CONFLICTING SIGNALS: UNDERSTANDING US IMMIGRATION REFORM THROUGH THE EVOLUTION OF US IMMIGRATION LAW*

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Summary

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* **Nota:** podeu consultar les versions en català i castellà d'aquest article a www.rcdp.cat.

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I. Introduction

The modern debate over immigration law in the United States is the most recent stage of a long evolution.[1] The history of the United States is closely intertwined with its immigration history. After all, immigrants[2] colonized the land that would become the United States, and the United States has continued a tradition of immigration. Many in the United States are very aware of their immigrant roots. They know the migration stories of their parents, grandparents or great-grandparents; they know their family story of how and why that first family member left home to make a new one in the United States. The evolution of immigration law in the United States does reflect a welcoming story in which immigrants have been invited. The welcoming story continues to present day. The United States admitted over one million legal, permanent immigrants in fiscal year 2008 alone,[3] and in 2006, the foreign-born made up 12.5 percent of the US population.[4]

But the story of immigration law and the United States has been, at times, less welcoming and instead focused on tight immigration control. Throughout its history, the United States has enacted immigration laws that strictly control how many and what kinds of immigrants are welcome. Thus, the story of immigration law and the United States sends conflicting signals. There is a narrative, symbolized by the Statute of Liberty, of a welcoming country. At the same time, however, there is a narrative of tight control.[5] This control narrative is influenced by fear of perceived negative characteristics of immigrants and of perceived negative effects of immigration on the United States.[6]

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1. For more information on the history of US immigration policy, see Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control*, Princeton University Press, 2002.

2. This essay uses the term «immigrant» in its colloquial sense unless otherwise specified.

3. U.S. Department of Homeland Security, U.S. Legal Permanent Residents: 2008 at 1 (available at http://www.dhs.gov/files/statistics/publications/yearbook.shtm).

4. Pew Hispanic Center, *Statistical Portrait of the Foreign-Born Population in the United States, 2006*, http://pewhispanic.org/files/factsheets/foreignborn2006/Table-1.pdf.

5. This essay does not address why this conflicted narrative exists and leaves aside a discussion of the integration of immigrants into US society. The focus here is on recognizing evidence of the conflicted narrative within the evolution of US immigration law and to think about how the conflicted narrative illuminates the modern debate over immigration reform.

6. In 1889, the US Supreme Court described the circumstances leading to the Chinese Exclusion Act, an example of immigration control legislation: «The differences of race added greatly to the

This essay sets the modern immigration reform debate in the context of this conflicted evolution of US immigration law. The conflicted narrative is carrying through to modern policy debates. In Part II, this essay illustrates the conflicted evolution of US immigration law in three key areas: the selection system; the adjudication system; and the legal theory that underlies federal regulation of immigration. In Part III, this essay shows how the conflicted narrative is found in modern debates over the future of the immigration selection system and the future of the immigration adjudication system.

II. The Evolution of US Immigration Law

The immigration laws of the United States have evolved in three key areas: the system designed to select which foreign nationals may enter and remain in the United States; the system designed to adjudicate the application of the selection system to a particular individual; and the legal theory that supports federal authority to regulate immigration. At some level, evolution in these three areas has been positive; the evolution reveals movement towards a nondiscriminatory selection system, a more formal system of adjudication and a slightly more modern legal theory. This movement is relative, however, to starting points of an overtly racist selection system, an adjudication system that combined the roles of judge and prosecutor and a legal theory steeped in Nineteenth Century notions of rights. Also, movement in US immigration law is not always a consistent forward path. At times, regression is evident.

difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation.» Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 595 (1889).

A. The Selection System

At the time of writing, US immigration law is based on a statute enacted in 1952, the Immigration and Nationality Act (INA).[7] There have been several major amendments to the INA, but the basic structure of US immigration law remains as Congress established it in 1952.

That basic structure consists of a selection system, with accompanying provisions governing naturalization.[8] There are selection system provisions that establish the contours of the selection system itself and others that govern enforcement of the selection system.[9] The enforcement provisions govern those who present themselves at the border seeking legal entry but do not qualify under the selection system, those present who did not enter through the legal selection system and those who may have committed an act that renders their previous legal selection invalid. Under the INA, all of these circumstances may lead to the removal[10] of a foreign national.

The selection system presumes that all who wish to enter the United States intend to remain permanently and must meet the stringent entry requirements of a legal permanent resident («green card» holder).[11] An individual who only seeks temporary entry, however, has the opportunity to show that he or she falls within one of the statutorily (set by Congress) established temporary entry categories.[12] Under the statute, a person who intends to remain permanently is an «immigrant,» while a temporary entrant is a «nonimmigrant.»[13] There are different categories of permanent and temporary entry.

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7. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

8. 8 U.S.C. §§ 1101 *et. seq.* (2009).

9. *See, e.g.*, 8 U.S.C. §§ 1151-1160, 1182, 1227. The enforcement structure provides a check against those seeking legal entry. Those individuals are subject to a test of admissibility. The enforcement structure also provides a check against the behavior of noncitizens who have already entered the United States legally. Those individuals are subject to a test of deportability.

10. Under current statutory terminology, a person who is either inadmissible or deportable is subject to removal from the United States. While the everyday term «deportation» persists, the statutory terminology refers to removal.

11. 8 U.S.C. § 1101(a)(15).

12. 8 U.S.C. § 1101(a)(15)(A)-(V).

13. 8 U.S.C. § 1101(a)(15). Thus the term «immigrant», as used in the statute, refers only to legal permanent residents and not to all foreign nationals.

Permanent entry mostly is based on a qualifying family or employment relationship.[14] The selection system for permanent entry is constrained by overall yearly numerical limits in combination with per category and generally applicable per country limits.[15] For example, if an individual applies for permanent residence as the spouse of an existing legal permanent resident, the applicant must fall within a yearly overall quota, a quota that applies to the category of spouses of legal permanent residents and may be subject to a per country quota[16] that applies to the spouse's home country. Some categories of permanent entry, however, are exempt from the quota requirements. For example, spouses of United States citizens are exempt from the quotas.[17]

The major nonimmigrant categories relate to temporary employment, tourism and study.[18] Individual categories of nonimmigrant entry may carry their own quotas. For example, the number of H-1B temporary workers is limited per year. [19]

Since 1952, the INA has evolved to become both more and less welcoming. Congress has made several changes to the selection system that reflect the welcoming narrative. These changes include the elimination of the national origins quota system, the elimination of blatantly racist restrictions on Asian immigration and increases in the volume of legal immigration.[20] But there is also evidence of a desire for tighter control. Congress has expanded the categories of activities that render someone removable. Congress has also made it more difficult to obtain judicial review of the executive branch's immigration actions. Such narrowing of the role of the independent federal courts demands atten-

14. 8 U.S.C. § 1153(a)-(b). There are other ways to obtain legal, permanent status. *See, e.g.,* 8 U.S.C. § 1158 (establishing a procedure to apply for asylee status, which can lead to legal, permanent status); 8 U.S.C. § 1153(c) (establishing a diversity lottery program that distributes legal, permanent status).

