ADMINISTRATIVE CONSTITUTIONALISM IN IMMIGRATION LAW

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The direct application of constitutional norms in immigration law has long been stymied by unique doctrinal and institutional barriers. Scholarship has focused on the role that federal courts may play in indirectly advancing constitutional norms through statutory interpretation and the use of subconstitutional norms in immigration cases. Despite the limited role of federal courts vis-à-vis the administrative state in the shaping of immigration law, less attention has been paid to the role of the executive branch in this arena. This Article addresses and critiques the current state of administrative constitutionalism in immigration law. As this Article describes, the executive

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branch has underutilized its power to enforce constitutional norms in immigration law. Despite extensive opportunities for advancing constitutional norms in immigration adjudication, federal immigration officials have failed to embrace their role in constitutional decisionmaking. This Article argues that federal agencies can and should play a larger role in enforcing constitutional norms in immigration law.

INTRODUCTION

Executive action on immigration has recently taken center stage in the constitutional debate. Just days after his inauguration, President Donald Trump signed and implemented an executive order that banned noncitizens from seven Muslim-majority countries from entering the United States.[1] Numerous lawsuits halted aspects of the order throughout the country on constitutional and statutory grounds before President Trump rescinded and replaced the order in subsequent actions that resulted in additional legal challenges.[2] In 2012 and 2014, President Barack Obama announced a series of administrative actions that included sweeping programs to provide prosecutorial discretion to provide temporary reprieves to noncitizens who would otherwise face deportation.[3] Despite being

[1] Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977-78 (Feb. 1, 2017) (affecting citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen).

[2] *See, e.g.*, Decision & Order at 2, Darweesh v. Trump, No. 1:17-cv-00480 (E.D.N.Y. dismissed Sept. 21, 2017), ECF No. 8 (enjoining removal of citizens of seven nations legally authorized to enter United States); Temporary Restraining Order at 5-6, Washington v. Trump, No. 2:17-cv-00411 (W.D. Wash. Feb. 3, 2017), ECF No. 52 (enjoining enforcement of executive order on nationwide basis). Following the initial litigation, President Trump released his first revised executive order on March 6, 2017, altering some (but not all) of its contested terms and removing Iraq from the list of banned countries. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209-13 (Mar. 9, 2017) (acknowledging impact of litigation and re-ordering suspension of entry for six nations with somewhat different parameters). On September 24, 2017, President Trump issued a proclamation further altering the scope of the ban, with some citizens from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen facing restrictions. *See* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (Sept. 27, 2017). At the time this Article went to print, litigation was pending at the Supreme Court over the latest order. *See* Order Granting Petition for Writ of Certiorari, Hawaii v. Trump, No. 17-965 (U.S. Jan. 19, 2018).

[3] On June 15, 2012, President Obama announced a new immigration program—Deferred Action for Childhood Arrivals ("DACA")—pursuant to which certain individuals who came to the United States as children could apply for work authorization and temporary relief from deportation proceedings. *See* Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800, 800-02 (June 15, 2012) (describing DACA and its rationale); Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V.

centered in the executive branch's longstanding authority to exercise discretion, the actions sparked considerable controversy among political commentators and legal scholars alike.[4] Litigation halted the more significant aspects of the 2014 program.[5] In 2017, President Trump announced the rescission of both of the 2012 and 2014 prosecutorial discretion programs, based in part on constitutional concerns.[6]

Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/EP2M-5WGZ] (outlining use of prosecutorial discretion in regard to certain undocumented people). President Obama announced additional actions on November 20, 2014, including Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), which would also afford a temporary period of relief from deportation proceedings and work authorization to eligible parents of United States citizens or lawful permanent residents. *See* Address to the Nation on Immigration Reform, 2014 DAILY COMP. PRES. DOC. 1, 1-2 (Nov. 20, 2014) (announcing DAPA); Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/3X7A-ANB4] (outlining DAPA policy); *You May Be Able to Request DAPA. Want to Learn More?*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 30, 2015), https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf [https://perma.cc/H7GZ-JSC2] (announcing expected rollout of DAPA to potential enrollees).

[4] *Compare Confirmation Hearing on the Nomination of Loretta Lynch as Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Stephen H. Legomsky, John S. Lehmann University Professor, Washington University School of Law), http://www.judiciary.senate.gov/imo/media/doc/01-29-15%20Legomsky%20Testimony.pdf [https://perma.cc/8DW7-QLG9] (defending President Obama's proposed deferred action programs), *and* Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 85-97 (2015) (same), *and* Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 62-70 (2013) (same), *with* Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013) (criticizing President Obama's deferred action program for childhood arrivals), *and* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1194 (2015) (criticizing aspects of President Obama's deferred action program for parents of U.S. citizens and lawful permanent residents).

[5] A federal district court enjoined the implementation of DAPA and expansion of DACA. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex.) (granting request for preliminary injunction to prevent implementation of DAPA and expansion of DACA), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

[6] On June 15, 2017, President Trump's then-Secretary of the Department of Homeland Security rescinded the DAPA memorandum. Memorandum from John F. Kelly, Sec'y, U.S.

The political spectacle over executive authority in these settings raises important questions about how executive branch actors consider constitutional concerns in immigration law. At a minimum, these recent controversies make a compelling case for more transparency behind the defense of potentially problematic actions. President Obama announced his 2014 executive action on prosecutorial discretion with a memorandum from the Office of Legal Counsel ("OLC") defending the constitutionality and legality of the program.[7] While President Obama's program was halted in court, the district court's initial injunction was primarily based on Administrative Procedure Act concerns rather constitutional ones.[8] President Trump announced his 2017 travel ban with no explanation of its legality, and court orders blocked the initial program primarily on constitutional and statutory grounds.[9] It was unclear with which agencies President Trump had consulted as to the constitutionality of aspects of his order when it was first announced. A brief OLC memorandum released several days later did not address the constitutional concerns.[10] The then-Acting Attorney General Sally Yates spoke out against the ban, noting the difference between her role and that of the OLC, and ordered the Department of Justice ("DOJ") not to

Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot. et al., Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf [https://perma.cc/JS7Q-7QP5]. President Trump later announced the rescission of the original DACA program on September 5, 2017. Press Release, Office of the Press Sec'y, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law [https://perma.cc/58G2-AXE9]. Attorney General Jefferson Sessions wrote a letter to the Department of Homeland Security explaining that DACA is an unconstitutional exercise of discretion by the executive branch. *Id.* Litigation on the validity of the rescission is pending.

[7] *See* The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., 2014 WL 10788677 (Nov. 19, 2014) (answering two questions about scope of executive discretion in immigration enforcement).

[8] Texas v. United States, 86 F. Supp. 3d at 677-78 (holding on procedural grounds and explicitly avoiding substantive statutory and constitutional questions).

[9] *See, e.g.*, Washington v. Trump, 847 F.3d 1151, 1164-68 (9th Cir. 2017) (holding that travel ban would likely be found to violate Constitution on due process grounds).

[10] *See* Memorandum from Curtis E. Gannon, Acting Assistant Attorney Gen., to President & the White House, Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (Jan. 27, 2017), https://assets.documentcloud.org/documents/3442905/EO-Foreign-Terrorist-Entry.pdf [https://perma.cc/WZ7C-3PPG] (outlining actions to be taken in proposed executive order).

defend the order in the courts due to its questionable constitutionality.[11] She was summarily fired the following day.[12]

Executive action from the President, however, represents only a sliver of the power that the executive branch wields every day over immigrants in the United States. The President can be expected to act politically—and federal courts may act swiftly to address challenges to the constitutionality of presidential actions. But what about the thousands of other actions that take place within the executive branch every day? What about the powers that executive branch actors have—and have failed to wield fully—to enforce the constitutional rights of immigrants? Is it possible to imagine an executive branch that robustly engages in constitutional issues in the immigration arena, outside the political spotlight?

Historically, even in relatively pro-immigrant administrations, the answer has been no. Contrary to its engagement in constitutional issues in other substantive areas, the executive branch's consideration of constitutional issues in its implementation and interpretation of federal immigration law has been limited at best—enforcing constitutional norms on behalf of immigrants inconsistently, if at all.[13]

The relative lack of executive engagement with constitutional issues in this arena is particularly remarkable in light of the extent to which constitutional issues are raised in the administration of immigration law. Courts have long recognized the constitutional dimensions of immigration provisions, particularly considering the liberty interests imposed by deportation, detention, and other immigration enforcement issues.[14] Constitutional challenges are common in administrative immigration adjudication, which is the primary means by which the executive branch engages in immigration enforcement. Yet the executive branch has largely abdicated its role in addressing constitutional norms, even indirectly, in substantive immigration law. Administrative consideration of constitutional issues in core statutory implementation and interpretation, including the constitutional implications of deportation and detention provisions that raise serious concerns, has been limited. Why has constitutional engagement

[11] *See* Letter of Sally Yates, Acting Attorney Gen., Dep't of Justice (Jan. 30, 2017), https://www.nytimes.com/interactive/2017/01/30/us/document-Letter-From-Sally-Yates.html?_r=0.

[12] Evan Perez & Jeremy Diamond, *Trump Fires Acting AG After She Declines to Defend Travel Ban*, CNN (Jan. 31, 2017, 2:37 PM), http://www.cnn.com/2017/01/30/politics/donald-trump-immigration-order-department-of-justice/ [https://perma.cc/F8QF-VSW3].

[13] *See infra* Part II.

[14] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (construing immigration statute to avoid due process concerns raised by indefinite detention); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (applying Fifth and Sixth Amendments to hold that "even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law").

generally, and constitutional enforcement specifically, been the exception rather than the rule for the executive branch in the immigration context?

Part of the reluctance to engage with or enforce constitutional norms may stem from the fact that immigration law has long operated in the shadows of the "plenary power" doctrine.[15] Under this doctrine, federal courts have given wide berth to Congress's—and to some extent, the executive branch's—choices with respect to immigration law even where constitutional issues may be directly implicated.[16] Early federal case law thus eroded many of the constitutional doctrines one might assume would be implicated by immigration law. Although the Supreme Court has long recognized that deportation is the "loss of . . . all that makes life worth living,"[17] it has nonetheless categorized deportation as a "civil" rather than "criminal" penalty, making it difficult for immigrants to pursue constitutional challenges predicated on the penalizing effect of immigration provisions.[18] As a result, it is widely recognized that although many constitutional norms are implicated by immigration law, constitutional norms are not fully applied in this context.

But the strange relationship between immigration and constitutional law has not stopped federal courts from enforcing constitutional norms through other means. As scholars have written, federal courts regularly engage in rigorous forms of statutory interpretation to construe federal immigration law to protect immigrant rights.[19] Although rarely engaging in direct constitutional challenges,

[15] *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (describing courts' development of plenary power doctrine and its scope); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

[16] *See* Legomsky, *supra* note 15, at 255 (stating that under plenary power doctrine "[c]ourt has declined to review federal immigration statutes for compliance with substantive constitutional restraints"); Motomura, *supra* note 15, at 547 ("[I]n general the [plenary power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.").

[17] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[18] Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 293-98 (2008) (critiquing blanket designation of all removal proceedings as "civil" in nature and arguing that procedural protections afforded defendants in criminal trials should extend to individuals facing expulsion).

[19] *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 155-70 (1987) (describing judicial branch's role in eroding plenary power doctrine through liberal statutory interpretation, "focusing on the pertinent policies and the presence of arbitrariness" affecting immigrants); Motomura, *supra* note 15, at 568-75 (describing courts' use of tools of statutory interpretation in immigration law); Brian G.

federal courts have regularly applied the canon of constitutional avoidance, construing various provisions within the governing federal immigration statute to avoid constitutional doubts.[20]

Although the federal courts have routinely waded into these constitutional waters in recent years, federal immigration agencies have been far more inconsistent in their approach. The U.S. Department of Homeland Security ("DHS"), which largely enforces the Immigration and Nationality Act ("INA"), and the DOJ, which conducts and defends formal immigration administrative adjudications and related rulemaking, engage in constitutional analysis on a limited basis.[21] In particular, the DOJ's Board of Immigration Appeals ("Board" or "BIA"), which adjudicates formal removal proceedings and sets legal precedent, has often declined to consider constitutional concerns in adjudication, even when such concerns are explicitly raised by parties or stakeholders.[22]

The role of the BIA in substantive immigration law is significant. Although most federal agencies opt to engage in administrative lawmaking through their regulatory powers, the DOJ has utilized the BIA as its primary vehicle for developing substantive immigration law for more than sixty years.[23] Constraints on the BIA's engagement in constitutional analysis thus have a significant impact on the development of substantive immigration law.

Some might suggest that such constraints on agencies are of little import in light of the role that federal courts have played in promoting constitutional norms in immigration law. But such a suggestion would overstate the role that federal courts play in safeguarding constitutional rights. The immigration system affects millions of individuals every day. At its most extreme, each year two to four hundred thousand people are deported from the country, a similar number are detained, and thousands of applications for affirmative relief or status, such as asylum, are denied by executive branch actors.[24] Most of these

Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 364-67 (2007).

[20] *See* Slocum, *supra* note 19, at 384-92.

[21] *See infra* Part II.

[22] *See* 8 C.F.R. §§ 1003.1 to .8 (2016) (describing functions and duties of BIA within DOJ's Executive Office for Immigration Review). As will be discussed in more detail in Part II, the BIA has regularly declined to address constitutional challenges. *Compare* G-K-, 26 I. & N. Dec. 88, 96-97 (B.I.A. 2013) (holding that BIA lacked jurisdiction to address respondent's vagueness challenge), *with* Rojas, 23 I. & N. Dec. 117, 138 (B.I.A. 2001) (Rosenberg, Board Member, dissenting) (arguing that BIA should note constitutional issues in construing statutory provisions).

[23] Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 61-76, 79-80 (2016).

[24] In fiscal year 2013, for example, approximately 438,000 people were removed, 441,000 were detained, and thousands of applications for asylum and naturalization were denied by administrative officials. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2013 STATISTICS YEARBOOK J1, K1 (2014), https://www.justice.gov/sites/default/files/

decisions are administrative in nature and never reviewed by a federal court, even with respect to formal removal proceedings. For example, only a minority of removals are effectuated through formal immigration court proceedings, and only eleven percent of immigration court decisions are administratively appealed, with an even smaller fraction subsequently making it to a federal court.[25] Even within formal removal proceedings, there is no right to appointed counsel[26] and over forty percent of immigrants are pro se.[27] Pursuing constitutional claims in federal court is thus a challenging process.

Consider, for example, immigration detention—an area where there is widespread agreement that constitutional rights are implicated and where cases

eoir/legacy/2014/04/16/fy13syb.pdf [https://perma.cc/CAP9-NL9X] (noting that in fiscal year 2013 asylum officers "referred," rather than granted, 14,957 asylum cases to immigration court and that immigration courts denied 8823 asylum cases); OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2014 YEARBOOK OF IMMIGRATION STATISTICS 52 (2016), https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf [https://perma.cc/5Y5F-7S7P] (reporting that 83,112 naturalization applications were denied in fiscal year 2013 out of 772,623 applications filed); JOHN F. SIMANSKI, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 1 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [https://perma.cc/V9QZ-LCGK] [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2013] (specifying that in fiscal year 2013 DHS removed approximately 438,000 noncitizens from United States and detained approximately 441,000 noncitizens).

[25] In fiscal year 2013, eighty-three percent of removals were accomplished through expedited or reinstated removal orders administered by frontline immigration officers rather than immigration judges. IMMIGRATION ENFORCEMENT ACTIONS: 2013, *supra* note 24, at 1 (reporting that expedited removal orders accounted for forty-four percent of all removals, and reinstatements of final orders accounted for thirty-nine percent). Eleven percent of immigration judge decisions were appealed to the BIA. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK V1 (2015), https://www.justice.gov/eoir/pages/attachments/2015/03/16/fy14syb.pdf [https://perma.cc/W626-RHLB] [hereinafter FY 2014 STATISTICS YEARBOOK]. In fiscal year 2013, the BIA completed 31,277 appeals of immigration judge decisions, *id.* at Q2, most resulting in no relief for the applicant, *see* BANKS MILLER, LINDA CAMP KEITH & JENNIFER S. HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 120 (2015) (stating that only one quarter of appeals from immigration judges to BIA result in granting of some form of relief). Yet only 6688 BIA decisions were appealed to federal circuit courts by applicants in an analogous twelve-month period. *Federal Judicial Caseload Statistics 2014*, U.S. CTS., http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014 [https://perma.cc/5SPV-VCCD] (last visited Nov. 14, 2017) (reporting that BIA appeals represented eighty-nine percent of 7515 administrative agency appeals to circuit courts in 2014).

