upon this comprehensive theory would require the government to provide hearings to deportable and excludable aliens who contest the government's factual grounds for removing them. Such a provision would place a premium on the protection of the rights of aliens without unduly compromising administrative efficiency.

The IIRIRA is the most comprehensive reform in U.S. immigration law since its inception in the late 1800s. A growing belief among many Americans that aliens are responsible for terrorism, unemployment, high crime rates, and welfare abuse has put an enormous amount of political pressure on legislators to strictly limit legal and illegal immigration. Congress has responded to this pressure aggressively, undermining the constitutional rights of many vulnerable people to defend their homes, jobs, families, lives, and liberty. The United States may be sorely in need of immigration reform, but with this piece of legislation Congress has gone too far.