15. 8 U.S.C. §§ 1151, 1152.

16. Congress has exempted 75 percent of this family-based immigration category from the per country limitation. 8 U.S.C. § 1152(a)(4).

17. 8 U.S.C. § 1151(b). These exemptions explain how the total number of legal, permanent immigrants admitted per year can exceed the yearly quota.

18. 8 U.S.C. § 1101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(H).

19. 8 U.S.C. § 1184(g)(1)(A).

20. This essay discusses some examples of the conflicted narrative of welcome and tight control. There are other examples, and this essay does not attempt to discuss all of them.

tion under the separation of powers tradition of the United States. Additionally, in response to the terror attacks of September 11, 2001, the immigration laws are now administered with a deep sense of caution and suspicion.

As enacted, the INA's selection system continued a tradition of national origins quotas.[21] Congress first enacted these yearly quotas of immigrants in 1921 and made them permanent in 1924.[22] The yearly quota of a particular nationality was based on the number of individuals of that nationality residing in the United States as of 1890.[23] The motivation behind the national origins quotas was to maintain a particular mix of nationalities in the United States.[24] By establishing these national origins quotas, Congress expressed its preference for a certain kind of immigrant–one from Northern Europe. There was a push from inside the United States for restrictions on new kinds of immigrants –those from Eastern and Southern Europe–and Congress responded with the national origins quota system. Those pushing for restrictions argued that the biological, racial inferiority of the Eastern and Southern Europeans demanded quotas that would preserve the Anglo-Saxon characteristics of the United States.[25] The national origins quotas severely limited the number of immigrants from Eastern and Southern Europe because those nationalities did not make up a significant portion of the US population in 1890.[26]

In 1965, Congress eliminated the national origins quotas, along with all other quotas that singled out particular races or geographic regions.[27] The 1965 law replaced the national origins system with a worldwide numerical yearly quota and an equal per country quota, no matter the sending country.[28]

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21. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 201, 66 Stat. 163.

22. Tichenor, *Dividing Lines* at 143-46.

23. *Id*. at 145.

24. *Id*. at 143-46; Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, Princeton University Press, 2004, 21-23.

25. Tichenor, *Dividing Lines* at 143-44. There were other motivations besides race, such as economic fear and national security concerns. *Id*. at 146-49.

26. *Id.*

27. Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911. *See also* Ngai, *Impossible Subjects* at 227; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273 (1996).

28. Immigration Act of 1965, Pub. L. No. 89-236 §§ 2, 3, 79 Stat. 911.

This 1965 law did contain elements of control, however. It applied new quotas to immigration from the Western Hemisphere, including Mexico.[29]

Another effort to limit the type of immigrant welcome in the United States predates the national origins quotas. Starting in the Nineteenth Century, the United States enacted laws aimed at preventing immigration to the United States from Asia. For example, the Chinese Exclusion Act of 1882 eliminated the future immigration of Chinese laborers, and the prohibition was extended in 1888 to forbid reentry of even previously legal Chinese residents who had temporarily left the United States.[30] As the US Supreme Court explained, the proponents of these restrictions perceived an inability of the Chinese to assimilate and feared that the United States would be «overrun» by Chinese immigrants.[31] In 1924, Congress effectively barred all Asian immigration.[32] In a welcoming move, Congress eliminated the bar to Asian immigration when it enacted the INA in 1952.[33] But at the same time, it exhibited control by restricting Asians to only a token amount of quota slots.[34]

As described above, the 1965 amendments to the INA implemented worldwide quotas on immigration and eliminated race-based or country-based restrictions.[35] There are two important examples of an opening up of the worldwide quotas after 1965 that further reflect the welcoming narrative. First, Congress implemented a legalization program in 1986. For foreign nationals residing illegally in the United States, this program provided a way to legalize their status.[36] This was a one-time relaxation of the yearly quotas. Second, Con-

29. *Id.* The 1952 INA had excluded immigrants from the Western Hemisphere from the national origins quota system. Tichenor, *Dividing Lines* at 146. For further discussion of the development of the Western Hemisphere quotas in the Immigration Act of 1965, see Ngai, *Impossible Subjects* at 254-58.

30. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 582 (1889).

31. *Id.* at 595.

32. Tichenor, *Dividing Lines* at 145; Ngai, *Impossible Subjects* at 37; Chin, *The Civil Rights Revolution* at 281-87.

33. The Act also eliminated the bar to the naturalization of Asians. Chin, *The Civil Rights Revolution* at 282-87.

34. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 202(b), 66 Stat. 163.

35. The elimination of these types of restrictions does not eliminate the role of race in immigration policy. A facially neutral policy could have a disparate impact, for example. The implementation of a facially neutral policy is a welcoming advancement, however.

36. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359.

gress decided to relieve pressure on the yearly quotas in 1990 by enacting legislation that, among other things, permanently increased the worldwide numerical limits.[37] The United States now allows for the admission of between 416,000 and 675,000 non-quota exempt permanent immigrants per year.[38]

While these expansion initiatives are consistent with the welcoming narrative, at the same time, these initiatives also exhibit a desire to control. Congress created the 1986 legalization program in tandem with sanctions against employers whose hiring practices violate immigration law.[39] The 1990 act limited immigrant access to the courts to challenge the application of the selection system to a particular individual.[40] While the 1990 act did increase the worldwide numerical limits, the resulting quotas must be viewed in the context of an estimated US population of 308 million.[41] Finally, accessing the legal immigration opportunities presented by these initiatives depends on maneuvering through confusing application processes that allow the government to exert procedure-based control.[42]

Aside from the control features of these welcoming initiatives, there are other recent manifestations of the control narrative. Congress amended the INA in 1996 to exert even more control through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which Congress passed in 1996. Also, changes to the administration of the selection system that took hold after September 11, 2001 are evidence of tight control.