[26] *See* 8 U.S.C. § 1229a(b)(4)(A) (2012) (providing that noncitizens have "privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings").

[27] *See* FY 2014 STATISTICS YEARBOOK, *supra* note 25, at F1 (noting that in fiscal year 2013, 71,411 of 173,151 completed immigration court cases involved pro se litigants).

raising these concerns have in fact reached federal appellate courts and the Supreme Court.[28] Despite federal courts repeatedly applying subconstitutional norms to construe detention statutes to avoid constitutional concerns, the BIA has generally refrained from addressing constitutional issues even when construing purportedly ambiguous detention statutes.[29] Yet the BIA and the hundreds of immigration judges bound by its decisions continue to interpret and implement detention provisions in thousands of cases each day—applying various tools of statutory construction and interpretation while ignoring the constitutional concerns that various readings of the statutory provisions at issue may raise.[30] While the failure of administrative agencies to engage with constitutional norms may be cured by eventual federal court or Supreme Court decisions, hundreds of thousands of people continue to be detained each year waiting for the possibility that a federal court may intervene. For the vast majority of detained immigrants—eighty-six percent of whom are pro se—federal courts provide a weak and distant avenue for protecting their constitutional rights.[31]

Given the limited role that federal courts play in enforcing constitutional norms in immigration law, it is surprising that little scholarly attention has been

[28] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 699 (2001) (applying constitutional avoidance in light of due process concerns with indefinite detention following final order of removal); Reid v. Donelan, 819 F.3d 486, 494 (1st Cir. 2016) (applying constitutional avoidance in light of due process concerns with prolonged detention pending removal proceedings); Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) (same); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231-32 (3d Cir. 2011) (same). *But see* Jennings v. Rodriguez, No. 15-1204, slip op. at 29 (U.S. Feb. 27, 2018) (holding that immigration detention statutes cannot be plausibly read to include temporary limitation through constitutional avoidance, but remanding for further consideration of whether prolonged detention is unconstitutional).

[29] *See, e.g.*, Aguilar-Aquino, 24 I. & N. Dec. 747, 752 (B.I.A. 2009) (interpreting "custody" in 8 U.S.C. § 1226 and 8 C.F.R. § 1236.1(d)(1) without addressing serious constitutional concerns); Saysana, 24 I. & N. Dec. 602, 604 (B.I.A. 2008) (interpreting "when the alien is released" in 8 U.S.C. § 1226(c)(1) in relation to effective date of statute without addressing serious constitutional concerns), *overruled by* Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009); Kotliar, 24 I. & N. Dec. 124, 125-26, 125 n.1 (B.I.A. 2007) (interpreting terms "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation" and "is deportable" in 8 U.S.C. § 1226(c)(1) without addressing serious constitutional concerns); Rojas, 23 I. & N. Dec. 117, 126-27 (B.I.A. 2001) (rejecting dissent's call for constitutional avoidance in interpreting "when . . . released" clause of 8 U.S.C. § 1226(c) without considering whether its interpretation raises serious constitutional concerns).

[30] *See infra* Section II.A (discussing executive branch's limited engagement in constitutional concerns in detention or adjudication).

[31] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (reporting that between 2007 and 2012, only fourteen percent of detained noncitizens with deportation cases secured representation).

paid to the role of administrative agencies in this arena. As scholars have explored in other contexts, administrative constitutionalism—the role of agencies in interpreting and applying constitutional norms—plays a significant role in advancing constitutional norms.[32] Yet there has not been a thorough exploration of the application and viability of administrative constitutionalism in immigration law. This Article attempts to fill the gap.

In Part I of this Article, I describe in greater detail the various limitations on judicial enforcement of constitutional norms in immigration law and highlight the opportunities for administrative intervention. Part II of this Article then explores the executive branch's current approach to considering and applying constitutional norms in immigration law. Focusing on adjudication, I trace the history and uneven application of the BIA's reluctance to engage in constitutional analysis in the context of substantive immigration law. I contrast these approaches to other areas where the BIA, and other federal immigration agencies, have engaged in constitutional analysis. In Part III, I critique the BIA's approach, and present a theory in favor of greater constitutional engagement in administrative adjudication. I contend that substantive immigration law would benefit from greater adjudicative enforcement of constitutional norms, and that the rationales for abdicating this role are misguided.

I. CONSTITUTIONAL ENFORCEMENT IN IMMIGRATION LAW: LIMITATIONS ON JUDICIAL INTERVENTION

Judicial review has been historically limited in the immigration arena. Where federal courts have exercised judicial review, more often than not they have declined to enforce constitutional rights. Federal courts have, at times, rejected constitutional challenges to immigration statutes under various constitutional

[32] *See, e.g.*, Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 800-06 (2010) (discussing Federal Communications Commission's and Federal Power Commission's interpretation and implementation of equal protection principles in employment rulemaking); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897-1902 (2013) (discussing forms of administrative constitutionalism and arguing that it represents legitimate form of constitutional development, but one that poses accountability challenges); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 561-62 (2015) (discussing federal agencies' implementation of constitutional principles through statutory interpretation); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 854-59 (2015) (discussing Social Security Board's use of equal protection principles in withholding or threatening to withhold funds from states excluding Native Americans from public assistance programs).

provisions, including due process,[33] double jeopardy,[34] ex post facto,[35] excessive bail,[36] and unreasonable search and seizure,[37] in some cases holding that a particular constitutional provision has limited or no applicability in the immigration context.[38]

Several factors, institutional as well as analytical, explain why constitutional protections have been so constrained. First is a line of cases delineating the "plenary power" doctrine, limiting the scope of judicial review of constitutional immigration cases. Second is the related characterization of immigration penalties as "civil" rather than "criminal" in nature. Together, these precedents have prevented the full engagement with, and enforcement of, constitutional rights.

First, under the plenary power doctrine, the Supreme Court has held that the political branches have broad and exclusive authority to determine which individuals to admit and exclude from the United States.[39] To a lesser extent, this doctrine has also applied to deportation policies and other issues affecting

[33] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[34] *See* De La Teja v. United States, 321 F.3d 1357, 1364-65 (11th Cir. 2003) (holding that deportation proceedings "cannot form the basis for a double jeopardy claim" because "they are inherently civil in nature"); United States v. Yacoubian, 24 F.3d 1, 9-10 (9th Cir. 1994) (same).

[35] *See* Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

[36] *See* Carlson v. Landon, 342 U.S. 524, 544-45 (1952) (rejecting noncitizen's excessive bail challenge to his mandatory detention, and noting that "[bail] clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail" (footnote omitted)).

[37] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (holding that exclusionary rule does not apply to Fourth Amendment violations in immigration context, except where such violations are egregious or widespread).

[38] Although federal courts recognize some constitutional constraints on immigration power, including due process in certain contexts, courts have declined to extend criminal constitutional protections to the deportation and detention context. *See, e.g.*, Aaron S. Haas, *Deportation and Double Jeopardy After* Padilla, 26 GEO. IMMIGR. L.J. 121, 124-26 (2011) (discussing and critiquing failure of courts to apply double jeopardy arguments to deportation cases); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 515-16 (2007) (discussing failure of courts to apply constitutional protections applicable in criminal cases to deportation cases); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307-13 (2000) (discussing limited scope of constitutional protections in immigration context).

[39] *See* LEGOMSKY, *supra* note 19, at 177-222 (providing in-depth history of development of plenary power doctrine and criticizing its expansive use by courts); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009); Legomsky, *supra* note 15, at 256-60; Motomura, *supra* note 15, at 547.

the treatment of immigrants within the United States.[40] Under the doctrine, the Court has held that it has limited, if any, authority to review the constitutionality of immigration statutes.[41] As Stephen Legomsky and other scholars have observed, the origins of the doctrine stem not from the Court's interpretation of any particular constitutional provision proscribing judicial review in this context but from federalism concerns.[42] The Court originally articulated the political branches' power over immigration matters in cases challenging the federal government's authority to regulate immigration.[43] Since that time, the plenary power doctrine has expanded—improperly, as many scholars argue—to apply to cases involving individual rights, where noncitizens challenge the constitutionality of particular provisions within federal immigration statutes.[44] Citing the plenary power doctrine, federal courts have declined at various times to enforce due process and equal protection norms in various types of immigration cases.[45] Although the plenary power doctrine has eroded in some contexts over time, it has never been explicitly abrogated, and remains a barrier to the full enforcement of constitutional norms in the immigration context.[46]

[40] *See* Motomura, *supra* note 15, at 560 (describing how location of noncitizen—inside or outside United States—and type of constitutional challenge influence application of plenary power doctrine).

[41] *See* Legomsky, *supra* note 15, at 255 (describing Court's refusal to apply judicial review to immigration statutes); Motomura, *supra* note 15, at 547 (asserting that under plenary power doctrine, courts should "rarely, if ever, . . . entertain constitutional challenges to decisions about which aliens should be admitted or expelled").

[42] *See* LEGOMSKY, *supra* note 19, at 177-92 (describing plenary power doctrine's origins in early cases involving attempts by individual states to exclude noncitizens and cases involving challenges to federal government's authority to exclude noncitizens, cases that "involved the allocation of power between the federal government and the states").

[43] *See id.*; Cox & Rodríguez, *supra* note 39, at 460, 466-70 (discussing how plenary power doctrine developed through cases addressing "allocation of regulatory authority between the states and the federal government," leading Supreme Court to rely heavily on concepts of national sovereignty to justify federal government's authority).

[44] *See* LEGOMSKY, *supra* note 19, at 192-219.

[45] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 799 (1977) (applying plenary power doctrine to reject equal protection claim challenging immigration provision that recognized mother, but not father, of child born out of wedlock as parent for immigration purposes); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210-11, 215-16 (1953) (applying plenary power doctrine to reject due process challenge to exclusion and indefinite detention of returning noncitizen deemed to be seeking entry to the United States); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60, 664 (1892) (applying plenary power doctrine to deny claim that due process requires judicial hearing prior to exclusion based on likelihood of becoming public charge).

[46] LEGOMSKY, *supra* note 19, at 211-17 (describing cases that suggest possible retreat from plenary power); Motomura, *supra* note 15, at 610 (describing how courts have avoided

As an outgrowth of the plenary power doctrine, the second line of precedents that have constrained the application of constitutional norms in the immigration context is the civil-criminal distinction in immigration law.[47] Under a long line of cases, the Supreme Court has treated exclusion, deportation, and detention as civil consequences despite noncitizens' arguments that these consequences were ultimately punitive in nature.[48] As a result, federal courts have long held that criminal constitutional protections, such as the right to government-appointed counsel, right to jury trial, Double Jeopardy Clause, and, to some extent, Ex Post Facto Clause and protections against unlawful searches and seizures, do not apply in immigration cases.[49] Stemming in part from the notion that the power to regulate noncitizens is part of a nation's sovereignty, the civil-criminal distinction has permitted federal courts to ignore the punitive nature of many immigration consequences in federal law.[50]

The development of constitutional rights in the immigration context, however, has not completely stagnated. In a recent decision, the Supreme Court struck down a provision of immigration law addressing citizenship claims on

plenary power precedent by issuing "subconstitutional decisions that rely on phantom constitutional norms much more favorable to aliens").

[47] *See* Markowitz, *supra* note 18, at 298-307 (describing origin of "civil" label in immigration proceedings and tying it to plenary power concerns).

[48] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The [deportation] proceeding . . . is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime.").

[49] *See supra* notes 33-38 and accompanying text (citing cases rejecting application of various constitutional norms in immigration context).

[50] *See* Markowitz, *supra* note 18, at 298-305 (tying civil-criminal distinction to plenary power concerns and criticizing courts' failure to reexamine distinction in deportation proceedings). Recent developments have called the vitality of the civil-criminal distinction into question. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court recognized for the first time that, "although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process," and therefore "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Id.* at 365-66 (citation omitted). The long-term implications for the civil-criminal distinction are unclear. *See* Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 314 (2011) (stating that *Padilla* "move[s] deportation law *somewhat* from the formalist, insulated realm of the 'civil' into a more functionalist discourse in which its true nature matters," but noting that opinion leaves many unanswered questions); Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 235-39 (2016) (stating that *Padilla* "blur[s] the boundary" of civil-criminal distinction).

equal protection grounds.[51] Other Supreme Court cases may provide additional contexts for direct resolution of constitutional challenges in immigration law.[52]

More commonly, however, courts have responded to longstanding doctrinal barriers to direct constitutionalism in immigration law through the application of statutory interpretation principles. As Hiroshi Motomura has explained, over time the Court began to apply subconstitutional norms to avoid or erode the dictates of the plenary power doctrine through statutory interpretation.[53] Without disavowing plenary power as a governing doctrine, courts apply subconstitutional norms to construe statutes as failing to authorize the challenged government action.[54]

In particular, courts have robustly applied the canon of constitutional avoidance. Traditionally, the canon has been one of many tools that counsel courts to avoid reaching constitutional questions and has taken different forms.[55] As a tool of statutory construction, the modern version of the canon specifies that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[56] Proper application of the canon ensures that "constitutional issues not be needlessly confronted" and "recognizes that Congress, like [the Supreme] Court, is bound by and swears an oath to uphold the Constitution."[57]

Since the first enactment of the modern INA in 1952, the Supreme Court has applied the canon to avoid serious constitutional concerns posed by immigration provisions in several cases. In *United States v. Witkovich*,[58] the Court applied

[51] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (invalidating gender-discriminatory provision regulating citizenship claims).

[52] *See, e.g.*, Jennings v. Rodriguez, No. 15-1204 (U.S. Feb. 27, 2018) (holding that lower court erred by applying canon of constitutional avoidance to immigration detention statutes in the prolonged detention context and remanding for consideration of constitutionality of the provisions at issue); Sessions v. Dimaya, No. 15-1498 (U.S. argued Oct. 2, 2017) (addressing applicability of void-for-vagueness doctrine to federal immigration provision).

[53] Motomura, *supra* note 15, at 610 (noting that although plenary power doctrine has developed in Supreme Court constitutional precedent, "courts will continue to avoid this directly applicable constitutional doctrine through subconstitutional decisions that rely on phantom constitutional norms much more favorable to aliens").

[54] *See id.*

[55] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (describing various tools by which courts avoid addressing constitutional questions, including canon of constitutional avoidance in statutory interpretation); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948-49 (1997) (discussing formulations of constitutional avoidance).

[56] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[57] *Id.*

[58] 353 U.S. 194 (1957).

the canon to interpret a provision in the INA that had both immigration and criminal implications.[59] The clause provided the Attorney General with the authority to supervise and question certain noncitizens with final orders of removal who had not yet been removed.[60] In interpreting the provision, the Court held that the clause should be read to require the noncitizen to answer questions only insofar as they are related to the noncitizen's availability for deportation.[61]

The Court noted that a construction of the statute empowering the Attorney General to inquire into matters beyond a noncitizen's availability for deportation would raise a serious constitutional question "of the extent to which an administrative officer may inhibit deportable aliens from renewing activities that subjected them to deportation."[62] It thus invoked the avoidance canon to construe the statute to avoid this problem, citing the articulation of the principle in *Crowell v. Benson*[63] that

> [w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[64]

In *INS v. St. Cyr*,[65] the Supreme Court again applied the avoidance canon in concert with several other canons of statutory construction to hold that jurisdiction-stripping provisions in the INA did not deprive federal courts of habeas jurisdiction over a noncitizen's legal challenge to his deportation.[66] The Court began by applying "the strong presumption in favor of judicial review of administrative action," and the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction" to insist that Congress provide a plain statement explicitly repealing habeas jurisdiction in this context in order for the government's argument to prevail.[67] The Court then applied the canon of constitutional avoidance as "additional reinforcement" for the need for a plain statement, stating that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of

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[59] *Id.* at 196-98 (agreeing with court below which "was further guided by the principle that requires courts, when construing statutes, to avoid constitutional doubts").

[60] *Id.* at 195-96 (interpreting Criminal Appeals Act of 1907, as amended, which states that "[a]ny alien, against whom a final order of deportation . . . issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General").

[61] *Id.* at 202.

[62] *Id.* at 201.

[63] 285 U.S. 22 (1932).

[64] *Witkovich*, 353 U.S. at 201-02 (quoting *Crowell*, 285 U.S. at 62).

[65] 533 U.S. 289 (2001).

[66] *Id.* at 299-300.

[67] *Id.* at 298-99.

the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."[68] The Court concluded that interpreting the statute to preclude all review of a pure question of law "would give rise to substantial constitutional questions" under the Suspension Clause, which requires "some 'judicial intervention in deportation cases.'"[69] After analyzing the scope of habeas review and the Suspension Clause concerns, the Court concluded that "[t]he necessity of resolving such a serious and difficult constitutional issue—and the desirability of avoiding that necessity—simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent."[70]

The Supreme Court's application of the avoidance canon has been particularly robust in the immigration detention context, where the Court has twice applied the canon as a tool of statutory interpretation. The INA includes a provision that authorizes the detention of noncitizens with final orders of removal.[71] In *Zadvydas v. Davis*,[72] the Supreme Court applied the avoidance canon to interpret this provision to authorize detention "only for a period *reasonably necessary* to secure the alien's removal" in a case involving a deportable noncitizen.[73] The Court concluded that the "indefinite detention of aliens . . . would raise serious constitutional concerns" and thus "construe[d] the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."[74] To aid federal courts in their review of the reasonableness of detention, the Court concluded that it was "practically necessary to recognize some presumptively reasonable period of detention."[75] Noting that "Congress previously doubted the constitutionality of detention for more than six months," the Court held that six months of detention following a final order of removal is presumptively reasonable, after which point the government must rebut any evidence offered by the noncitizen that there is no significant likelihood of removal in the reasonably foreseeable future.[76]

Two years later, in *Clark v. Martinez*,[77] the Supreme Court held that its interpretation of the statute in *Zadvydas* applied not only to deportable noncitizens, but also to inadmissible noncitizens—a class of noncitizens whose constitutional rights, according to the federal government, were more

[68] *Id.* at 299-300 (citation omitted) (quoting *Crowell*, 285 U.S. at 62).

[69] *St. Cyr*, 533 U.S. at 300 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

[70] *Id.* at 305.

[71] 8 U.S.C. § 1231(a) (2012).

[72] 533 U.S. 678 (2001).

[73] *Id.* at 682.

[74] *Id.*

[75] *Id.* at 700-01 (citing Cheff v. Schnackenberg, 384 U.S. 373, 379-80 (1966)) (noting that Court has "adopted similar presumptions in other contexts to guide lower court determinations").

[76] *Id.* at 701.

[77] 543 U.S. 371 (2005).

questionable under prior precedent.[78] As the Court observed, the statutory provision itself did not distinguish between inadmissible and deportable noncitizens, rather it applied generally to noncitizens with final orders of removal.[79] As such, it was enough for the Court to conclude that the government's suggested interpretation of the statute would raise constitutional doubts for some class of noncitizens—it did not need to decide whether the indefinite detention of inadmissible noncitizens in particular would raise the same concerns. As Justice Scalia explained, "[t]he lowest common denominator, as it were, must govern. . . . If one [plausible interpretation of the statute] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[80]

In effect, the avoidance canon has presented federal courts with a means of enforcing constitutional norms through subconstitutional means. Federal courts, while avoiding the direct adjudication of serious constitutional claims, have thus repeatedly read statutes to avoid entrenchment on noncitizens' claimed constitutional rights. Although not fully liberated from the dictates of the plenary power doctrine or years of precedent recognizing limitations on the extent to which immigrants may avail themselves of certain constitutional protections, federal courts have taken steps forward to enforce constitutional norms through statutory interpretation.

The impact of such judicial intervention remains limited, however, due to other institutional constraints. Supreme Court decisions, like the ones described above, may have a momentous nationwide impact on the advancement of constitutional norms. However, very few immigration cases make it to the Supreme Court or to any federal court for review.[81] This is due partially to the design of the immigration adjudicative system. The vast majority of immigration rulemaking and adjudication takes place within the administrative state. Congress, through the INA, has largely delegated administrative authority over immigration law to the Attorney General, the Secretary of Homeland Security, the Secretary of State, and the Secretary of Labor, who in turn have delegated authority to designees within their respective departments.[82] In some cases, this authority is largely insulated from federal review, and in many cases is exercised by administrative officers in non-adversarial settings.[83] A minority of removals are ordered by immigration courts; the rest are ordered by immigration officials

[78] *Id.* at 386-87.

[79] *Id.* at 378.

[80] *Id.* at 380-81 (citations omitted).

[81] *See supra* notes 24-27 and accompanying text (noting that majority of immigration cases will not end up in federal courts).

[82] *See* Family, *supra* note 23, at 62-83.

[83] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1729-30 (2011).

through various administrative processes that limit paths to further review by administrative or federal tribunals.[84] Even where removals are decided through an adversarial process in immigration court, factors such as the complexity of the law, lack of government-appointed counsel, and the use of detention make it difficult for individuals to pursue appeals, particularly in federal court.[85] Moreover, absent Supreme Court review, a federal court decision will apply only within the jurisdiction unless adopted as a nationwide ruling by the BIA.

In light of these constraints, the executive branch may play a much more significant role in the enforcement of constitutional norms than the judiciary. The next Part will describe the extent to which the executive branch has taken on that responsibility.

II. THE EXECUTIVE'S ROLE IN THE ENFORCEMENT OF CONSTITUTIONAL NORMS IN IMMIGRATION LAW

As a general matter, the executive branch has increasingly engaged in administrative constitutionalism—defined as "actions by federal administrative agencies to interpret and implement the U.S. Constitution."[86] Examples of administrative constitutionalism include the application of constitutional law principles and related Supreme Court precedent;[87] the defense of the

[84] *See infra* notes 24-27 and accompanying text (describing how few immigration cases are adjudicated through administrative tribunals or federal courts).

[85] *See* Alina Das, *Self-Representation, Civil* Gideon*, and Community Mobilization in Immigration Cases*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 141, 143-50 (Samuel Estreicher & Joy Radice eds., 2016) (discussing challenges facing pro se litigants defending against removal).

[86] Metzger, *supra* note 32, at 1897; *see also* Lee, *supra* note 32, at 801 (defining administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law"); Ross, *supra* note 32, at 529 (defining administrative constitutionalism as "[a]gencies' constitutional value judgments, made in the process of interpreting statutes"). Of course, the precise scope of what is included in the ambit of "administrative constitutionalism" is not settled, as some scholars "extend[] the constitutional label to a wide array of measures . . . that, like the Constitution, are entrenched, provide basic rights to individuals, and constitute the government." *See* Metzger, *supra* note 32, at 1910-12 (describing scholarly debate over distinction between constitutional and ordinary law and how administrative constitutionalism may straddle both). For purposes of explicating the role of administrative constitutionalism in immigration law, I focus primarily on agencies' interpretation and application of the Constitution itself. As Metzger observes, "[t]hese instances of agency constitutional interpretation represent the core of administrative constitutionalism and are easiest to distinguish from judicial constitutionalism on the one hand and ordinary administrative decisionmaking on the other." *Id.* at 1911. By focusing on this aspect of administrative constitutionalism, I do not, however, suggest that administrative constitutionalism should be limited to this analysis.

[87] *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 30-32 (2010) (discussing Equal Employment Opportunity

constitutionality of executive decisions, rules, or policies;[88] the demarcation of constitutional scope of the executive branch's authority to act in certain arenas;[89] and the advancement of constitutional norms in statutory interpretation.[90] Some federal agencies, including the Equal Employment Opportunity Commission, the Federal Communications Commission, and the National Labor Relations Board ("NLRB"), have routinely applied constitutional principles in certain areas of agency lawmaking.[91] Courts have not objected to agencies' engagement in these issues, although they may agree or disagree with the executive branch's ultimate conclusions.[92]

In the immigration context, the idea that the executive branch would play a significant role in constitutional development and enforcement has particular salience. First, as noted in Part I, federal courts have long adhered to the notion that the political branches have extensive authority over immigration matters, leading to limitations on judicial intervention in constitutional immigration cases.[93] While this jurisprudence has not carefully delineated the allocation of power among the political branches, "the President has historically possessed tremendous power" independent from that of Congress in the immigration

Commission's application and development of equal protection principles in its administration of civil rights regulation); Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948-1964*, 26 LAW & HIST. REV. 327, 329-30 (2008) (describing National Labor Relations Board's application of Supreme Court equal protection precedent to rule that it could not certify unions that engaged in certain racially discriminatory practices); Lee, *supra* note 32, at 814-31 (describing Federal Communications Commission's application of Supreme Court equal protection precedent to issue rules prohibiting employment discrimination and promoting equal employment regulation).

[88] *See* Metzger, *supra* note 32, at 1897 (providing example of rulemaking by Food and Drug Administration defending why its regulation of tobacco companies does not violate First Amendment).

[89] *See id.* (providing example of memorandum from OLC in DOJ commenting on President's constitutional authority to commit U.S. forces to NATO military campaign without prior congressional approval).

[90] Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218-19 (2006) (discussing use of constitutional avoidance by federal agencies); *see also* Lee, *supra* note 32, at 816 (discussing Federal Communication Commission's interpretation of Communications Act's public interest standard to avoid constitutional concerns); Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 254-56, 260-62, 268-71, 276-81 (discussing Equal Employment Opportunity Commission's interpretation of Title VII of Civil Rights Act pursuant to equal protection principles).

[91] *See supra* notes 87-90 and accompanying text.

[92] As Bertrall Ross has written, courts have resisted administrative constitutionalism through application of anti-deference principles. *See* Ross, *supra* note 32, at 530-35.

[93] *See supra* notes 39-50 and accompanying text.

arena.[94] As Adam Cox and Cristina Rodríguez have explained, the executive branch has been uniquely situated to exercise this power through claims of inherent authority as well as formal and de facto congressional delegation.[95]

This Part examines the approach that the executive branch has taken to the consideration of constitutional issues in immigration law. Given the primary role played by the BIA in administrative immigration lawmaking on deportation and detention, I begin by assessing the executive branch's approach to constitutionalism in immigration adjudication. I then turn briefly to the executive branch's approach to constitutionalism in immigration regulation, which presents a smaller universe of examples for analysis.

A. *Immigration Adjudication*

Administrative immigration law is unusual in its reliance on agency adjudication as a primary form of administrative lawmaking. While federal agencies like the DOJ engage in notice-and-comment rulemaking to develop areas of immigration law, the BIA is a primary vehicle by which administrative immigration law is made each year in the deportation and detention context, particularly with respect to substantive immigration law.[96] While reliance on adjudication over regulation opens administrative immigration law to criticism,[97] it also presents opportunities for administrative constitutionalism that may be different than those apparent in regulation.

The BIA has long played a central role in the formation of immigration law precedent. The Attorney General first created the BIA through regulation in 1940.[98] The BIA's jurisdiction extends to appeals of immigration judge decisions in various removal, relief, and bond matters in individual cases, as well as disciplinary cases against attorneys and other legal representatives who

[94] Cox & Rodríguez, *supra* note 39, at 462-63 (exploring complex allocation of immigration power between legislative and executive branches with respect to core immigration policymaking).

[95] *Id.* at 462, 485-528 (describing historical examples of inherent authority and formal delegation models in immigration policy).

[96] *See* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 683-88 (2008) (discussing prominent role BIA plays in immigration lawmaking vis-à-vis regulatory approaches, particularly with respect to substantive immigration law).

[97] *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929-42 (1965) (describing benefits of rulemaking versus adjudication); *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-79 (1969) (Douglas, J., dissenting) (discussing how rulemaking process reinforces democratic values and may result in better decisionmaking by agencies).

[98] *See* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3502-03 (Sept. 4, 1940) (now codified at 8 C.F.R. § 1003.1 (2016)) (demonstrating departmental organization and authority of BIA).

appear in removal proceedings.[99] The BIA may designate its decisions as precedential,[100] and such decisions bind not only the parties before it, but also all immigration judges and DHS employees nationwide.[101] Decisions of the BIA may be certified for review by the Attorney General (a relatively rare occurrence).[102] If a noncitizen loses an appeal at the BIA (or before the Attorney General), she may seek federal review in some cases—including cases that involve constitutional questions and other questions of law.[103] Since its creation, the BIA has issued thousands of precedential decisions as an impartial appellate body.[104]

One might expect that this adversarial process could produce more balanced consideration of constitutional concerns. As a quasi-judicial body, the BIA and the immigration courts it governs separate the prosecutorial and adjudicatory functions of the government.[105] Although the DHS initiates the case by filing a charging document, the ultimate decision rests with a different agency, the DOJ, and the outcome generally comes only after both sides have been heard.[106] Thus

[99] 8 C.F.R. § 1003.1(b).

[100] *Id.* § 1003.1(g) (noting that majority of permanent Board members may designate certain types of BIA decisions as precedent).

[101] *Id.* (setting forth BIA's authority to make precedential law "binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States").

[102] *See id.* § 1003.1(h)(2); Eyer, *supra* note 96, at 671 (stating that, while BIA's decisions are subject to review and reversal by Attorney General, this authority has been rarely exercised).

[103] 8 U.S.C. § 1252 (2012).

[104] 8 C.F.R. § 1003.1(d) ("Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations."); Eyer, *supra* note 96, at 670 (noting that BIA has issued, on average, forty-eight precedential decisions per year for most of its history).

[105] Eyer, *supra* note 96, at 670 ("In exercising both its lawmaking and individual review functions, the BIA has historically maintained relative independence from the enforcement wing of immigration administration (historically the Immigration and Naturalization Service (INS), and today the Department of Homeland Security, United States Immigration and Customs Enforcement (ICE)).").

[106] 8 C.F.R. § 239.1 (describing role of DHS in initiating removal proceedings); *id.* § 1003.0 (stating that DOJ houses Executive Office for Immigration Review, which includes BIA); *see also* Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 658-60 (2006) (describing various allocations of prosecutorial and adjudicative functions, with lesser and greater degrees of independence over time).

noncitizens have the ability to raise constitutional concerns before the adjudicator decides how best to adjudicate the case. In this way, one might expect a pattern of constitutional enforcement that at least mirrors the development of constitutional norms seen in federal court jurisprudence, including the application of tools like the canon of constitutional avoidance. Indeed, these administrative courts are bound to follow the relevant federal precedent.

A review of the BIA's approach, however, reveals an incoherent, and at times conflicting, view of its authority to engage in constitutional analysis or otherwise apply constitutional norms in decisionmaking. This Section addresses the BIA's approach in three areas: constitutional challenges in substantive immigration law, statutory interpretation implicating constitutional concerns, and constitutional challenges in procedural immigration law. As described below, the BIA has long taken the position that it has no authority to consider the constitutionality of the statutes—and even regulations—it administers, although it has sent mixed signals on this prohibition in some contexts. While it recognizes its authority to apply canons of construction, such as the canon of constitutional avoidance, it has not done so in a majority opinion despite pressure from dissenting BIA members. It has, however, undertaken constitutional analysis in the context of protecting the fairness of the removal process, including review of pre-hearing acts by immigration officials. In this arena, too, however, it has taken mixed positions on the extent to which it may intervene.

1. Constitutional Challenges in Substantive Immigration Law

In dozens of decisions over the last sixty years, the BIA has held that it lacks the authority to consider the constitutionality of the statutory provisions it administers.[107] Over the years, this prohibition has extended not only to statutory

[107] *See, e.g.*, Vella, 27 I. & N. Dec. 138, 141 (B.I.A. 2017) (stating that BIA has no authority to address respondent's equal protection challenge to his ineligibility for waiver of inadmissibility); G-K-, 26 I. & N. Dec. 88, 96 (B.I.A. 2013) (stating that BIA has no authority to address respondent's argument that provision barring people convicted of "particularly serious crimes" from protective relief is unconstitutionally void for vagueness); Sanchez-Lopez, 26 I. & N. Dec. 71, 74 n.3 (B.I.A. 2012) (stating that BIA has no authority to address respondent's argument that stalking ground of removal is unconstitutionally void for vagueness); C-, 20 I. & N. Dec. 529, 531-32 (B.I.A. 1992) (stating that BIA has no authority to address respondent's Ex Post Facto Clause argument); Valdovinos, 18 I. & N. Dec. 343, 345-46 (B.I.A. 1982) (stating that BIA has no authority to address respondent's arguments that preclusion of good moral character under section 101(f)(7) of INA ends up affecting double jeopardy and is constitutionally overbroad); Cenatice, 16 I. & N. Dec. 162, 166-67 (B.I.A. 1977) (stating that BIA has no authority to address respondents' due process and equal protection arguments); Awadh, 15 I. & N. Dec. 775, 776-77 (B.I.A. 1976) (stating that BIA has no authority to address respondent's argument that section 241(a)(11) of INA violates his Eighth Amendment rights by imposing cruel and unusual punishment); Ramos, 15 I. & N.

challenges in adjudication, but to regulatory challenges as well.[108] As a result, immigration judges routinely pass over both facial and as-applied challenges to the constitutionality of various immigration provisions.