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37. Immigration Act of 1990, Pub. L. No. 101-649, § 101, 104 Stat. 4978.

38. U.S. Department of Homeland Security, U.S. Legal Permanent Residents: 2008 at 1 (available at http://www.dhs.gov/files/statistics/publications/yearbook.shtm). There is a complicated calculation that arrives at the exact number. *Id.* at 6. This number excludes those categories exempt from the quotas, such as the spouses of United States citizens. *Id.* at 2. In fiscal year 2008, the United States admitted over one million permanent immigrants, including those exempt from the quotas. *Id.* at 1.

39. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359.

40. Immigration Act of 1990, Pub. L. No. 101-649, § 502, 104 Stat. 4978.

41. These numbers must also be viewed in the context of the requirements imposed to obtain one of the quota slots. For example, certain employment-based categories require a labor certification from the US Department of Labor. This certification is designed to control immigration to protect US workers, even if the effectiveness of the control is debatable. *See* Lenni B. Benson, *The Myth of the Alien Labor Certification*, Cross-Border Human Resources, Labor and Employment Issues (Andrew P. Morris & Samuel Estreicher eds.), 2005.

42. Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 Administrative L. Rev. 203 (2002) (describing process borders in immigration adjudication).

The congressional amendments to the INA in 1996 through IIRIRA render the selection system more inflexible and unforgiving.[43] For example, the 1996 legislation expanded the statutory definition of an «aggravated felony.»[44] This is an immigration term of art. Congress defined the term «aggravated felony» in the INA to include a list of crimes.[45] Thus, Congress determines what crimes count as an aggravated felony for immigration purposes. In 1996, Congress added crimes to the list of those that are statutorily identified as aggravated felonies.[46] These crimes are not necessarily aggravated or felonies.[47] If a foreign national is deemed to be convicted of an aggravated felony, as defined by the INA, that individual may be removed from the United States and is ineligible from most forms of relief from removal.[48]

The 1996 legislation also made it much more difficult to challenge the executive branch's application, through individualized adjudication, of the selection system and its accompanying enforcement mechanisms.[49] Through this legislation, Congress enacted substantive limits on judicial review.[50] The substantive restrictions include a provision that forbids review of questions of fact in certain cases and a restriction against the review of many discretionary administrative decisions.[51] These restrictions are contrary to a US tradition of separation of powers, where independent judicial review of the administrative actions of the executive branch serves as a check on the executive branch. As Congress does not conduct day-to-day oversight of the activities of the exec-

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43. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

44. Nancy Morawetz. *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 113 (1998).

45. 8 U.S.C. § 1101(a)(43).

46. Morawetz. *Rethinking Retroactive Deportation Laws* at 113.

47. For example, a theft offense which carries a term of imprisonment of one year or more, regardless of any suspension of the sentence, is an aggravated felony. 8 U.S.C. § 1101(a)(43)(G); 8 U.S.C. § 1101(a)(48)(B).

48. 8 U.S.C. § 1227(a)(2)(A)(iii); 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1229c(a)(1).

49. Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 Geo. Immigr. L.J. 233 (1998).

50. Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 Wash. U. J. L. & Pol'y 71, 82-83 (2008).

51. 8 U.S.C. § 1252(a)(2); Family, *Threats to the Future of the Immigration Class Action* at 82-83.

utive agencies, the federal courts are the only potential outlet for individualized review of an agency decision. By restricting the role of the federal courts in reviewing the executive branch's administration of the selection system, Congress shut out many immigrants from the federal court system, and therefore from the tradition of independent review.

Reaction in the wake of the September 11, 2001 terrorist attacks also illustrates a desire to exert tight control over the selection system.[52] The attacks injected a deep sense of caution and suspicion into US immigration policy. For example, detentions of foreign nationals increased, including terrorism-related detentions.[53] The government implemented the National Security Entry-Exit Registration System (NSEERS) program, which required certain nonimmigrants to register specially with the government.[54] New reporting requirements for foreign students were also implemented in response to the attacks.[55] Additionally, the attitude of caution and suspicion led to increased collection of biometric identifiers at the border.[56]

The evolution of the selection system reflects a conflicted narrative of welcome and of tight control. The national origins quotas no longer exist and the bars against Asian immigration are repealed. Congress increased immigration quotas and implemented a legalization program. However, the evolution of the selection system also exhibits a desire for strict controls, especially pertaining to enforcement of the selection system. The 1996 Act made the INA more inflexible and harsh by enlarging the removal grounds and narrowing the availability of judicial review. Also, policies enacted after September 11, 2001 have imbued a sense of cau-

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52. This is not the first time that the United States has implemented immigration controls in response to a national security threat. *See* Daniel Kanstroom, *Deportation Nation: Outsiders in American History*, Harvard University Press, 2007, 49-55, 136-141, 145-155, 186-213; David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 989-994 (2002).

53. Susan M. Akram and Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. Davis L. Rev. 609, 620-632 (2005).

54. *Registration and Monitoring of Certain Nonimmigrants*, 67 Fed. Reg. 52,584 (Aug. 12, 2002).

55. *Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended: Student and Exchange Visitor Information System (SEVIS)*, 68 Fed. Reg. 28,129 (May 23, 2003).

56. Department of Homeland Security, *Enhancing Security Through Biometric Identification* (December 2008) (available at http://www.dhs.gov/xlibrary/assets/usvisit/usvisit_edu_biometrics_brochure_english.pdf).

tion and suspicion. Thus at times, US immigration law has moved towards a more welcoming system, but at other times jerks to assert tighter controls. In fact, it is not uncommon for one piece of legislation to contain both welcoming and control features. This conflicted evolution of the selection system helps us to understand the modern policy debate over the selection system, as explained in Part III.

B. The Adjudication System

1. Administrative Adjudication

The structure of immigration adjudication has evolved to be more formal and to require greater separation of enforcement and adjudication functions, but immigration adjudicators lack decisional independence.[57] The development of a more formal system with greater protections for those immigrants appearing before it is laudable. The system that has developed, however, is still subservient to a politically appointed law enforcement official. This subservience is linked to the lack of decisional independence. The existence of an improved adjudication system that lacks decisional independence adds to the conflicted narrative of US immigration law.