The BIA first announced this rule in *H-*,[109] a 1948 decision upholding an order to deport a noncitizen based on his past membership in the Communist Party of the United States.[110] In that case, a citizen of Greece, who immigrated to the United States at the age of thirteen, faced deportation under a statutory provision that targeted members of organizations that advocate to overthrow the government by force or violence regardless of current membership.[111] The individual had admitted his past membership in the Communist Party of the United States, but challenged his deportability on several grounds, including a challenge to the constitutionality of the amended statute.[112] Specifically, he argued that the statute was unconstitutionally retroactive and violated his First Amendment rights.[113]

The BIA approached this issue against a backdrop of legislative and judicial conflict over anti-communist policies. Federal immigration law had long

Dec. 671, 675 (B.I.A. 1976) (stating that BIA has no authority to address respondent's argument that statutory retention requirement as applied to individual who knows of his claim to citizenship, but not retention requirement, is unconstitutional); Bogart, 15 I. & N. Dec. 552, 555 (B.I.A. 1976) (stating that BIA has no authority to address respondent's due process arguments regarding regulations promulgated under INA); Chery & Hasan, 15 I. & N. Dec. 380, 382 (B.I.A. 1975) (stating that BIA has no authority to address respondents' due process argument and argument that section 241(a)(2) of INA, as amended, is both overbroad and vague); Swissair "Flight #164", 15 I. & N. Dec. 111, 112 (B.I.A. 1974) (stating that BIA has no authority to address respondent's constitutional arguments against section 273 of INA); Lennon, 15 I. & N. Dec. 9, 27 (B.I.A. 1974) (stating that BIA has no authority to address respondent's argument that section 212(a)(23) of INA is unconstitutional), *overruled on other grounds by* Esqueda, 20 I. & N. Dec. 850 (B.I.A. 1994); L-, 4 I. & N. Dec. 556, 557 (B.I.A. 1951) (stating that BIA has no authority to address respondent's constitutional arguments against Internal Security Act of 1950, including that due process has been violated); H-, 3 I. & N. Dec. 411, 419, 456 (B.I.A. 1949) (stating that BIA has no authority to address respondent's argument that deportation statute calling for removal of anarchists, those who oppose organized government, and those who advocate for overthrow of government, was unconstitutional).

[108] *See* C-, 20 I. & N. Dec. at 532 ("[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations."); Valdovinos, 18 I. & N. Dec. at 345 (stating that "claims as to the unconstitutionality of the statutes and regulations administered by this Board are outside the scope of our jurisdiction"); Bogart, 15 I. & N. Dec. at 555 (rejecting consideration of constitutional challenge to regulation).

[109] 3 I. & N. Dec. 411 (B.I.A. 1948).

[110] *Id.* at 418-19, 459.

[111] *Id.* at 412, 415-17.

[112] *Id.* at 413, 417.

[113] *Id.* at 456.

included provisions providing for the exclusion and deportation of noncitizens who are members of organizations that advocate to overthrow the U.S. government by violence, which was repeatedly held to include members of the Communist Party.[114] In *Kessler v. Strecker*,[115] the Supreme Court held the 1918 and 1920 versions of these laws did not apply to individuals who were no longer members of the Communist Party at the time of their exclusion or deportation proceedings.[116] In response, the Communist Party cancelled the membership of its noncitizen members in the United States, presumably to immunize them from deportation.[117] In response to the Supreme Court's rebuke, Congress amended the law to clarify that it did intend the provisions to apply to individuals who had become, but were no longer, members of the organization.[118]

It was in this context—where Congress amended immigration law in response to a Supreme Court decision—that the BIA first articulated the principle that, as an agency, it could not override Congress by invalidating a congressional act as unconstitutional. In *H-*, its first precedential decision addressing the newly amended law, the BIA stated that "[i]t is not within . . . [its] province . . . to pass upon the constitutionality of the statutes enacted by Congress."[119] It rejected counsel's attempt to distinguish between the noncitizen's facial and as-applied challenges to the statute, considering the as-applied challenge to "embod[y] another attack upon the constitutionality of the statute" that it had no jurisdiction to consider.[120] It therefore upheld his deportation.[121] The case later made its way up to the Supreme Court, which did ultimately consider, and reject, the constitutional challenges the individual pursued, upholding the validity of the statute and federal deportation power in *Harisiades v. Shaughnessy*.[122]

[114] Harisiades v. Shaughnessy, 342 U.S. 580, 593 (1952) (highlighting that "Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party").

[115] 307 U.S. 22 (1939).

[116] *Id.* at 30 (concluding that laws only apply to present membership or affiliation with Communist Party because Congress did not provide "clear and definite expression" that laws should apply to membership or affiliation at any time in past).

[117] *Harisiades*, 342 U.S. at 593.

[118] *Id.* at 593-94 (acknowledging that revised law has "unmistakable language" that membership in Communist Party at any time makes noncitizen deportable).

[119] H-, 3 I. & N. Dec. 411, 456 (B.I.A. 1949).

[120] *Id.*

[121] *Id.* at 459 (affirming deportation order because respondent became member of Community Party after entering United States).

[122] *Harisiades*, 342 U.S. at 596 (rejecting arguments that Alien Registration Act of 1940 violated Fifth Amendment right to due process, First Amendment rights to freedoms of speech and assembly, and Ex Post Facto Clause).

The BIA never explained the basis for its disavowal of authority to consider the constitutional claims raised in *H-*. Although one may surmise that the BIA disavowed any role in considering constitutional concerns based on a separation of powers rationale, it left few clues as to the basis of its conclusion in the decision itself. In stating the proposition in *H-*, it merely provided a string cite to federal and Interstate Commerce Commission cases with similar holdings, most of which also merely state similar propositions—that agencies lack authority to consider constitutional challenges to the statutes they administer—without further explanation.[123]

Only one of these cases, a 1940 decision by the D.C. Circuit in *Panitz v. District of Columbia*,[124] presents any reasoning. In *Panitz*, the D.C. Circuit addressed whether a litigant was required to raise a constitutional objection to the imposition of a tax in a hearing with an assessor in order to pursue such a claim in federal court.[125] The D.C. Circuit held that, for purposes of the rule of exhaustion of administrative remedies, the litigant did not need to raise such an objection. It explained exhaustion was not required because "ministerial officers cannot question the constitutionality of the statute under which they operate."[126] However, this conclusion was not grounded in a separation of powers rationale. Rather, as the D.C. Circuit explained, "the orderly, efficient functioning of the processes of government . . . makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution."[127] The *Panitz* decision thus addressed the question in a different context, with respect to ministerial officers required to collect taxes, rather than an adjudicative body delegated power to interpret laws.

The citation, therefore, points to the BIA's reliance on a "ministerial efficiency" rationale—the idea that the BIA, like a tax assessor, is an administrative agent required, for the sake of the orderly functioning of the administrative state, to carry out the will of Congress, at least where the alternative would result in a nullification of the law. However, this points to an obvious weakness in the chain of logic because the BIA arguably differs in material respects from a tax assessor. The duties of a ministerial officer who

[123] *H-*, 3 I. & N. Dec. at 456.

[124] 112 F.2d 39 (D.C. Cir. 1940).

[125] *Id.* at 40-41.

[126] *Id.* at 42 (holding, for purpose of exhaustion of administrative remedies, that tax assessor has no inherent authority to consider constitutional objection to imposition of tax: "It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus, it is held that ministerial officers cannot question the constitutionality of the statute under which they operate." (footnote omitted)).

[127] *Id.*

enforces the law with no lawmaking function are distinguishable from the duties of an appellate body charged with the responsibility of interpreting law and setting precedent on behalf of the executive branch.

Perhaps the more telling explanation for the conclusion in *H-* stems instead from the context in which it arose. *H-* arose in the context of a debate between Congress and the Supreme Court over the extent to which Congress intended—and had the necessary authority—to extend its deportation powers to noncitizens based on their past membership in a disfavored group.[128] Thus, without saying it, the BIA may have feared encroaching on either judicial or legislative powers of government, despite its lawmaking authority in the immigration context. Such a separation of powers rationale might better explain the BIA's reluctance than a "ministerial efficiency" rationale. Without clarity from the BIA, however, it is unclear which rationale motivated the doctrine. This distinction may prove to be important for reasons further discussed in Part III.

In any event, the BIA's failure to provide a clear basis for its rule has done nothing to curb its proliferation. In subsequent cases, the BIA has pronounced the rule wherever a constitutional challenge is raised, regardless of context or the nature of the challenge.[129] In several cases, for example, noncitizens challenged provisions of the INA as unconstitutionally vague. Rather than address the vagueness question, a question that the BIA, as the administrative body in charge of applying and interpreting the statute, is uniquely poised to address, the BIA has eschewed this task as a constitutional challenge exceeding its authority.[130]

Even recently, when the Supreme Court concluded in *Johnson v. United States*[131] that a sentencing provision in criminal law, which has a close analogue to a similarly worded "crime of violence" deportation provision, was

[128] Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952) (discussing decision in *Kessler*, requiring Congress to explicitly authorize deportation for former members of Communist Party and Congress's responding legislation).

[129] *See supra* note 107 and accompanying text (discussing cases where BIA denied its authority to consider constitutional challenges in various contexts).

[130] *See, e.g.*, G-K-, 26 I. & N. Dec. 88, 96-97 (B.I.A. 2013) (holding that BIA lacks authority to address whether statutory provision barring relief for people convicted of "particularly serious crimes" is constitutionally void for vagueness because "[n]either the Board nor the Immigration Judges have the authority to rule on the constitutionality of the statutes [they] administer"); Chery & Hasan, 15 I. & N. Dec. 380, 382 (B.I.A. 1975) (stating that BIA has no authority to address respondents' due process argument or respondents' arguments that INA section 241(a)(2), as amended, is both overbroad and vague); LaRochelle, 11 I. & N. Dec. 436, 442 (B.I.A. 1965) (holding BIA had no jurisdiction to determine whether term "constitutional psychopathic inferiority" is void for vagueness).

[131] 135 S. Ct. 2551 (2015).

unconstitutionally vague,[132] the BIA's approach has been incoherent. On one hand, following *Johnson*, the BIA announced that it would consider briefing on what effect, if any, the *Johnson* decision has on the "continued viability" of the BIA's analysis of this deportation provision.[133] Yet in unpublished decisions addressing this very claim—that, under *Johnson*, a similar provision within the "crime of violence" removal ground was invalid—the BIA again repeated its longstanding prohibition on the consideration of constitutional issues, rejecting the noncitizen's argument that the provision was void for vagueness.[134] Because the BIA has never explained why it believes it lacks the authority to consider constitutional challenges, it is difficult to assess whether a legal issue with a constitutional dimension will be found to be within its authority to consider or not.[135]

A similarly unexplained application of the BIA's rule is found in its extension to regulations. While its initial pronouncement in *H-* applied to review of the constitutionality of the statutes it administers, the BIA subsequently tacked on regulations to the mix.[136] In *Bogart*, the BIA rejected an attorney's challenge to

[132] *Id.* at 2557 (holding that residual clause to criminal statute requiring inquiry about whether crime "involves conduct that presents a serious potential risk of physical injury to another" is void for vagueness).

[133] BD. OF IMMIGRATION APPEALS, AMICUS INVITATION NO. 15-09-28 (2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/09/28/amicus-invitation-no-15-09-28-due-10-28-2015.pdf [https://perma.cc/6W4Q-7YJ6] (calling for amicus briefing on the effect *Johnson* may have on the continued viability of *Matter of Francisco-Alonzo*, 26 I. & N. Dec. 594 (B.I.A. 2015), considering the *Johnson* Court's discussion of the 'ordinary case' methodology?").

[134] Garcia, File A044 801 234, 2016 WL 946722, at *3 n.1 (B.I.A. Feb. 17, 2016) (questioning merits of applying *Johnson* to "crime of violence" clause but concluding that it "is not a matter for us to decide" because "[t]his Board has no authority to declare an Act of Congress unconstitutional").

[135] The Supreme Court recently heard oral arguments in *Sessions v. Dimaya*, a void-for-vagueness challenge to the INA's definition of a crime of violence. *See* Transcript of Oral Argument at 3, Sessions v. Dimaya, No. 15-1498 (U.S. argued Oct. 2, 2017). The Ninth Circuit concluded that a portion of the crime of violence provision is unconstitutionally vague under *Johnson v. United States*. *See* Dimaya v. Lynch, 803 F.3d 1110, 1114 (9th Cir. 2015) (holding that INA definition of "aggravated felony," which includes crimes of violence, was unconstitutionally vague). In oral argument before the Supreme Court, the government claimed that the vagueness test as applied to civil immigration laws was not as vigorous as the test applied to criminal laws. Kevin Johnson, *Argument Analysis: Faithful to Scalia, Gorsuch May Be Deciding Vote for Immigrant*, SCOTUSBLOG (Oct. 3, 2017, 11:50 AM), http://www.scotusblog.com/2017/10/argument-analysis-faithful-scalia-gorsuch-may-deciding-vote-immigrant/ [https://perma.cc/TG85-ESAQ]. However, Justice Gorsuch noted that the Due Process Clause does not make a distinction between criminal and civil laws. *Id.* A decision is currently pending.

[136] *See* C-, 20 I. & N. Dec. 529, 532 (B.I.A. 1992) ("[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the [INA] and the

a regulation on disbarment as violating his due process rights, concluding that it lacked authority to consider a constitutional challenge to a regulation it was charged with administering.[137] In coming to this conclusion, the BIA combined its precedent prohibiting review of constitutional challenges to statutory provisions[138] with a separate line of cases rejecting ultra vires challenges to regulations, concluding that "we are bound by the regulations promulgated under the Immigration and Nationality Act."[139]

The BIA's extension of its prohibition on constitutional consideration from statutes to regulations thus calls into question its rationales. If its rationale is a concern over separation of powers, there is little reason to think that upholding a constitutional challenge to a regulation would encroach on the other branches of government. If its rationale is one of "ministerial efficiency"—i.e., that as an administrative body, it must unquestioningly follow the dictates of not only Congress but the principal agency's binding regulations—there is more legitimacy to the rule, but it does not address competing concerns, such as the BIA's duty to interpret the law as an impartial body separate from the enforcement arms of the administrative state.

A final area in which the BIA has recognized its ability to apply constitutional principles to substantive immigration law is the BIA's own interpretations. This final area sheds some further light on the BIA's approach and rationales. In *Silva*,[140] the BIA addressed the availability of a form of discretionary relief under former section 212(c) of the INA.[141] The statute explicitly provides certain lawful permanent residents with the ability to seek a waiver of certain grounds

regulations."); Valdovinos, 18 I. & N. Dec. 343, 345 (B.I.A. 1982) (stating that "claims as to the unconstitutionality of the statutes and regulations administered by this Board are outside the scope of our jurisdiction"); Bogart, 15 I. & N. Dec. 552, 555 (B.I.A. 1976) (rejecting consideration of constitutional challenge to regulation promulgated under INA).

[137] *Bogart*, 15 I. & N. Dec. at 555 (finding meritless respondent's argument that BIA is precluded from suspending or disbarring him from practice when statute actually permits "limit[ing] the discipline, including disbarment, of individuals who appear in a representative capacity before an agency" (citing 5 U.S.C. § 500)).

[138] *Id.* ("This is not the proper forum for a determination of the constitutionality of the regulations." (citing Swissair "Flight #164", 15 I. & N. Dec. 111 (B.I.A. 1974); Santana, 13 I. & N. Dec. 362 (B.I.A. 1969); L-, 4 I. &. N. Dec. 556 (B.I.A. 1951))).

[139] *Id.* The BIA cited two cases rejecting ultra vires challenges to regulations: *Bilbao-Bastida*, 11 I. & N. Dec. 615, 616 (B.I.A. 1966) (rejecting argument that regulation purporting to limit validity of alien registration card for individuals who had been in Cuba was ultra vires, concluding that properly promulgated regulation binds agency), and *Tzimas*, 10 I. & N. Dec. 101, 101-02 (B.I.A. 1962) (rejecting counsel's argument that regulation barring relief to certain classes of noncitizens is ultra vires, concluding that properly promulgated regulation binds the agency).

[140] 16 I. & N. Dec. 26 (B.I.A. 1976).

[141] *Id.* at 27 (highlighting how section 212(c) of INA grants Attorney General discretionary power to admit certain aliens, despite specified grounds for exclusion under section 212(a)).

of exclusion when they return from temporary trips abroad.[142] In a series of cases, the BIA permitted immigration officials to grant the waiver nunc pro tunc to individuals who traveled abroad in the past and had not sought the waiver, but were facing deportation subsequently.[143] However, the BIA declined to extend the waiver to individuals who never left the United States at all.[144] In *Francis v. INS*,[145] the Second Circuit held that the BIA's interpretation was unconstitutional, and applied due process and equal protection principles to hold that lawful permanent residents who have not departed from the United States should have the opportunity to seek the waiver if facing deportation.[146] In *Silva*, the BIA adopted the Second Circuit's position nationwide, emphasizing the origins of the interpretation in BIA precedent and the Solicitor General's decision not to seek certiorari review of *Francis*.[147] In so doing, the BIA appears to have embraced the application of constitutional concerns articulated in the Second Circuit's opinion, without questioning its authority to extend *Francis* to the country as a whole.

The majority decision did not address whether its approach to the equal protection concerns was in tension with the longstanding prohibition on the consideration of the constitutionality of the statutes and regulations it administers. However, one member of the panel wrote separately to emphasize that the *Francis* decision framed the constitutional concern as one relating to the BIA's interpretation of the availability of the waiver, rather than a direct challenge to the statute itself.[148] Thus, it appears that the BIA at least recognizes that it may consider constitutional challenges with respect to its own rules—decisions not dictated by the statute or expressed by other divisions of administrative agencies through regulation. This "exception" to its general rule, however, does little to shed light on the rule's rationales—although it suggests

[142] *Id.* (outlining possibility of waiver for aliens who (1) are lawfully admitted for permanent residence; (2) go abroad temporarily, voluntarily and not under deportation order; and (3) return to "lawful unrelinquished domicile of seven consecutive years").

[143] *Id.* at 27-28 (discussing development of BIA's approach to availability of section 212(c) waivers).

[144] *Id.* at 28 (discussing several cases in which alien had not departed United States since his conviction, thus not qualifying for waiver under section 212(c)).

[145] 532 F.2d 268 (2d Cir. 1976).

[146] *Id.* at 273 (finding BIA's interpretation as applied to petitioner to be unconstitutional because it subjected individuals within specific group to "disparate treatment on criteria wholly unrelated to any legitimate governmental interest").

[147] *Silva*, 16 I. & N. Dec. at 29-30 (concluding that section 212(c) waiver can be granted regardless of whether alien has departed United States after law(s) making alien deportable).

[148] *Id.* at 32 n.4 (Appleman, Board Member, concurring) ("Here the courts readily exercise authority since the challenge is to the manner in which the law is applied rather than to the law itself. Accordingly, the *Francis* decision, by invalidating a Board 'interpretation' of the statute, on its face does not offend the precedents.").

that another exception to the rule may lay in the realm of ambiguous statutory interpretation.

2. Constitutional Avoidance in Statutory Interpretation

The BIA's decision in *Silva* suggests that the agency will recognize its authority to address constitutional concerns within the ambit of statutory interpretation where neither Congress nor a regulating agency has dictated the meaning of a particular term being challenged. This raises the possibility of an administrative application of constitutional avoidance—a rule permitting the BIA to at least consider constitutional issues to the extent they may be avoided through statutory interpretation. As it turns out, the BIA does pay lip service to its ability to use the constitutional avoidance canon to interpret ambiguous provisions. It has not, however, ever applied the canon in that manner.

In *Fuentes-Campos*,[149] the BIA acknowledged the canon of constitutional avoidance and its authority to use it when interpreting ambiguous statutes.[150] In that case, a noncitizen sought a section 212(c) waiver for his ground of inadmissibility, despite a statutory bar he would have confronted had he been facing a ground of deportability for the same offense.[151] The government urged the BIA to apply constitutional avoidance, arguing that an interpretation of section 212(c) to apply in this manner would raise serious equal protection concerns that could be avoided if application of the statute was barred as to all noncitizens with such offenses.[152] The BIA, citing federal court precedent, acknowledged that it could apply the canon of constitutional avoidance to construe an ambiguous statute to avoid serious constitutional concerns.[153] Nonetheless, it declined to apply the canon in this context, concluding that the statutory provision at issue was unambiguous.[154] The BIA also would not address a head-on challenge to the statute as violating equal protection, noting its longstanding precedent that it lacks authority to consider such challenges.[155]

Fuentes-Campos thus suggests that the BIA can draw a distinction between its authority to invalidate an immigration statute versus its authority to construe an ambiguous statute to avoid constitutional concerns. After all, assuming the BIA was correct in construing the statute to be unambiguous as to the noncitizen's eligibility, the canon of constitutional avoidance had no role to play. However, its brief acknowledgment of the constitutional avoidance canon in

[149] 21 I. & N. Dec. 905 (B.I.A. 1997).
[150] *Id.* at 912.
[151] *Id.* at 906.
[152] *Id.* at 912.
[153] *Id.*
[154] *Id.*
[155] *Id.*

Fuentes-Campos alone does not establish that the BIA has in fact embraced constitutional avoidance as a tool of statutory interpretation.

A review of BIA precedent reveals that the BIA has not, in fact, applied constitutional avoidance in statutory interpretation. The BIA has repeatedly rejected application of the canon in cases involving ambiguous statutory provisions with limited explanation, despite the urging of noncitizens and, in some cases, dissenting BIA members.[156] The BIA's failure to apply constitutional avoidance to the construction of an ambiguous statute could, of course, be explained if none of the statutory interpretation questions at issue raised serious constitutional concerns—in which case application of the canon would be inappropriate. However, a review of BIA case law paints a different picture.

The BIA appears to apply a very narrow view of when the constitutional avoidance canon applies. This can be seen most clearly by directly comparing the BIA's and federal courts' treatment of prolonged detention claims. For example, in the prolonged detention context, numerous federal courts have applied the canon of constitutional avoidance to hold that detention statutes must be read to include a temporal limitation.[157] When the government appealed these

[156] *See, e.g.*, Punu, 22 I. & N. Dec. 224, 252 (B.I.A. 1998) (Rosenberg, Board Member, concurring in part and dissenting in part) (pointing to serious equal protection concerns raised by majority's reading of statutory definition of "conviction"); Guo Yu Lei, 22 I. & N. Dec. 113, 131 (B.I.A. 1998) (Rosenberg, Board Member, concurring in part and dissenting in part) (criticizing majority's reading of exceptional circumstances rule for reopening in absentia orders as raising serious due process concerns); Collado-Munoz, 21 I. & N. Dec. 1061, 1070 (B.I.A. 1998) (Rosenberg, Board Member, dissenting) (urging majority to construe law regarding when permanent residents are seeking admission so as to not violate constitutional principles); Gonzalez-Camarillo, 21 I. & N. Dec. 937, 953-54 (B.I.A. 1997) (Rosenberg, Board Member, concurring in part and dissenting in part) (criticizing majority reading of section 212(c) relief as creating constitutional concerns that could be avoided); Villalba-Sinaloa, 21 I. & N. Dec. 842, 847 n.2 (B.I.A. 1997) (Rosenberg, Board Member, dissenting) (urging majority to consider constitutional concerns when construing statutory provisions governing in absentia deportation hearings); Valdez-Valdez, 21 I. & N. Dec. 703, 718-20 (B.I.A. 1997) (Rosenberg, Board Member, dissenting) (criticizing majority's interpretation of transitional custody rules to apply to noncitizen in light of serious constitutional concerns); Garvin-Noble, 21 I. & N. Dec. 672, 702 (B.I.A. 1997) (Rosenberg, Board Member, concurring in part and dissenting in part) (arguing that canon of constitutional avoidance counsels towards narrowest reading of transitional detention provisions); Shaar, 21 I. & N. Dec. 541, 565 (B.I.A. 1996) (Guendelsberger, Board Member, dissenting) (dissenting from majority interpretation of statutory provision relating to noncitizens who file motions to reopen within voluntary departure period, arguing that BIA should construe provision not to preclude relief, so as to avoid due process and equal protection concerns).

[157] *See, e.g.*, Reid v. Donelan, 819 F.3d 486, 494 (1st Cir. 2016) (recognizing that due process "imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute"); Rodriguez v. Robbins, 715 F.3d 1127, 1138 (9th Cir. 2013) (highlighting that precedent has established that there must be

decisions, the Supreme Court concluded that the statutes at issue could not be plausibly interpreted to include a temporal limitation.[158] However, rather than reject the due process concerns outright, the Supreme Court remanded for consideration of the direct constitutional challenge.[159] Yet the BIA has routinely disavowed its ability to consider the constitutional concerns raised by the noncitizens challenging the constitutionality of their detention.[160] As such, noncitizens are forced to bring their claims to federal court, if they are able to marshal the resources to do so with counsel or pro se.

Even where constitutional avoidance has been explicitly raised in dissent, the BIA has viewed its role narrowly. In *Rojas*,[161] the BIA was called upon to determine whether the mandatory detention statute, which prohibits bond hearings for individuals who are detained "when . . . released" from criminal custody for certain offenses, applies to individuals who are not detained at the time of their release.[162] The BIA concluded that the statutory language at issue was ambiguous, and considering the statutory context—in particular, Congress's generalized intent to deport noncitizens with criminal convictions—construed the statute to apply regardless of the timing of a person's release from criminal custody, even to individuals released years prior.[163] In dissent, several members of the BIA pointed to serious constitutional concerns raised by mandatory detention, and argued that the statute could be construed to avoid those results if it were applied only at the time of a noncitizen's release.[164] The majority rejected the application of constitutional avoidance, noting that federal courts had been holding that mandatory detention at any time was unconstitutional.[165] Thus, it concluded that the interpretation advanced by the dissent would not address all the constitutional concerns, and it was powerless to consider the constitutionality of the provision as a whole.[166]

"'reasonable time' limitation" for detention); Diop v. ICE/Homeland Sec., 656 F.3d 221, 231-32 (3d Cir. 2011) (applying principle of constitutional avoidance, to find that statute authorizes detention for "reasonable amount of time").

[158] Jennings v. Rodriguez, No. 15-1204, slip op. at 29 (U.S. Feb. 27, 2018).

[159] *Id.*

[160] *See, e.g.*, Desai, File A037 061 888, 2008 WL 4420039, at *1 (B.I.A. Sept. 16, 2008) (stating "neither the Immigration Judge nor this Board may rule that detention under section 236(c)(1) of the [INA] is unconstitutional as applied to the respondent" in absence of binding federal precedent addressing same constitutional claim as applied to same facts).

[161] 23 I. & N. Dec. 117 (B.I.A. 2001).

[162] *Id.* at 119 (stating issue as "whether or not the phrase 'when the alien is released' is necessary part of description of alien in [INA]").

[163] *Id.* at 120-25.

[164] *Id.* at 138-39 (Rosenberg, Board Member, dissenting).

[165] *Id.* at 126.

[166] *Id.*

The majority's analysis seems, in some ways, a reasonable approach to constitutional avoidance. After all, the canon applies only where a particular interpretation of the statute raises constitutional concerns. However, it is striking that while the majority rejected the interpretation proposed by the dissent as failing to cure all the constitutional concerns raised, the majority never addressed whether its interpretation—to prohibit a bond hearing to an individual who has been at liberty for years following a past conviction, despite the evidence of lack of flight risk or dangerousness accumulated in the intervening time—raised constitutional concerns. Rather, the BIA appeared to abdicate its responsibility by framing the constitutional concerns solely as a direct challenge to the validity of the statute, and then invoking its longstanding prohibition on the consideration of such challenges to avoid further consideration of the concerns. In contrast, several federal courts, on habeas review, applied constitutional avoidance to construe the statute to apply at or around the time of release.[167]

Thus, the BIA's approach to constitutional avoidance—avoiding the canon by construing constitutional concerns as direct challenges to the statute rather than considering those concerns when construing ambiguous provisions—appears to be contributing to the relative stagnation in constitutionalism at the agency level. Although it makes no attempt to rationalize a ban on constitutional avoidance—and, to the contrary, recognizes its ability to apply the canon in

[167] *See, e.g.*, Rodriguez v. Shanahan, 84 F. Supp. 3d 251, 265 (S.D.N.Y. 2015) ("Th[e] special justification [necessary for mandatory detention] . . . no longer applies for non-citizens such as Rodriguez who have, by virtue of being in his community for seven years, rebutted Congress's otherwise acceptable presumption of dangerousness, recidivism, and flight risk. Holding him without a bond hearing now raises constitutional concerns that would not have been present had he been apprehended 'when . . . released.'"); Figueroa v. Aviles, No. 14-cv-09360, 2015 WL 464168, at *4 (S.D.N.Y. Jan. 29, 2015) (concluding that mandatory detention of individual not detained "when . . . released" "raises serious due process concerns"); Martinez-Done v. McConnell, 56 F. Supp. 3d 535, 548 (S.D.N.Y. 2014) ("[T]he government's construction of section 236(c) would confer limitless authority on the Attorney General to pluck immigrants from their families and communities with no hope of release pending removal—even decades after criminal confinement. This construction threatens immigrants' statutory and constitutional rights."); Araujo-Cortes v. Shanahan, 35 F. Supp. 3d 533, 550 (S.D.N.Y. 2014) (holding that petitioner who has returned to his family and community is "differently situated from the criminal aliens who are taken into custody 'when . . . released' . . . [and therefore], Congress' concerns about whether those criminal aliens pose a flight risk or danger to the community, do not justify . . . continued detention" (footnote omitted)); Espinoza v. Aitken, No. 5:13-cv-00512, 2013 WL 1087492, at *7 (N.D. Cal. Mar. 13, 2013) ("[T]he liberty interest implicated by any civil detention statute, especially one which calls for imprisonment without review, makes it unsurprising why Congress would want to limit its application to a particular class of individuals detained at a particular time."); Monestime v. Reilly, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010) (concluding that, given length of time that has passed since immigrant detainee's last removable offense, "DHS can only determine whether [the petitioner] poses a risk of flight or danger to the community through an individualized bond hearing").

principle—the BIA nonetheless approaches the canon with the same hesitancy that it approaches all constitutional claims in substantive immigration law. This phenomenon might be best explained as a lack of constitutional competency—an inability to understand and consider constitutional concerns generally—or the predictable result of a "chilling effect" on constitutional analysis caused by its poorly-explained prohibition on the consideration of constitutional challenges.

3. Constitutional Challenges in Procedural Immigration Law

The third and final area of constitutional analysis found at the BIA suggests that its stagnation in constitutional norms enforcement within substantive immigration law is a result of a conceptual constraint rather than purely a competency issue. This is because the BIA has delved deep into constitutional waters in one area—protecting the procedural fairness of the administrative process. In this context, the BIA has embraced the view that an agency must ensure the fairness of its own procedures, and thus has engaged in constitutional decisionmaking under the rubric of due process. While its framing focuses on due process, the BIA has engaged in other areas of constitutional law by analogizing to other constitutional rights. Its engagement in constitutionalism in the procedural context presents an interesting foil to its general disengagement in constitutionalism in substantive immigration law, and undercuts a theory of limited agency competence to address constitutional matters.

For example, the BIA has issued several decisions addressing whether unlawfully obtained evidence must be excluded in deportation proceedings, analogizing to the Fourth Amendment "exclusionary rule" long applied in criminal cases.[168] In *Sandoval*,[169] the BIA applied a balancing test to conclude that the exclusionary rule should not generally apply in deportation proceedings, holding that the societal costs of excluding otherwise reliable and probative evidence outweighed the deterrent effect of a rule against unlawfully obtained evidence of deportability.[170] However, the BIA recognized exceptions to this rule, concluding in a separate case that termination was appropriate where the only evidence of deportability stemmed from involuntary statements.[171] Eventually, the exclusionary rule question reached the Supreme Court in *INS v.*

[168] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained as result of unlawful search is inadmissible in state criminal proceedings).

[169] 17 I. & N. Dec. 70 (B.I.A. 1979).

[170] *Id.* at 83.