Understanding how far immigration adjudication has come requires a look at its informal beginnings, where commingling of enforcement and adjudication was common. Under the Immigration Act of 1907, the job duties of a front-line inspection officer included both serving as an investigator and as an appellate adjudicator.[58] Also, in early deportation proceedings, the Presiding In-

57. Here, I adopt Professor Stephen Legomsky's focus on one type of constraint on decisional independence. Professor Legomsky has explored «the threat of personal consequences for the adjudicator» in the context of immigration adjudication. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 389 (2006). Professor Legomsky described: «Under this constraint, the case is presumed to be one that the law clearly allows the adjudicator to decide, and there is no attempt by a superior to directly dictate the outcome of that case, but there are general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator.» *Id.* Professor Legomsky has argued that decisional independence is necessary, at a minimum, at some point in the immigration adjudication system to uphold the rule of law. *Id.* at 386, 394-401, 403.

58. Pub. L. No. 59-97 § 25, 34 Stat. 898 (1907). Additional levels of administrative appeal included an appeal to the commissioner of the port of entry, an appeal to the Commissioner of Immigration and ultimately an appeal to the Secretary of Commerce and Labor. *Id.* For a discussion of the history of administrative immigration adjudication, see Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 Tex. L. Rev. 1633 (2000).

spector often presented the government's case for deportation and decided the case.[59]

From those beginnings, immigration adjudication has taken several steps to separate from investigation. This increase in the separation of functions has made the system more formal, with actors filling more defined roles. The increase also has arguably made the system fairer, as non-investigative adjudicators could play a more objective role.

The creation of the Board of Immigration Appeals [Board] in 1940 was a movement toward a more formal system with greater separation of functions.[60] In 1940, the Department of Justice took over supervision of the country's immigration laws, including adjudication. The Attorney General, as the head of the Department of Justice, created the Board of Immigration Appeals to aid in the adjudication of immigration cases.[61] The Board is an administrative review tribunal created to hear appeals from initial administrative determinations. It is staffed by individuals whose sole function is to adjudicate cases.

While the creation of the Board was a movement toward greater separation of functions, the Board today still lacks decisional independence from the Attorney General, the nation's top law enforcement officer and a politically appointed official.[62] The Attorney General of the United States created the Board by issuing a federal regulation.[63] There is no statutory (congressional) command supporting the Board. The Board continues to exist today at the pleasure of the Attorney General. Also, the Attorney General retains the ability to overrule a decision of the Board.[64] Law enforcement supervision can be at odds with the goals of an objective adjudicating body.[65]

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59. Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46 (1950). *See also* Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 17 Interp. Releases 453, 454 (1988); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 7 (1980-1981).

60. Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 33-34 (1977-1978). The Board of Immigration Appeals evolved from several incarnations of an advisory Board of Review, which aided the Secretary of Labor, who was then in charge of overseeing the country's immigration laws. *Id.*

61. *Id.* at 34.

62. Legomsky, *Deportation and the War on Independence* at 371-385.

63. 8 C.F.R. § 1003.1 (2009).

64. 8 C.F.R. § 1003.1(h).

65. Legomsky, *Deportation and the War on Independence* at 376-77.

Initial adjudicators have also benefitted from greater separation of functions. An immigration judge presides over the initial hearing designed to adjudicate whether a particular foreign national should be removed from the United States.[66] Immigration judges can trace their ancestry to the Presiding Inspectors discussed above, but immigration judges are no longer responsible for presenting the government's case. They are, however, employees of the Attorney General, and they share a lack of decisional independence with members of the Board.[67]

While Board members and immigration judges are dependant on the Department of Justice, they do exist in their own entity within the Department of Justice. While they are ultimately responsible to the Attorney General, this existence is an improvement from a past administrative structure where one immediate supervisor, below the level of Attorney General, oversaw both immigration investigation and adjudication. In 1983, the Attorney General created the Executive Office for Immigration Review [EOIR] within the Department of Justice. [68] EOIR houses the Board of Immigration Appeals and the immigration judges. By creating EOIR, immigration adjudication functions were separated further from immigration investigation by removing the adjudication functions from the supervision of an investigations official, but immigration investigation and adjudication still resided in the same law enforcement agency, the Department of Justice. Also, the Board of Immigration Appeals members and the immigration judges remained dependent on the Attorney General.

Further separation of functions occurred in 2003, when oversight of the country's immigration laws moved to the new Department of Homeland Security.[69] EOIR remained in the Department of Justice.[70] Thus, after 2003,

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66. 8 C.F.R. § 1003.10 (2009).

67. *Authorities Delegated to the Director of the EOIR, and the Chief Immigration Judge*, 72 Fed. Reg. 53,673 (Sept. 20, 2007) (explaining that immigration judges are «Department of Justice attorneys who are designated by the Attorney General to conduct such proceedings, and they are subject to the Attorney General's direction and control»); Legomsky, *Deportation and the War on Independence* at 372-75.

68. *Organization of the Department of Justice Executive Office for Immigration Matters*, 52 Fed. Reg. 44,971 (Nov. 24, 1987).

69. Homeland Security Act of 2002, Pub. L. No. 107-296 § 101, Title IV, 116 Stat. 2135.

70. *Id*. at Title IV.

immigration adjudication was no longer housed in the same agency as immigration investigation. However, Board members and immigration judges remained dependant on the Attorney General, the nation's chief law enforcement officer.

The above evolution reveals that separation of functions has increased over the history of immigration adjudication. The evolution also reveals, however, that immigration adjudicators are still dependant on a politically appointed law enforcement officer. Thus, the adjudication system itself is conflicted. Despite improvements, it still remains under the thumb of a politically appointed law enforcement official.

The link between the supervision of the Attorney General and the lack of decisional independence is best exemplified by two controversies that developed during President George W. Bush's administration. First, Attorney General John Ashcroft used his power over immigration adjudication to fire members of the Board of Immigration Appeals. Second, the Bush administration used its power over the hiring of immigration adjudicators to hire new adjudicators based on their political loyalties instead of their professional qualifications.

There is evidence that, in 2003, Attorney General Ashcroft fired those Board members whose decisions were more favorable to foreign nationals.[71] The President of the National Association of Immigration Judges has explained that immigration judges saw the Board firings as politically motivated and served as a warning to immigration judges.[72] This immigration judge called the Attorney General's actions «selective downsizing» and noted the «chilling effect» of the firings.[73] As employees of the Attorney General, immigration judges felt political pressure on their rulings.

A politicized hiring process has also highlighted the fragility of immigration adjudication. The U.S. Department of Justice Office of Professional Re-

71. Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 Bender's Immigr. Bull. 1154 (Oct. 1, 2004); Legomsky, *Deportation and the War on Independence* at 376.

72. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigr. Bull. 3, 11 (Jan. 1, 2008).

73. *Id.* at 11, 14.

sponsibility and the U.S. Department of Justice Inspector General issued a report detailing the unlawful politicization of hiring for immigration judge positions during the Bush administration.[74] Immigration judges fill career civil service positions.[75] These are not purely political positions.[76] The report concluded that members of the Bush administration violated civil service laws and departmental policy in selecting candidates for immigration judge positions based on political ties and recommendations rather than based on professional qualifications.[77] At times, individuals were hired based on political recommendations without interviews or any vetting by career immigration adjudication specialists in the Department.[78] Additionally, those appointed with immigration law experience «were prosecutors or held other immigration enforcement jobs» as opposed to experience representing the interests of foreign nationals.[79] Hiring adjudicators based on political loyalties sent a message to all adjudicators that those who act in-step with the Attorney General are rewarded.

Through the Board firings and the politicized hiring, the Bush administration highlighted the lack of decisional independence of immigration adjudicators. These actions revealed the fragile, conflicted state of immigration adjudication, despite its advancements from its beginnings.

2. Judicial Review

The immigration judges and the Board make up immigration adjudication at the administrative level. The evolution of the role of the constitutionally independent Article III federal courts[80] reveals retrogression through a congressional desire to restrict immigrant access to the US courts. As explained above, since 1996, it is harder to obtain federal court review of the administrative determin-

74. U.S. Department of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and other Staff in the Office of the Attorney General* (July 28, 2008).

75. *Id.* at 70.

76. *Id.* at 11-15.

77. *Id.* at 115.

78. *Id.* at 75, 81-82, 88-90, 105.

79. Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, Wash. Post, June 11, 2007, at A1.

80. U.S. Const. art. III.

ation whether an individual should be removed from the United States. By insulating more decisions from judicial review, Congress increased the executive branch's power over immigration adjudication. Now, under certain circumstances, the executive branch may adjudicate immigration cases knowing that there is no independent judicial review.[81]

This lack of judicial review draws even more attention to the state of the administrative adjudication process.[82] While the system has evolved to be more formal and to promote greater separation of functions, the system still leaves its adjudicators at the whim of the nation's top law enforcement officer, while insulating many of its decisions from independent judicial review. This conflicted evolution is characterized by greater formalization accompanied by a lack of decisional independence and restricted judicial review. Understanding the conflicted history of immigration adjudication sheds light on the modern debate over the future of the adjudication system, as discussed in Part III.

C. The Legal Theory

Simultaneous to the evolution of the immigration selection and adjudication systems is a progression of the legal theory behind federal authority to regulate immigration. This evolution is also conflicted because at times the theory has advanced to reflect more modern notions of rights, but at other times the legal theory seems to be firmly planted in its Nineteenth Century roots. Also, the legal theory reveals itself to be another manifestation of control over immigration.

The powers of the three branches of the federal government (legislative, executive and judicial)[83] are limited to those described in the Constitution.[84]

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81. An even broader perspective on immigration adjudication reveals the multitude of ways the government may divert foreign nationals from immigration adjudication, including both administrative and judicial review. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 Geo. Immigr. L.J. 595 (2009).

82. As Professor Legomsky has argued, the restrictions on judicial review, in combination with the lack of decisional independence at the administrative level, mean that there is no decisional independence at any stage of immigration adjudication for certain types of cases. Legomsky, *Deportation and the War on Independence* at 384-85.

83. U.S. Const. art. I; U.S. Const. art. II; U.S. Const. art. III.

84. U.S. Const. amend. X.

In the United States, immigration regulation is primarily a federal matter.[85] Therefore, the federal government must derive its immigration power from the Constitution.

The Constitution, however, nowhere explicitly grants the federal government the power to regulate immigration. The federal power is inferred from several provisions that are mentioned explicitly in the Constitution. The Constitution does grant the federal government the power to control naturalization, foreign affairs, commerce with foreign nations and the power to declare war.[86] From the explicit grant of these powers and from notions of sovereignty itself, a theory of an implied immigration power has emerged. As the US Supreme Court explained in 1889: «Jurisdiction over its own territory . . . is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.»[87] Under this reasoning, immigration regulation is a fundamental power of an independent nation and is closely related to foreign relations and to the war power. As these are all sovereign powers, and because the Constitution grants such sovereign powers to the federal government, federal regulation of immigration is appropriate.

Not only is federal regulation of immigration appropriate, but the US Supreme Court has classified the federal immigration power as virtually absolute because it is so closely tied to a fundamental notion of sovereignty. According to the Court, the federal government has plenary power over immigration policies, and its immigration policies are «conclusive upon the judiciary.»[88] Such an abdication of the role of judicial review by the Court is highly significant, especially in a system of government which highly values checks on power and a balance of power.

The Court has invoked the plenary power doctrine to explain its refusal to review even the most controversial of immigration policies. For example, the

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85. Recently, however, some state and local governments have sought a larger role in immigration enforcement. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. Rev. 1557 (2008).

86. U.S. Const. art. I, § 8; U.S. Const. art. II, §2.

87. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 603-04 (1889).

88. *Id.* at 606.

Court has refused to second-guess its sibling branches in cases involving indefinite detention and secret evidence.[89] At times, however, the Court has adopted a more robust role. For example, the Court has held that the Due Process Clause of the Constitution does apply to foreign nationals in certain situations, thus providing procedural protections for immigrants, especially those in removal proceedings.[90] Over time, it has also exhibited some willingness to review immigration policies.[91] At the time of writing, however, the Court has not overruled its pro-plenary power decisions.