[171] Garcia, 17 I. & N. Dec. 319, 321 (B.I.A. 1980). The respondent's uncontradicted testimony indicated that he had admitted his alienage "only after a significant period in custody had elapsed, after his requests to contact his attorney were repeatedly rebuffed, and after he had given up all hope of speaking with her." *Id.* The BIA determined that the resulting evidence must be excluded as a matter of due process. *Id.*

Lopez-Mendoza.[172] While the Court concluded that the exclusionary rule generally does not apply in deportation proceedings, it preserved the possibility of certain exceptions for egregious or widespread Fourth Amendment violations.[173] Since *Lopez-Mendoza*, the BIA has issued hundreds of decisions adjudicating motions to suppress evidence in the immigration context. While most decisions have resulted in the denial of such motions, the BIA has affirmed a small fraction of cases in which immigration judges suppressed evidence and terminated proceedings based on egregious Fourth Amendment violations.[174] By definition, each of these cases involved the agency's assessment of whether a Fourth Amendment violation had occurred, and whether it rose to the level of egregiousness required under the applicable precedent.

The BIA has similarly recognized due process protections with respect to noncitizens' right to effective assistance of counsel by drawing from parallel standards in the Sixth Amendment criminal context. In *Lozada*,[175] the BIA applied due process principles to deny a noncitizen's motion to reopen removal proceedings based on the ineffective assistance of his counsel.[176] The BIA stated that to show denial of due process, respondents must demonstrate that the deficient representation resulted in a proceeding "so fundamentally unfair that the alien was prevented from reasonably presenting his case" and that such deficiency prejudiced the respondent, mirroring the requirements in the criminal context.[177] The BIA reiterated its approach, against government criticism, in

[172] 468 U.S. 1032, 1041 (1984) (discussing how application of exclusionary rule beyond criminal prosecution was unclear).

[173] *Id.* at 1050-51.

[174] *See* Lara-Torres, File A094 218 294, 2014 WL 1120165, at *1-2 (B.I.A. Jan. 28, 2014) (upholding suppression of evidence and termination where National Security Agency officers investigated respondent's immigration status during traffic stop based on his race and unreasonably detained him for four hours); Ixpec-Chitay, File A097 535 400, 2013 WL 5872076, at *2 (B.I.A. Sept. 16, 2013) (upholding suppression of evidence and termination where, among other things, agents hit respondent in head three times with heavy flashlight and ten agents came in his home without consent); Vargas-Lopez, File A099 577 393, 2009 WL 4639868, at *2 (B.I.A. Nov. 18, 2009) (upholding suppression of evidence and termination where respondents said they were unlawfully interrogated and forced to wait unreasonable amount of time to use bathroom, and DHS failed to provide testimony justifying or denying those actions); Avalos-Casillas, File A097 764 752, 2008 WL 4722664, at *1 (B.I.A. Oct. 7, 2008) (upholding suppression of evidence and termination based on determination that respondent, who was handcuffed before he was even asked about immigration status, was stopped solely on basis of his Hispanic appearance and limited English, which is egregious under Ninth Circuit law).

[175] 19 I. & N. Dec. 637 (B.I.A. 1988).

[176] *Id.* at 638-40.

[177] *Id.* at 638.

Assaad.[178] After former Attorney General Michael Mukasey overturned *Lozada* and *Assaad* without notice or briefing in a 2009 decision, *Compean*,[179] the subsequent Attorney General, Eric Holder, reinstated *Lozada*, while calling for rulemaking on the standards applicable to ineffective assistance of counsel in the immigration context.[180] While declining to take a position that noncitizens have a constitutional right to effective assistance of counsel, the latest decision emphasizes the importance of ensuring a fair deportation process. The relative resilience of *Lozada*, even in the face of criminal cases eroding ineffective assistance of counsel claims where no right to government-appointed counsel exits, demonstrates one example of robust constitutionalism in procedural immigration law.[181]

These lines of cases suggest that the BIA appears to take a more robust view of its authority to protect the procedural fairness of the removal process, and has the competency to do so. This is not to suggest that there are no limits to the BIA's engagement with procedural due process issues. The BIA's analysis of regulatory violations, for example, makes it difficult for noncitizens to prevail

[178] 23 I. & N. Dec. 553, 556-57 (B.I.A. 2003) ("The *Lozada* approach has provided an appropriate framework for analyzing ineffective assistance claims, balancing the need for finality in immigration proceedings with some protection for aliens prejudiced by ineffective assistance of counsel."). In *Assaad*, the then-INS asked the BIA to reconsider *Lozada* in light of two Supreme Court cases, *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Wainwright v. Torna*, 455 U.S. 586 (1982). *Assaad*, 23 I. & N. Dec. at 554. *Wainwright* held that because there was no right to counsel for a discretionary state appeal, the defendant could not be deprived of effective assistance of counsel. *Wainwright*, 455 U.S. at 587-88. *Coleman*, citing *Wainwright*, confirmed that where there is no constitutional right to counsel in a criminal proceeding, a defendant cannot be deprived of effective assistance of counsel. *Coleman*, 501 U.S. at 752 (reaching same conclusion for defendant pursuing state post-conviction relief). Federal immigration officials thus argued that the BIA was compelled to hold that there could be no constitutional violation for ineffective assistance of counsel in immigration proceedings, where the respondent has no constitutional right to counsel at the government's expense. *Assaad*, 23 I. & N. Dec. at 557. The BIA, sitting en banc, declined to overrule *Lozada*, stating that it (1) was settled law in almost all circuits and was beyond the BIA's authority to overrule, (2) had been settled circuit law for a significant amount of time, (3) had never been challenged on these grounds by the INS in the more than ten years since *Coleman* was decided, and (4) was not controlled by *Coleman* and *Wainwright*, as their applicability is limited to the criminal context in which they arose. *Id.* at 554, 558-60.

[179] 24 I. & N. Dec. 710, 712 (Att'y Gen. 2009).

[180] Compean, 25 I. & N. Dec. 1, 2 (Att'y Gen. 2009).

[181] Miguel A. Gradilla, *Making Rights Real: Effectuating the Due Process Rights of Particularly Vulnerable Immigrants in Removal Proceedings Through Administrative Mechanisms*, 4 COLUM. J. RACE & L. 225, 235-37 (2014) (discussing history of ineffective assistance litigation before BIA and role of administrative agencies in promoting right to counsel in removal proceedings).

on motions to terminate.[182] Some immigration judges appear hesitant to terminate proceedings based on due process violations occurring prior to removal proceedings.[183] Finally, as will be discussed in greater detail in Part III, the line between procedural and substantive law is blurred in this context. There are many procedural due process challenges to the immigration statute that the BIA declines to address because it characterizes them as challenges to substantive immigration law. For example, the question of whether detained noncitizens must receive bond hearings within a certain period of time raises both substantive and procedural due process questions, but the BIA has treated the issues as one of substantive immigration law.

Thus, in the context of adjudication, the BIA has taken differing approaches—abdicating any role in considering constitutional challenges to the immigration statute, even where it may aid in statutory interpretation, while embracing constitutionalism in the context of procedural fairness in the administration of immigration law. The rationales for these differing approaches have never been fully explained, although possible explanations may include separation of powers, "ministerial efficiency," and competency. The validity of these distinct approaches and their potential rationales, addressed below in Part III, may suggest a more robust role for administrative constitutionalism in this context.

B. *Immigration Rulemaking*

While the executive branch relies heavily on adjudication to apply and interpret immigration law in the deportation and detention context, it also engages in other forms of administrative lawmaking, including regulation. In this Section, I briefly explore the executive branch's engagement in constitutionalism in rulemaking.

A review of the Federal Register and related administrative notices regarding executive rulemaking in the immigration arena reveals limited discussion of constitutional issues, and the tenor of such analysis was generally dismissive of stakeholders' constitutional concerns.[184] However, where such constitutional

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[182] *See* Hernandez, 21 I. & N. Dec. 224, 228 (B.I.A. 1996) (holding that immigration judge, where possible, can and should take corrective action short of termination of proceedings when there has been violation of DHS regulation).

[183] *See, e.g.*, Santos, File A088 189 860, 2010 WL 1975945, at *2 (B.I.A. Apr. 27, 2010) (concluding that "even if pre-hearing regulatory violations occurred, as argued by the respondent on appeal, these violations are not grounds for termination as there was no showing that they resulted in 'prejudice that may have affected the outcome of proceedings, conscience-shocking conduct, or a deprivation of fundamental rights'" (quoting Rajah v. Mukasey, 544 F.3d 427, 446-48 (2d Cir. 2008))).

[184] An October 16, 2017, Westlaw search of the Federal Register (fr) database using the terms adv: (constitution! /p immigra!) & (justice or state or homeland or naturalization) & (right or problem or avoid! or concern or doubt) % ("Employment and Training Administration") produced 127 results. Of those hits, thirteen involved rulemaking related to

the administration of immigration law or immigration-related issues in which a federal agency noted constitutional principles in announcing a rule or responding to constitutional objections during notice and comment. Of those thirteen, the federal agency rejected the commenters' constitutional objections without modification of the provision at issue in twelve notices. *Compare* Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5284-85 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37) (addressing and rejecting commenters' concerns that standardized national licensing requirement would impinge on several constitutional rights, including concerns that program would commandeer state resources, hinder due process for states and individuals, encourage racial discrimination, and impinge upon individuals' right to travel), *and* Powers of the Attorney General to Authorize State or Local Law Enforcement Officers to Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens, 67 Fed. Reg. 48,354, 48,355-56 (July 24, 2002) (to be codified at 8 C.F.R. pt. 2 and 28 C.F.R. pt. 65) (addressing and rejecting commenters' concerns that rule implementing INA section 103(a)(8) permitting Attorney General to authorize state or local law enforcement to perform certain duties of INA employee during "mass influx of aliens" could lead to constitutional issues like racial profiling and civil rights violations), *and* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,881-83, 54,893 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3) (addressing and rejecting commenters' concerns that rule revising structure and procedures of BIA would cause due process violations under *Mathews v. Eldridge* through single member review, fundamental fairness issues through adverse effect on independence of BIA, and general constitutional issues through reduction of Board members), *and* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36,799, 36,800 (May 28, 2002) (to be codified at 8 C.F.R. pt. 3) (recognizing that rule authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information raises First Amendment free speech issues by limiting respondent's ability to disclose or disseminate information, but asserting that rule comports with Supreme Court's First Amendment jurisprudence and should be construed to comply with constitutional requirements), *and* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,137-39 (Oct. 18, 1999) (to be codified at 8 C.F.R. pt. 3) (addressing and rejecting commenters' concerns that rule allowing single permanent BIA member to affirm decisions below with form, one-line order violates due process by failing to provide adequate rationale for decisions), *and* Citizenship Requirement for Employment, 60 Fed. Reg. 29,467, 29,468 (June 5, 1995) (to be codified at 8 C.F.R. pt. 3) (addressing and rejecting commenters' concerns that rule requiring all Executive Office for Immigration Review employees to be U.S. citizens lacks rational basis and is unconstitutional because Constitution does not require Article III judges to be citizens), *and* Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 541-42 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103, 212) (addressing and rejecting commenters' concerns that proposed provisional unlawful presence waiver would exceed executive branch's constitutional authority and could only be addressed by Congress), *and* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284, 62,285 (Dec. 5, 1994) (to be codified at 8 C.F.R. pts. 208, 236, 242, 274a, 299) (addressing and rejecting commenters' concerns that rule foregoing detailed denials by Asylum Officers in favor of referral to immigration judge infringes on Fifth and Fourteenth Amendment rights by failing to provide applicants with

concerns were raised, the relevant federal agencies explicitly addressed them. Unlike in the adjudication context, where the BIA has largely abdicated any role in constitutional analysis in substantive immigration law, the DOJ has expressed no similar qualms in the rulemaking context. Although the DOJ is not being asked to invalidate a law, it is administering and interpreting the law in ways that are similar to the role taken by the BIA in cases of statutory interpretation, and thus presents an interesting parallel, albeit on a smaller scale.

For example, a search of the Federal Register reveals thirteen instances in which the DOJ addressed the constitutional implications of a proposed or final immigration rule in the last two decades. In an example involving an interim rule, the DOJ raised constitutional concerns for the purpose of describing the various limitations on noncitizens' constitutional rights in the immigration context.[185] Nonetheless, the DOJ squarely addressed commentators'

reasons for and opportunity to rebut denial and depriving some applicants of non-adversarial interview), *and* Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281, 80,282-83 (Dec. 21, 2000) (to be codified at 8 C.F.R. pts. 212, 236, 241) (addressing and rejecting commenters' concerns that rule allowing continued detention, beyond ninety-day removal period, of immigrants believed to be flight risk or danger violates substantive and procedural due process rights), *and* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,584 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264) (addressing and rejecting commenters' concerns that publication in Federal Register of rule modifying regulations to require certain nonimmigrant aliens to make specific reports to INS at certain intervals is not sufficient notice for subject individuals already residing in United States and is violation of due process rights), *and* Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364, 4366 (Jan. 29, 2003) (to be codified at 8 C.F.R. pts. 236, 241) (addressing and rejecting commenters' concerns that rule establishing uniform policy on release of information on immigrant detainees violates due process and First Amendment rights), *and* Review of Custody Determinations, 71 Fed. Reg. 57,873, 57,876-81 (Oct. 2, 2006) (to be codified at 8 C.F.R. pt. 1003) (addressing and rejecting commenters' concerns that rule instituting automatic stay of immigration judge's decision ordering immigrant's release where DHS has ordered immigrant be held without bond or with bond of $10,000 or more violates due process rights to not be detained indefinitely, without bond, and without meaningful opportunity to challenge detention), *with* Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441, 27,443 (May 19, 1998) (to be codified at 8 C.F.R. pts. 3, 236) (addressing and making slight modifications to narrow categories of lawful permanent residents and other "lawfully admitted aliens" subject to mandatory detention in response to commenters' concerns that rule establishing three categories of "criminal aliens" for purpose of making categorical detention decisions is unconstitutional in case of lawful permanent residents).

[185] *See, e.g.*, Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. at 36,800.

constitutional concerns in announcing a final rule, and in one case modified its rule to account for some of the concerns raised.[186]

This is not to suggest that the executive branch has engaged with constitutionalism as robustly as it could in the rulemaking context. Rather than enforcing constitutional norms to advance immigrant rights, the executive branch has tended to take stances on constitutional law that preserved or aggrandized its own power to act, even in the face of contrary trends in judicial precedent.

Take, for example, the DOJ's promulgation of regulations expanding the use of "automatic stays" in immigration detention cases. The DOJ first introduced the automatic stay rule as part of a package of reforms following the rollout of a new mandatory detention statute enacted by Congress.[187] Under the original formulation of the rule, immigration officials were authorized to seek an automatic stay of an immigration judge's order to release an individual on bond or other conditions pending appeal, so long as the individual would otherwise be subject to sections of the mandatory detention statute and the local immigration director had originally denied bond or set a bond of $10,000 or higher.[188] Unlike stays generally, the automatic stay provision required no adjudication by the BIA, nor did it provide noncitizens with any opportunity to challenge its imposition.[189] Instead, INS officials would receive the automatic stay simply by filing a notice of intent to appeal on the day the order is issued.[190] Initially viewed as a mechanism applicable only to those individuals who fit Congress's criteria for mandatory detention (where no release on bond would be available in any event), the rule was expanded in 2001. Following the sweeping immigration law changes proposed after the terrorist attacks on September 11, 2001, the DOJ issued an interim rule that specifically expanded the automatic stay provisions to apply to noncitizens—irrespective of whether they would otherwise be subject to mandatory detention—if an immigration official files a notice that their office intends to appeal a decision on release within one business

[186] *See* Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. at 27,443.

[187] Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 62 Fed. Reg. 48,183, 48,183 (Sept. 15, 1997) (to be codified at 8 C.F.R. pts. 3, 236).

[188] *Id.* at 48,186; *see also* Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 102-03 (2010) (discussing history of automatic stay provision in immigration detention cases).

[189] Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 62 Fed. Reg. at 48,185.

[190] *Id.* at 48,186.

day of the decision, provided that immigration officials subsequently file the actual appeal within ten days.[191]

In its justification for the 2001 interim rule, the DOJ briefly described the federal government's broad powers in the area of immigration law. Citing Supreme Court case law from 1896 and 1952, the DOJ noted that courts have long upheld detention as a necessary aspect of the federal government's deportation power, and then cited 1990s federal circuit court cases to describe detained immigrants' liberty interests as narrow.[192] Although the Supreme Court had recognized detainees' due process rights in *Zadvydas* that same year by applying constitutional avoidance in light of those concerns to read an immigration detention statute narrowly, the DOJ did not discuss the *Zadvydas* decision in its proposed rule or acknowledge detainees' due process rights.[193]

In response to the 2001 interim rule, several commentators raised concerns about the constitutionality of the automatic stay provision. They emphasized the due process concerns raised by the automatic stay provision, citing *Zadvydas* and distinguishing the case law cited by the DOJ.[194] At the same time, several federal courts weighed in on the constitutionality of the regulation. The majority of district courts to address the rule held that it was unconstitutional.[195] These courts observed that the automatic stay provision converted the government's discretionary detention authority into mandatory detention in violation of

[191] *See* Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,911 (Oct. 31, 2001) (to be codified at 8 C.F.R. pt. 3); Jorjani, *supra* note 188, at 98.