Thus, the strength of the plenary power doctrine is conflicted. Its strength can vary from case to case. In fact, immigration scholars today debate whether the plenary power doctrine is still as strong as it ever was, or whether it is fading away.[92]

Not only is the state of the doctrine conflicted, but the doctrine also contrasts with the welcoming narrative. The plenary power doctrine views the relationship between the United States and its immigrants in terms of a license or a contract.[93] The Supreme Court explained in 1889 that «whatever license» the government grants to an immigrant to enter the country, that license «is held at the will of the government, revocable at any time, at its pleasure.»[94] Using

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89. U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. *ex rel.* Mezei, 345 U.S. 206 (1953).

90. Yamataya v. Fisher, 189 U.S. 86 (1903); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Landon v. Plasencia, 459 U.S. 21 (1982).

91. Fiallo v. Bell, 430 U.S. 787 (1977); Zadvydas v. Davis, 533 U.S. 678 (2001).

92. Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America,* Oxford University Press, 1987, 177-222; T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365 (2002); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 Geo. Immigr. L.J. 257 (2000); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. L.Q. 1087 (1995).

93. *See* Family, *Threats to the Future of the Immigration Class Action* at 101-102.

94. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

similar rhetoric of contract, under this mode of thinking the relationship is uncomplicated–the government gives out a benefit (immigration status), with the understanding that the beneficiary (the immigrant) will comply with the government's terms and conditions, otherwise removal may result.[95] This idea of "immigration as contract"[96] has superficial appeal, but upon closer inspection, it has shortcomings that reveal how the legal theory contrasts against the welcoming narrative.[97]

The shortcomings of the idea of immigration as contract or license include that if there were such a thing as an immigration contract, under the plenary power doctrine it would be a very one-sided agreement, with one contracting party (the government) dictating all of the terms.[98] Also, this analogy of immigration as contract simply does not accurately portray the complex web that holds together the United States and its immigrants.[99] The plenary power idea of immigration as license or contract oversimplifies the realities of immigration. Immigrants quickly establish roots in their new communities and are not so easily extracted. Employers and communities may quickly grow to depend on them and immigrant families can quickly mix with US citizens through marriages and births.

This idea of immigration as contract reflects a half-hearted welcome. Any welcome provided by the selection system is tempered by a legal theory that attempts to neuter the federal courts as a venue for foreign nationals to address their immigration grievances. Also, the idea of immigration as contract allows the US to retain tight control over immigrants. It allows immigrants to come, but only on one-sided terms.

The reluctance to let go of the plenary power doctrine, especially the survival of the Nineteenth Century notion of immigration as contract or license, is evident in the modern debate over immigration reform. The connections to modern debates are discussed in Part III.

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95. Hirsohi Motomura, *Americans in Waiting*, Oxford University Press, 2006, 58.

96. *Id.* at 9.

97. *Id.* at 57-62.

98. *Id.* at 60.

99. *Id.* at 61.

III. Modern Immigration Reform Debates Linked to the Evolution of US Immigration Law

Identifying the conflicted US immigration narrative in the development of the three areas described above (the selection system, the adjudication system and the legal theory) helps to understand the contours of modern immigration policy debates in the United States. This essay addresses how the conflicted narrative is apparent in two fundamental pieces of the modern immigration reform debate: (1) Whether, and how, the selection system should further evolve and (2) Whether administrative adjudicators should be more independent. The tension inherent in a conflicted history manifests in opposing viewpoints.

A. Selection System Reform

As described above, the selection system Congress established in 1952 is still the basic framework of US immigration law. That system establishes categories of legal entry and numerical restrictions in the form of quotas, although the quotas have shifted away from the national origins quotas, and bans on Asian immigration no longer exist. Recall, however, that when Congress abolished the national origins quotas, it retained the concept of yearly limits of the number of immigrants who could enter the United States. Also, Congress implemented limits on the number of immigrants from the Western Hemisphere.

The INA's selection system, however, is not the only immigration mechanism that exists. Running along side the official selection system is a shadow immigration structure. There is a large population of foreign nationals living in the United States without the government's permission. These are individuals whose presence in the United States is not in compliance with the selection system. These individuals either entered the United States without permission or entered with permission but violated the terms of their permission to enter. The debate over how to treat this undocumented population is an emotional, fierce debate. It is easier to comprehend the debate through the lens of the conflicted narrative of US immigration law.

The undocumented population in the United States is estimated to be around twelve million.[100] The existence of a large undocumented population raises two policy issues that relate to the evolution of the selection system. The first concerns the proper policy response to this shadow selection system. The second asks whether the existence of this population is a signal that the selection system itself needs reform.

Complicating debate over these two issues is the conflicted attitude toward immigration carried forward throughout the history of the selection system. The system, as it has historically, has welcoming features that encourage immigrants to come. At the same time, however, the system, as it has historically, exerts tight control over how many and which kinds of immigrants may come. This internal conflict–yes, we want immigrants, but at the same time, we do not want too many, we may not want them to stay too long and we certainly do not want *those* immigrants–is steeped in the history of the selection system. This same internal conflict is at the heart of modern immigration policy debates.

For example, the internal conflict plays out in the debates over what should be done about the existence of the shadow selection system and its resulting undocumented population. Some have expressed a desire to exercise that well-worn instinct to exert tight control over this population. Those who want to exercise tight control have objected to a legalization program that would give legal immigration status to these undocumented individuals, pejoratively calling such a program an «amnesty» program.[101] Instead, these restrictionists have pushed for tough enforcement policies that seek out undocumented individuals for removal.[102] This view is focused on the limiting portion of the historical

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100. Jeffrey S. Passel, *Undocumented Immigration Now Trails Legal Inflow, Reversing Decade-Long Trend*, Pew Research Center (October 2, 2008) (available at http://pewhispanic.org/reports/report.php?ReportID=94).

101. *See, e.g.*, Federation for American Immigration Reform, *Why Amnesty Isn't the Solution* (August 2007) (available at http://www.fairus.org/site/News2?page=NewsArticle&id=16701&security=1601&news_iv_ctrl=1007). Another group has dedicated a section of its website to the «comprehensive amnesty threat.» NumbersUSA, *Comprehensive Amnesty Threat* (available at http://www.numbersusa.com/content/hot-topics/comprehensive-amnesty-threat.html).