[192] Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. at 54,909. The DOJ cited *Wong Wing v. United States*, 163 U.S. 228, 235 (1896), and *Carlson v. Landon*, 342 U.S. 524, 538 (1952), for the proposition that the government's detention authority has long been recognized. Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. at 54,909. It cited *Doherty v. Thornburgh*, 943 F.2d 204, 208-09 (2d Cir. 1991), and *Clark v. Smith*, 967 F.2d 1329, 1332 (9th Cir. 1992), for the proposition that immigrants' liberty interests during the course of immigration proceedings are limited. Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. at 54,909

[193] *See* Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. at 54,909.

[194] *E.g.*, David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1030 (2002) (criticizing provision for automatically staying release order "no matter how frivolous the appeal is, and without any requirement that the District Director meet the usual standards for a stay pending appeal, such as likelihood of success and irreparable harm"); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1915, 1938-39 (2002) (characterizing provision as "impair[ing] the[] ability of [immigration judges] to conduct fair and independent deportation hearings").

[195] Jorjani, *supra* note 188, at 102-03.

noncitizens' due process rights, and collapsed the role of the prosecutor and arbitrator in bond proceedings.[196]

The DOJ ultimately responded to the concerns in publishing its final rule in 2006.[197] It claimed to have considered the constitutional issues related to the automatic stay thoroughly in its initial adoption of the rule.[198] It noted *Zadvydas*, but stated that commentators had misconstrued the relevant case law.[199] Dividing commentators' due process concerns into three categories—implications on detainee's right to freedom from restraint, concerns over indefinite detention, and the lack of a meaningful opportunity to challenge detention—the DOJ rejected each category of concerns. Reiterating the federal government's broad powers over immigrants, both with respect to the Attorney General and the Secretary of the DHS, the DOJ engaged in a lengthy discussion of cases in which immigrants' rights were limited or unrecognized by federal courts.[200] The DOJ distinguished the indefinite detention concerns addressed in *Zadvydas*, for example, by citing the Supreme Court's subsequent rejection of a facial challenge to the constitutionality of mandatory detention in its 2003 decision in *Demore v. Kim*.[201] The DOJ declined to discuss the various district court cases holding that its automatic stay rule was unconstitutional.

The selective presentation of judicial precedent and dismissive discussion of constitutional concerns demonstrate that even where federal immigration agencies have engaged in administrative constitutionalism, they have interpreted constitutional mandates narrowly. However, the approach may not be surprising in the context of rulemaking, a process that gives the executive branch significant control over the outcome and where stakeholders' concerns may be confronted only after the proposal of the initial rule—an internal process through which the executive branch's position on a particular issue is often already solidified. In this context, the executive branch has a particular incentive to take positions that aggrandize their power to act. The same may not be true for the adjudicative context, where an administrative agency is created as an independent and impartial tribunal with a greater degree of separation from prosecutorial functions to complement its lawmaking functions.

More importantly, in comparison, the relative (if somewhat self-serving) openness to constitutional engagement found in immigration rulemaking stands

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[196] *Id.*

[197] Review of Custody Determinations, 71 Fed. Reg. 57,873 (Oct. 2, 2006).

[198] *Id.* at 57,876 ("The [DOJ] extensively considered the constitutional issues relating to the detention of aliens in general and the automatic stay rule in particular when the Attorney General first adopted the automatic stay provision in 1998." (citing Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441, 27,448-49 (May 19, 1998))).

[199] *Id.* at 57,878-79.

[200] *Id.* at 57,876-81.

[201] *Id.* at 57,876, 57,879 (citing Demore v. Kim, 538 U.S. 510, 523 (2003)).

in stark contrast to the constraints imposed in immigration adjudication, at least as it relates to substantive immigration law. It is difficult to divine a principled explanation for the diverging administrative approaches to constitutionalism in immigration law. The next Part takes on this task.

III. ASSESSING THE CURRENT LIMITATIONS ON ADMINISTRATIVE CONSTITUTIONALISM IN IMMIGRATION LAW

The executive branch's convoluted approach to constitutionalism in immigration law raises several questions, which I will explore in this Part. First, is engagement in constitutional analysis ever appropriate within the executive branch? Second, if some constitutional engagement is appropriate, where in the executive branch does one locate that authority? Third and finally, if some constitutional engagement is appropriate by some executive branch actors, are there certain types of constitutional issues that are more or less appropriate for those executive branch actors to consider?

The questions are complex, and perhaps nowhere more so than in the immigration context with its complicated relationship to constitutional law. However, the suggestion that agencies may lack authority to consider certain constitutional claims is not limited to the immigration context. Although there is scant judicial analysis supporting the proposition, general statements averring the limited authority of some agencies to consider the constitutionality of statutes appear in numerous administrative contexts.[202] However, it is equally clear that some agencies also routinely engage in constitutional analysis in administering and interpreting statutes.[203]

Take, for example, the NLRB. As the Supreme Court has noted, the NLRB has expressed seemingly conflicting opinions on its authority to consider constitutional questions related to the National Labor Relations Act

[202] *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 368 (1974) (noting that Board of Veterans Appeals "expressly disclaimed authority to decide constitutional questions" and generally adheres to that principle); E. Ohio Gas Co., 1 F.P.C. 586, 592 (1939) ("It is not within the [Federal Power] Commission's province to pass upon the constitutionality of statutes enacted by Congress."); Handy Andy, Inc., 228 N.L.R.B. 447, 452 (1977) (stating that National Labor Relations Board lacks authority "to determine the constitutionality of mandatory language in the [National Labor Relations] Act").

[203] *See*, *e.g.*, Howard Enter., Inc., 93 F.T.C. 909, 941-42 (1979) (recognizing that "there may be persuasive reasons justifying consideration of constitutional issues by administrative agencies, arising out of both the obligation of each Commissioner to 'support and defend the Constitution' and of the expertise of the agency in construing the statutes it enforces, as the result of which it may be in the best position to make the first assessment of their constitutionality"); *supra* notes 87-90 and accompanying text (discussing examples of administrative constitutionalism).

("NLRA").[204] On one hand, the NLRB, like the BIA, has disavowed authority to consider challenges to the constitutionality of provisions of the NLRA—the congressional act it administers—with little explanation.[205] On the other hand, unlike the BIA, the NLRB has robustly embraced constitutional analysis in statutory interpretation, routinely considering First Amendment principles in assessing the reach of the NLRA.[206] The diverging approaches lend support to the need for a more coherent approach to administrative constitutionalism, particularly in the adjudication context.

A. *The Validity of Administrative Constitutional Engagement*

First, is engagement in constitutional analysis ever appropriate within the executive branch? Some may argue that, under Article III of the Constitution, the authority to engage in constitutional analysis and decisionmaking lies exclusively and authoritatively with the judicial branch.[207] This conception of judicial supremacy could, at its extreme, forbid other actors from meaningful constitutional engagement beyond the dictates of Article III courts.[208]

Most scholars reject this understanding of the Constitution.[209] While the Supreme Court retains ultimate authority over the constitutional matters that come before it, its authority does not preclude other actors from engaging with

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[204] *See* Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 744 n.1 (1988) (noting confusion over "[w]hether or not the NLRB entertains constitutional claims" and collecting cases).

[205] *See Handy Andy*, 228 N.L.R.B. at 452.

[206] *See, e.g.*, United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506, 355 N.L.R.B. 797, 807-11 (2010) (applying constitutional avoidance to construe NLRA provision regulating coercive conduct to avoid First Amendment concern); Bobby Cline, 351 N.L.R.B. 205, 205 (2007) (holding that "free speech clause of the First Amendment does not protect threats of reprisal").

[207] *See* Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719, 1730-31 (2014) (discussing theories of judicial supremacy); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 780-82 (2002) (same); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending "judicial primacy" with respect to constitutional decisionmaking).

[208] *See* Whittington, *supra* note 207, at 784 (explaining that "[j]udicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review").

[209] *See* Landau, *supra* note 207, at 1732-36 (noting that most scholars reject strict judicial supremacy view and recognize varying degrees of presidential authority to address constitutional issues).

constitutional issues in the first instance.[210] Indeed, constitutional design not only allows for, but requires, participation from other actors. The Constitution demands that the President "preserve, protect and defend" it, which requires, by definition, engagement in constitutional analysis.[211] Acting upon this demand, presidents have had a long history of engaging in constitutionalism through the issuance of executive orders, participation in litigation, and the defense and nondefense of certain acts of Congress.[212] While some of the acts at the margins have been controversial, few critique the President's authority to engage in constitutional analysis in the performance of presidential duties.

Nor is the President the only actor that has enjoyed legitimacy in constitutional interpretation. Non-Article III courts—most prominently state courts—also regularly engage in constitutional decisionmaking without much controversy.[213] Moreover, Congress itself is generally considered to have "considerable latitude to locate at the least the initial determination of [constitutional] issues in non-article III courts."[214] Thus, rather than belonging to just one branch, constitutional interpretation is better understood as a "collaborative enterprise" between the branches of government, with the Supreme Court retaining ultimate, though not exclusive, authority to decide a particular constitutional question.[215]

Thus, on the question of whether executive actors may engage in constitutional analysis, the answer must be yes. The harder questions are whether such authority may be delegated and dispersed among executive branch actors beyond the President, and what such authority entails.

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[210] Some scholars argue that the judiciary does not necessarily have the final word on the constitutionality of the law. *See id.* at 1731-32 (discussing minority view among scholars that President need not enforce judicial edicts that he believes are unconstitutional).

[211] U.S. CONST. art. II, § 1, cl. 8; Morrison, *supra* note 90, at 1223-24 (discussing executive power to interpret and enforce Constitution).

[212] *See* Landau, *supra* note 207, at 1737-64 (discussing history of presidential constitutionalism in civil rights, including President Obama's nondefense of Defense of Marriage Act).

[213] *See* Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1685 (1977) (noting authority of state and legislative courts to consider constitutional concerns).

[214] *See id.*

[215] ESKRIDGE & FEREJOHN, *supra* note 87, at 69-70 (discussing view that all three branches of government share duty to engage in constitutional interpretation); Morrison, *supra* note 90, at 1200 (quoting Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105, 109) (explaining role of nonjudicial actors and constitutional interpretation, while also recognizing role of Supreme Court as final interpreter).

B. *The Proper Allocation of Administrative Constitutional Authority*

This brings us to our second question: If some constitutional engagement is appropriate, where in the executive branch does one locate that authority? Accepting that the President certainly has the authority—and, indeed, a duty—to engage in certain forms of constitutional analysis, it is not clear that the same should be said for every actor within the executive branch. As discussed in Part II, part of the hesitancy from the BIA to engage in constitutional issues stems from a "ministerial efficiency" rationale.[216] This rationale, articulated by some federal courts, suggests that "ministerial officers cannot question the constitutionality of the statute under which they operate" because it would undermine the "orderly, efficient functioning of the processes of government."[217] As noted in *Panitz*, a case cited by the BIA when it first pronounced its prohibition on considering the constitutionality of the immigration statute, it would be fatally chaotic to the tax system if a tax assessor were able to "nullify legislative enactments because of personal belief that they contravene the constitution."[218]

At first blush, this seems to be a reasonable limitation of the authority of executive branch actors to address constitutional issues. Just as the federal court in *Panitz* feared in the context of tax assessors, so too could one imagine disaster if frontline immigration officers were able to pick and choose among the immigration laws they were enforcing based on their own personal beliefs as to the constitutionality of the provisions. Recent controversies over top-down policies from the President to immigration officers demonstrate the potential danger to the functioning of the immigration system if immigration officers were empowered with the ability to consider ad hoc constitutional concerns in the application of immigration laws.[219]

However, it is not clear that these same "ministerial efficiency" concerns apply to lawmaking entities within the executive branch. The BIA, which plays an adjudicative, precedent-setting function, is designed to stand apart from the frontline enforcement arm of the federal government. Its function is to adjudicate, rather than blindly administer or even prosecute; it has been

[216] *See supra* notes 123-26 and accompanying text.

[217] Panitz v. District of Columbia, 112 F.2d 39, 42 (D.C. Cir. 1940) (explaining that for government to function properly, agencies should only function according to statutory powers); *see also* Note, *supra* note 213, at 1682-83 (listing rationales for argument that agencies may not pass upon constitutionality of statutes, including "a concern with protecting orderly administrative processes and procedure").

[218] *Panitz*, 112 F.2d at 42.

[219] *See* Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 689-91 (2016) (discussing internal power struggle between various executive actors, including frontline immigration officers who believed that enforcing President's "deferred action" program for childhood arrivals would require them to violate their oath to uphold Constitution).

designated the power to not only enforce, but make the law through binding precedent.[220] Its decisions are not considered to be motivated by "personal belief," but rather by reasoned analysis.[221] In this light, it is harder to understand why the BIA could not engage in constitutional decisionmaking. As a quasi-judicial body, with delegated lawmaking authority from the Attorney General, the BIA appears closer in the spectrum of power allocation to the President than it is to a frontline immigration officer.

If this is true, then one may accept that the BIA itself should not be constrained from engaging in constitutional analysis based on fears imploding "ministerial efficiency" alone. This is not to suggest that there are no concerns with the BIA's engagement in constitutionalism. Even the President would not be immune from criticism if he chose not to enforce an act of Congress based on the conclusion that the act is unconstitutional.[222] This is only to suggest that *Panitz* and its progeny are ill-fitted to explain a prohibition on constitutionalism in the context of an adjudicatory board imbued with administrative lawmaking authority. There still remains the question of what types of constitutionalism an adjudicatory body like the BIA may appropriately embrace.

C. *Critiquing Forms of Administrative Constitutional Engagement*

Thus far, I have posited that some constitutional engagement is appropriate within the executive branch, and that an adjudicatory, lawmaking board—such as the BIA—does not strictly fall within a ministerial exception to such authority. This brings us to the third and thorniest question: If some constitutional engagement is appropriate by executive branch actors like the BIA, are there certain types of constitutional issues that are more or less appropriate for those actors to consider, or types of constitutional decisions that are within or beyond their authority to make? In other words, it is not enough to conclude that the BIA may engage in some forms of constitutional analysis. As

[220] *See supra* notes 96-104 and accompanying text (discussing functions and authority of BIA).

[221] Certainly, some administrative boards have been subject to similar criticisms, and thus similar limitations, as individual ministerial officers. For example, the Supreme Court has critiqued the competency of Selected Service Boards to consider the constitutionality of the Selective Service Act, noting the lack of delegated power to consider the validity of statutes and regulations, and the part-time, uncompensated, local nature of board membership. Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 242-43 (1968). By contrast, the BIA has been delegated the authority to set precedent on contested questions of immigration law. 8 C.F.R. § 1003.1(g) (2016).

[222] Presidential power to not enforce an act of Congress came under renewed scholarly debate after President Obama decided to enforce, but not defend, the Defense of Marriage Act. Some scholars criticized his decision not to defend the law, while others criticized his continued enforcement of the law. *See* Landau, *supra* note 207, at 1766-72 (discussing scholars' perspectives on presidential duties with respect to constitutional questions posed by Defense of Marriage Act prior to Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

the history of the BIA's approach reveals, there may be reasons why certain types of constitutional challenges should be off limits for the BIA's consideration.

This is where the BIA's approach seems most complex and ultimately problematic. As discussed in Part II, the BIA has developed a multilayered approach to the question of whether it may consider constitutional claims. For both facial and as applied constitutional challenges, the BIA disavowed any ability to consider constitutional claims. For cases involving statutory interpretation, the BIA recognizes its authority to apply tools like constitutional avoidance, but has not applied those tools—perhaps due to the chilling effect of its prohibition on the consideration of direct constitutional challenges. For procedural due process claims, the BIA both recognizes and utilizes its authority to assessing constitutional concerns, including those beyond strictly due process norms. Do those conceptual boundary lines make sense? Are they justified, or is there room for a more nuanced approach?