102. *See, e.g.*, Federation for American Immigration Reform, *How to Stop Illegal Immigration* (June 2003) (available at http://www.fairus.org/site/PageServer?pagename=iic_immigration issuecenters716c); NumbersUSA, *Illegal Immigration* (available at http://www.numbersusa.com/content/issues/illegal-immigration.html) («The United States has mass illegal immigration because successive Congresses and Presidents have decided they want it. In one action after another

message to immigrants: if you come, you come on our terms, and we will not assume any obligations to you. This view finds solace in the plenary power doctrine, which frames the relationship in terms of a contract or license. According to this view, the United States never agreed to a relationship with these undocumented individuals.[103] Therefore, these individuals are not entitled to expect anything other than a forced return to their home country.

The contrary view leans heavier on the welcoming side of the internal conflict. This view has acknowledged the limits of the selection system to realistically handle the demand for immigration to the United States; thus acknowledging the selection system's own role in contributing to the existence of a large undocumented population.[104] This position asserts that the United States set the mold for this kind of immigration through historical encouragement of migration patterns that are not in sync with the legal immigration opportunities provided by the selection system.[105] Also, this view has expressed discomfort with the idea of heavy-handed immigration enforcement, especially efforts directed at immigrant workers.[106] This unease recognizes that the United States has sent conflicting signals to immigrants (please come, but wait, not so many, and maybe not *you*), and therefore disfavors acting against the welcoming part of the message at this late stage. The solution, then, is to find a way to legalize these individuals; to find a way to formalize and to further their integration into the United States. From this perspective, the plenary power doctrine seems outdated and fails to encapsulate the nature of the relationship between the United States and its immigrant population.

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over the last decade, they have declined to approve measures known to be effective to slow the flow of illegal immigrants, they have decided to end various kinds of enforcement that had been effective, and they have approved a series of rewards to those who violate immigration laws.»).

103. According to NumbersUSA, «[n]on-citizens enter the United States as guests and must obey the rules governing their entry.» NumbersUSA, *10 Principles for Immigration Reform* (available at http://www.numbersusa.com/content/learn/numbersusa/10-principles-immigration-reform.html).

104. *See, e.g.,* Benjamin Johnson, *Managing Immigration as a Resource*, Immigration Policy Center (June 2006) (available at http://www.immigrationpolicy.org/perspectives/managing-immigration-resource).

105. For example, the United States has historically encouraged the flow of unskilled workers from Mexico into the United States. Ngai, *Impossible Subjects* at 50-55, 64, 70-71, 128-158.

106. *See, e.g.*, Reform Immigration for America, *Principles of Immigration Reform* (available at http://reformimmigrationforamerica.org/blog/about/principles/).

This internal debate is also manifested in the second issue related to the evolution of the selection system: Is the existence of this population a signal that the selection system itself needs reform? Those who emphasize tight control have expressed a belief that the selection system should exert even tighter controls through greater enforcement efforts, not only to lower the number of undocumented immigrants but also to deter future illegal immigration.[107] These restrictionists have asserted that a lack of enforcement of the selection system is the problem. The key to immigration reform, from this perspective, is to exercise tighter control through bigger and better enforcement measures.[108] The reality of demand is not important, because that demand can be managed through tighter enforcement controls.

On the welcoming side, there has been a push to reform the selection system to open up to reflect the reality of a greater demand for immigration opportunities.[109] Under the current selection system, there are very few slots available for unskilled workers, and the quotas for the family-based categories are so over-subscribed that family members face years before unification.[110] If the selection system evolved to allow for greater numbers of immigrants and more flexible immigration, then supply could better meet demand, and there would be fewer entering the United States illegally.

Even within this welcoming stance, however, the instinct for control can arise. Some supporters of «welcoming» immigration reform argue that a guest worker program is the way to correct the gap between supply and demand. A guest worker program would open up slots for legal temporary immigration, but, as the name suggests, the nature of the immigration would be lim-

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107. In fact, some have pushed for an even narrower selection system. *See, e.g.,* Federation for American Immigration Reform, *Why America Needs an Immigration Time-Out* (August 2003) (available at http://www.fairus.org/site/News2?page=NewsArticle&id=16331&security=1601&news_iv_ctrl=1006).

108. *See, e.g.*, Mark Krikorian, *On Immigration, Enforcement Works*, Center for Immigration Studies (August 2008) (available at http://www.cis.org/node/729) (promoting the concept of «self-deportation» or «attrition through enforcement»); Federation for American Immigration Reform, *How to Stop Illegal Immigration*.

109. *See, e.g.*, Johnson, *Managing Immigration as a Resource*; National Immigration Forum, *Comprehensive Reform of Our Immigration Laws* (September 2008) (available at http://www.immigrationforum.org/research/reform).

110. *Id.*

ited.[111] Guest workers would be guests, with little to no opportunity to integrate fully into society.[112] Their legal term and purpose in the United States would be limited and controlled.

The debate over the future of the selection system also includes voices that reflect the historical racial, ethnic and cultural fears expressed towards immigrants. This motivator of tight control continues, as exemplified by the arguments of Peter Brimelow and Samuel Huntington.[113] Brimelow has advocated for an immigration time-out.[114] To Brimelow, immigrants are a threat to American national identity, culture and ethnicity.[115] Citing modern immigration from Latin America as a challenge to Anglo-Protestant culture, Professor Huntington similarly argued that such immigration threatens American national identity.[116] As part of his argument, Huntington advocates that modern immigrants from Latin America, particularly Mexico, are different than previous groups of immigrants and that they are not as desirable.[117]

These two major policy issues of the immigration reform debate focused on the selection system–what should be done about the shadow selection system and whether the selection system itself needs reform–are better understood through the conflicted evolution of immigration law in the United States. The United States has historically sent out messages of both welcome and of tight control. These messages are reflected in the debate over the future of the selection system.

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111. Maia Jachimowicz, *Bush Proposes New Temporary Worker Program*, Migration Policy Institute (February 2004) (available at http://www.migrationinformation.org/USFocus/display.cfm?ID=202).

112. *See* Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. Chi. Legal. F. 219.

113. Peter Brimelow, *Alien Nation: Common Sense About America's Immigration Disaster*, Random House, 1995; Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity,* Simon & Schuster, 2004.

114. Peter Brimelow, *Alien Nation* at 262-263.

115. *Id.* at 9, 10, 28, 36, 46-49, 56-57, 62-63, 90-91, 124, 129, 178-201, 232, 264.

116. Huntington, *Who Are We?* at xvi, 40-41, 61-62, 181, 221-256.

117. *Id.* at 18, 221-256.

B. Adjudication Reform

1. Administrative Adjudication Reform

As described above, the Bush administration's efforts to exert greater political control over immigration adjudication aggravated the conflicted nature of immigration adjudication. The firing and hiring controversies demonstrated that while immigration adjudication has separated from investigation, it is still dependent on a politically appointed law enforcement official. This conflicted status is the foundation of another immigration reform issue–whether administrative adjudicators should be more independent.[118]

The Bush Administration's efforts have illustrated the lack of decisional independence for immigration adjudicators. Mere employees of the Attorney General, the nation's chief law enforcement officer, are deciding immigration cases. The status of immigration adjudicators is confounding given the high stakes nature of immigration proceedings. At the very least, a person's ability to live and work where they choose is at stake. At most, the issue is one of life or death (as in an asylum, or refugee, case).

The status of immigration adjudicators is not as confounding when viewed through the conflicted evolution of immigration law, however. Efforts to increase the independence of immigration adjudicators may trouble those who push for tighter control. An independent system could be viewed as advancing the procedural rights of foreign nationals. To a subscriber of the plenary power theory of immigration as contract or license, immigrants are admitted pursuant to one-sided, non-negotiable terms; thus there is no need to be concerned about rights unless the government granted rights as a term of the contract. Also, a more independent system would require the Attorney General to give up control to a more independent corps of adjudicators. Those who still subscribe to the plenary power idea of immigration as contract or license may see a politically appointed law enforcement official as more responsible to popular will to enforce the contract.

Also, a formalized adjudication system that still allows for great political control is conflicted itself. On the one hand, it reflects advancement

118. *See, e.g.,* Appleseed, *Assembly Line Injustice*, 35-36 (May 2009) (calling for greater independence for immigration adjudicators).

toward contemporary adjudication values through the creation of immigration «judges» and by formally separating investigation and adjudication functions. On the other hand, the abundance of opportunity for political control over adjudication reflects a desire not to progress immigration adjudication too far. In other words, the system gives to foreign nationals immigration judges who are formally separate from immigration investigators, but keeps the Attorney General hovering, just in case. This is a manifestation of the country's historical unresolved attitude towards immigration. The history reveals a narrative composed of a desire for immigration, but with tight controls.

2. Judicial Review Reform

The nation's conflicted attitude towards immigration is also reflected in a modern debate over the proper role for the federal courts in reviewing immigration administrative adjudication. As explained in Part II, Congress rolled back access to the federal courts in 1996. As a part of modern immigration reform debates, there have been proposals to restrict the role of the federal courts even further.[119] These proposed restrictions reflect the half-hearted commitment to immigration. The United States does provide opportunities for immigrants, but is not willing to fully open the doors to its federal courts to those immigrants. The plenary power idea of immigration as contract or license is also evident. The invitation to immigrants only extends so far, and the invitation does not include the opportunity to participate fully in the court system, or to allow the federal courts to serve as a robust check on the administrative adjudication system.

IV. Conclusion

Looking at modern debates over immigration reform through the lens of the conflicted evolution of US immigration law reveals that the modern debates are linked to an ongoing, unresolved narrative about immigration in the United States. There is a welcoming narrative in the evolution of the selection system,

119. Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 Nev. L.J. 499 (2008).

but, at the same time, there is a story of tight control. The story of the adjudication system is conflicted too, as the system is now more formal, but lacks decisional independence, and the role of the federal courts has narrowed. Also, the legal theory supporting federal regulation of immigration law is conflicted itself and is evidence of a desire for tight control. Until these conflicts are resolved, US immigration law will continue to send conflicting signals, and the debate over immigration policy will continue to reflect those signals.

ABSTRACT

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en Conflicting Signals: Understanding US Immigration Reform through the Evolution of US Immigration Law
p. 145-174

This essay highlights the conflicting signals sent throughout the history of US immigration law. One consistent feature of the development of US immigration law is that it has exhibited signs of welcome and of tight control. Understanding this conflicted narrative helps to explain modern debates about immigration reform in the United States. The conflicting signals are evident in debates about the effectiveness of the system designed to select immigrants (including its enforcement features) and in debates over the future of the immigration adjudication system. Opposing views in these debates reflect the historical signals of welcome and of tight control.

Key words: immigration; United States; judicial review; administrative adjudication.

RESUM

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en Conflicting Signals: Understanding US Immigration Reform through the Evolution of US Immigration Law
ca Senyals contradictoris: entendre la reforma de la immigració mitjançant l'evolució de la legislació sobre immigració dels Estats Units d'Amèrica
p. 145-174

Aquest estudi posa de manifest els senyals contradictoris transmesos al llarg de la història per la legislació sobre immigració dels EUA. Una característica constant del desenvolupament de la legislació sobre immigració és que ha mostrat signes tant d'acollida com de control estricte. Entendre aquesta lectura contradictòria ajuda a explicar els debats actuals sobre la reforma de la immigració als Estats Units. Els senyals contradictoris són evidents en els debats sobre l'eficàcia del sistema destinat a seleccionar els immigrants (incloent-hi les funcions d'execució) i en els debats sobre el futur del sistema de resolució administrativa sobre immigració. Les visions oposades en aquests debats reflecteixen els senyals històrics d'acollida i de control estricte.

Paraules clau: immigració; Estats Units; revisió judicial; resolució administrativa.

RESUMEN

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en Conflicting Signals: Understanding US Immigration Reform through the Evolution of US Immigration Law
es Señales contradictorias: entender la reforma de la inmigración mediante la evolución de la legislación sobre inmigración de los Estados Unidos de América
p. 145-174

Este estudio pone de manifiesto las señales contradictorias transmitidas a lo largo de la historia por la legislación sobre inmigración de los EE.UU. Una característica constante del desarrollo de la legislación sobre inmigración es que ha mostrado senyales tanto de acogida como de control estricto. Entender esta lectura contradictoria ayuda a explicar los debates actuales sobre la reforma de la inmigración en los Estados Unidos. Las señales contradictorias son evidentes en los debates sobre la eficacia del sistema destinado a seleccionar a los inmigrantes (incluyendo las funciones de ejecución) y en los debates sobre el futuro del sistema de resolución administrativa sobre inmigración. Las visiones opuestas en estos debates reflejan las señales históricas de acogida y de control estricto.

Palabras clave: inmigración; Estados Unidos; revisión judicial; resolución administrativa.