This set of inquiries brings us back to the unspoken rationale lurking within the BIA's initial pronouncement regarding its limited authority to consider constitutional challenges: separation of powers. In *H-*, the BIA was confronted with a challenge to the constitutionality of a statute that Congress had recently enacted precisely in order to overturn a Supreme Court decision limiting the scope of a prior deportation statute.[223] Overturning the statute would thrust the BIA into an evolving fight between the judiciary and Congress. Not only would the BIA potentially be declaring an act of Congress unconstitutional, it would arguably be encroaching on the authority that the Constitution has vested in Article III courts to say what the law means and the Constitution requires.[224] In light of this context, and the apparent separation of powers concerns involved, it is unsurprising that the BIA disavowed any such authority.

It is not clear, however, that separation of powers concerns always arise when the BIA is called upon to decide facial challenges to statutes. For starters, it is not clear that the BIA would have the last word on the matter. An aggrieved noncitizen has the right to seek judicial review and consideration of any constitutional issues before an Article III court.[225] A more significant problem exists for the DHS, which is bound by BIA decisions and cannot seek judicial review in individual cases.[226] However, this asymmetrical judicial review, designed in recognition of the need for finality among the bureaus of government

[223] H-, 3 I. & N. Dec. 411, 417 (B.I.A. 1949).

[224] U.S. CONST. art. III, § 1 (requiring "judicial Power of the United States" be vested in courts); *see also* Note, *supra* note 213, at 1685 (noting argument that separation of powers supports view that only Article III courts may pass upon constitutional questions).

[225] 8 U.S.C. § 1252 (2012) (specifying process for judicial review of orders of removal).

[226] 8 C.F.R. § 1003.1(g) (setting forth BIA's authority to make precedential law "binding on all officers and employees of the [DHS] or immigration judges in the administration of the immigration laws of the United States").

responsible for deportation, does not necessarily spell the end of the case. The Attorney General may intervene to reverse BIA decisions where there is disagreement internally in the executive branch as to the proper understanding of the law.[227]

In any event, the nonjusticiability of certain issues is not, in and of itself, a reason to condemn an executive action as a violation of separation of powers in this context. After all, many administrative claims are nonjusticiable because affected parties may lack the statutory authority or standing to sue.[228] In such contexts, there is arguably no concern of usurping judicial power because the judiciary has no role to play.[229] Rather, in such cases, administrative constitutionalism "is all the more important as it will represent the main means for ensuring that constitutional constraints are enforced."[230]

That being said, one can imagine that certain types of constitutional challenges—like some of the challenges to deportation power posed in *H-* and ultimately decided by the Supreme Court in *Harisiades v. Shaughnessy*—may fundamentally go to the heart of the BIA's capacity to act at all.[231] If deportation power is unconstitutional, the legitimacy of the BIA itself is called into question. In such cases, the BIA may be prudentially justified to pass on the constitutional question.

The BIA does not, however, limit its prohibition on constitutional analysis to such instances. Rather, as discussed in Part II, the BIA's prohibition on considering constitutional issues extends to all substantive constitutional challenges. The BIA does not distinguish between sweeping facial challenges to the statute and narrower void for vagueness and as applied challenges to provisions within immigration statutes. Its prohibition extends so far that the BIA rarely engages in any substantive constitutional analysis, even when it might be helpful for statutory interpretation questions.

In this manner, the BIA's approach stands apart from other agencies. As noted above, the NLRB eschews its power to consider the constitutionality of the NLRA itself, but routinely applies constitutional principles, particularly First

[227] *Id.* § 1003.1(h) (describing process by which Attorney General may refer BIA decisions to herself).

[228] Morrison, *supra* note 90, at 1196-97 (describing cases "where the executive's interpretation is not subject to judicial review either because it does not affect any particular individual, because those affected have no cause of action or lack standing to sue, or because the case is otherwise nonjusticiable").

[229] *Id.* at 1222 (noting that "many constitutional issues will never come before the courts no matter what the executive does" and thus executive invocation of constitutional avoidance in such circumstances "does not affect the judiciary at all").

[230] *See* Metzger, *supra* note 32, at 1926.

[231] *See supra* notes 109-22 and accompanying text (discussing *H-* and its subsequent history).

Amendment law, to interpret and apply the NLRA to the parties before it.[232] No doubt influenced by Supreme Court decisions taking NLRB decisions to task as raising serious constitutional concerns, the NLRA considers such concerns.[233] Other agencies similarly draw a nuanced line.

For example, in multiple cases, the Federal Trade Commission ("FTC") has adopted a more fluid approach to constitutional analysis.[234] In *Howard Enterprises, Inc.*, the FTC was called upon to address a facial challenge to the validity of the Federal Trade Act on First Amendment grounds.[235] In responding to the claim, the FTC began by recognizing case law holding that administrative agencies were generally prohibited from considering the constitutionality of the statutes they administer.[236] This rule, the FTC concluded, stemmed from "a recognition that administrative agencies are created to enforce the law and effect the legislative mandate."[237] Separation of powers concerns, including the possible usurpation of judicial authority to review constitutional issues, counseled against consideration of such constitutional claims.[238] Rather than end its analysis there, however, the FTC noted that that there may nonetheless be "persuasive reasons justifying consideration of constitutional issues by administrative agencies," stemming from "the obligation of each Commissioner to 'support and defend the Constitution,'" and "the expertise of the agency in construing the statutes it enforces."[239] Separation of powers concerns could be assuaged if the FTC were permitted to take a first look at the constitutional issues, with the expectation that judicial review would be preserved.[240] The FTC

[232] *See supra* notes 204-05 and accompanying text (discussing NLRB's approach to constitutional issues).

[233] *See, e.g.*, United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506, 355 N.L.R.B. 797, 807-11 (2010) (applying constitutional avoidance to construe NLRA provision regulating coercive conduct to avoid First Amendment concern, and noting Supreme Court precedent recognizing similar concerns).

[234] *See, e.g.*, Howard Enters., Inc., 93 F.T.C. 909, 941 (1979) (discussing numerous cases holding that administrative agency does not have authority to interpret constitutionality of statutes it enforces, but that there may be reasons for allowing administrative agency to consider constitutional issues); Verrazzano Trading Corp., 91 F.T.C. 888, 952 (1978) (stating that "[w]ere an agency to conclude that a duly enacted statute was unconstitutional, it might thereby preclude any review of that issue by the courts, thus thwarting a constitutional scheme").

[235] 93 F.T.C. at 941.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 942.

thus proceeded to engage in a First Amendment analysis, ultimately concluding that the statute raises no First Amendment concerns.[241]

The BIA's approach notably lacks the nuance and distinctions drawn by the NLRB and FTC in these contexts. It does not distinguish between the types of substantive constitutional claims raised before it, nor does it give credit to the role it could play as the first (rather than last) body to consider the constitutionality of various provisions it administers. It does not even distinguish between constitutional challenges to statutes versus the context of regulations, where separation of powers rationales run thin. Nor does the BIA truly embrace constitutional avoidance, as other agencies have, to advance constitutional norms through subconstitutional means.[242]

The BIA's failure to embrace constitutionalism even in statutory or regulatory interpretation is particularly troubling. As noted by scholars, "instances in which Congress directs agencies to act in unconstitutional ways are rare."[243] Rather, "[m]ore common is the situation in which an agency has a choice of approaches, one or more of which might appear constitutionally troubling or at odds with important constitutional values."[244] Even an agency hesitant to address direct constitutional challenges to its governing statute or regulations could still "take[] constitutional concerns into account in determining *how* to act (as opposed to *whether* [to act])."[245]

This raises the question of whether an adjudicative agency should—like a federal court—apply the canon of constitutional avoidance when interpreting a statute. As Dean Trevor Morrison has explained, the answer to this question turns on one's theory of constitutional avoidance.[246] If constitutional avoidance

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[241] *Id.* at 942-43. In *Verrazzano*, the FTC also noted that it may be appropriate, in some instances, for agencies to extend constitutional precedent on analogous statutes to the statutes they administer. *See* Verrazzano Trading Corp., 91 F.T.C. 888, 953 (1978) ("[O]ne may imagine many situations, short of an adverse Supreme Court ruling directly on point, in which the unconstitutionality of a statute would be strongly indicated to all reasonable minds. For example, one might ask what would happen if, (to take a pure hypothetical) during the pendency of this litigation the Supreme Court were to rule unconstitutional the bonding provisions of the Fur Products Labeling Act, 15 U.S.C. 69, 69d, a statute closely analogous in form and purpose to the Wool and Textile Acts. Such a ruling might well compel any reasonable person to conclude that the bond provisions of the Wool and Textile Acts must fall. . . . It is no secret that certain statutes fall into disuse because prosecutors conclude, from their reading of case law and in the exercise of largely unreviewable discretion, that the constitutionality of those statutes could not survive challenge. It seems an artificial distinction to maintain that an administrative agency cannot consider the same issues when it acts, on the record for all to see, in its adjudicative capacity.").

[242] *See* Morrison, *supra* note 90, at 1218-20.

[243] *See* Metzger, *supra* note 32, at 1917.

[244] *Id.*

[245] *Id.* (emphasis added).

[246] Morrison, *supra* note 90, at 1220.

merely serves the purposes of judicial restraint and thus may only be used to further constitutional comity between the judiciary and Congress, then one might assume Congress "would very likely prefer the executive branch to enforce its legislation according to its best understanding of Congress's intent, and . . . let the courts sort out the constitutional issues as needed."[247] But if one views constitutional avoidance as serving a normative role of constitutional enforcement, then the executive branch may be on equal or even greater footing than the judiciary to protect against congressional encroachment on constitutionally sensitive issues.[248] Under this latter view, an agency's invocation of constitutional avoidance is not only appropriate, it is necessary where constitutional norms may otherwise not be enforced.

In the immigration context, one could see how this latter understanding of constitutional avoidance, if fully embraced by the BIA, could fill an important role. As discussed above, immigration law has been characterized as an area where constitutional norms are rarely applied by the judiciary, due to plenary power and other doctrines.[249] Assuming that constitutional avoidance is an appropriate tool for agencies to use—which the BIA does accept—these constraints on the judiciary cast the duty of administrative agencies to enforce the Constitution in a different light. As Lawrence Sager has written, agencies "cannot consider themselves free to act at what they perceive . . . to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins."[250] Rather, they have "a legal obligation to obey an underenforced constitutional norm . . . to the full dimensions of the concept which the norm embodies."[251] One such example is the Equal Employment Opportunity Commission's inclusion of pregnancy discrimination as

[247] *Id.* at 1222.

[248] *Id.* at 1222 (noting that if constitutional avoidance serves as clear statement rule to protect constitutional norms, "it is more likely to be effective if it is consistently applied by the executive as well as the courts").

[249] *See supra* notes 39-50 and accompanying text (discussing plenary power doctrine and civil-criminal distinction).

[250] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978).

[251] *Id.*; *see also* Morrison, *supra* note 90, at 1225 (noting that under constitutional enforcement theory of constitutional avoidance, "when institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive (and legislative) branch to enforce the provision more fully"); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128-29 (1993) ("Sometimes the executive branch should interpret the Constitution to impose stricter limits on its power than the Supreme Court's decisions themselves suggest. That is because in certain categories of cases, constitutional law as developed by the Supreme Court reflects great deference to judgments made by the executive branch."). *But see* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 920-26 (1999) (critiquing notion that constitutional rights can be underenforced or overenforced).

presumptive sex discrimination in its guidelines, despite courts' rejection of equal protection claims in this context.[252] When engaging in constitutionalism, agencies can protect and advance individuals' rights through subconstitutional means.

Of course, there is a concern that, in the immigration context, the BIA in particular might be captured by bias and self-aggrandizement. BIA members are appointed rather than elected and thus less directly accountable to the public.[253] Sophia Lee has argued in reviewing Federal Communications Commission decision regarding equal employment rules that, without accountability, agencies may engage in "selective interpretation" by ignoring "directly relevant, but unfavorable, Supreme Court precedent" and creatively expanding or narrowing judicial rules where such precedent was not clearly defined.[254]

There is good reason for this concern in the immigration context, as we see similar "selective interpretation" in immigration regulation, as discussed above.[255] However, a prohibition on considering constitutional issues in adjudication may exacerbate rather than alleviate this potential problem. As one commentator has noted, "allowing agencies to [consider constitutional limits on legislative enactments] may curb agency excesses by focusing administrative attention on constitutional restrictions."[256] As seen in the context of constitutional challenges regarding the procedural fairness of immigration law, the BIA can indeed issue decisions that are protective of immigrant rights, even at the expense of prosecutorial priorities.[257] Opening substantive immigration law to constitutional decisionmaking may produce a similar effect.[258]

One could easily imagine a greater role for constitutional protections in the area of immigration adjudication. Returning to the example of immigration detention, federal courts have held that the BIA could apply constitutional principles to interpret immigration detention statutes to provide bond hearings

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[252] *See* Metzger, *supra* note 32, at 1923 (describing how Supreme Court declined to view pregnancy discrimination as sex discrimination in violation of Equal Protection Clause, while both Equal Employment Opportunity Commission and Congress took more protective steps to ensure civil rights of pregnant women).

[253] *See id.* at 1901 (noting that agencies "lack direct electoral accountability").

[254] Lee, *supra* note 32, at 801-02; *see also* Metzger, *supra* note 32, at 1904.

[255] *See supra* notes 184-201 and accompanying text (discussing federal immigration rulemaking).

[256] *See* Note, *supra* note 213, at 1690.

[257] *See supra* notes 168-82 and accompanying text (discussing broad view BIA takes on procedural fairness and due process).

[258] *See* Note, *supra* note 213, at 1700 ("[S]ometimes the constitutional character of the agency decision will itself inhibit the play of bias and favoritism by bringing home to the administrators the significance of the issues presented, forcing the agency to make its decision in a highly visible manner and increasing the likelihood of intervention of public interest representatives.").

for noncitizens subject to unreasonably lengthy detention.[259] The BIA could reconsider the proper allocation of the burden of proof in bond hearings, as scholars have urged.[260] The BIA could interpret ambiguous provisions regarding the scope of mandatory detention to avoid constitutional concerns, as litigators have urged.[261] While there is no guarantee that the consideration of constitutional principles will ultimately change the result in these cases, it will create opportunities for constitutional enforcement where none previously existed.

Finally, it is worth noting that the failure to consider constitutional issues—particularly in the context of statutory interpretation—has its own costs. Where statutes are deemed ambiguous, the government often seeks deference to agency interpretations. This is highly problematic in the context where an agency has not applied constitutional avoidance as part of its interpretation, and serious constitutional concerns are presented by its interpretation.

Again, this does not suggest that agencies' pronouncements on constitutional issues may trump those of the judiciary. Where an agency rules, for example, that a law presents serious constitutional concerns—or rejects such a contention—on review an Article III court need not defer to that conclusion.[262] While the agency's expertise on aspects of the statute may influence the constitutional question, the judiciary remains free to enforce constitutional norms where the agency has improperly ignored them.[263]

Thus, there appear to be few rationales that counsel against constitutional analysis in substantive immigration law by the BIA. The lines currently drawn by the BIA fail to account for its wide authority to consider constitutional concerns in a variety of contexts, including but not limited to certain as-applied challenges and areas of statutory interpretation. Extending its reach into these areas may produce important gains in the enforcement of constitutional norms in the immigration context.

CONCLUSION

The development of constitutional principles in immigration has stagnated. While much of the blame lies with longstanding precedent limiting judicial

[259] *See supra* note 28 (listing cases regarding bond hearings).

[260] *See, e.g.*, Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 117 (2016) (arguing that government should have burden of proof during bond hearing as it "has access to the information that would provide the clearest picture of the relevant facts to ascertain dangerousness or flight risk").

[261] *See supra* note 167 (listing cases where courts applied constitutional avoidance to construe mandatory detention statute narrowly).

[262] *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 191-92 (2015) (discussing how canon of constitutional avoidance trumps *Chevron* deference principles).

[263] *Id.* (describing how the Supreme Court applies constitutional avoidance to reject agency interpretations that raise serious constitutional concerns).

intervention in immigration law, the executive branch shares responsibility for the dearth of constitutional analysis in administrative immigration lawmaking. A longstanding and misplaced doctrine has hampered the BIA's ability to engage in more robust constitutionalism in its adjudication of substantive immigration law. Re-conceptualizing administrative authority to consider constitutional concerns in adjudication will open doors for the enhanced enforcement of constitutional norms.