Another Limit on Federal Court Jurisdiction - Immigrant Access to Class-Wide Injunctive Relief

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I. INTRODUCTION

Congressional attempts to limit federal court jurisdiction over controversial issues are not innovative, and the scholarly debate addressing the constitutionality of

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2For a discussion of the history of congressional proposals to limit federal court review, including proposals to limit federal court review in the areas of abortion, school prayer, school bussing, immigration and prisoners’ rights, see Lloyd C. Anderson, Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison’s Compromise, 39 BRANDeIS L.J. 417, 427 (2000) [hereinafter Congressional Control]; Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 896-97 (1984); Stephan O. Kline, Judicial
such attempts dates back many years. In the past, the scholarly debate anticipated future possibilities. What if Congress were to eliminate Supreme Court review of certain claims? What if Congress were to deny access to federal courts to a particular group? One of the pieces of legislation recognized as heralding the movement of these questions from the possible to the certain is the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. IIRIRA


4 For example, the 1980’s wave of court-stripping scholarship evolved in response to proposed legislation that aimed to limit federal court jurisdiction regarding controversial issues such as abortion, school prayer and school bussing. None of these bills became law. Anderson, Congressional Control, supra note 2, at 418. In 1984, Professor Chemerinsky acknowledged the argument that “Congress, rarely, if ever, would use its power to restrict federal court jurisdiction,” and prophetically wrote: “But it is not at all certain that Congress would refrain from enacting such laws.” Chemerinsky, The Price of Asking, supra note 3, at 1219-20.

contains many limits on court review, and federal courts still grapple with the boundaries and meanings of its restrictions.

One restriction Congress implemented through IIRIRA that the Supreme Court has yet to interpret directly is 8 U.S.C. § 1252(f)(1). This section may limit the ability of federal courts to grant class-wide injunctive relief in immigration cases. The exact meaning and effect of the section is uncertain. Analysis of this statutory section is important because federal courts have used the class action procedural device of Federal Rule of Civil Procedure 23 to issue class-wide injunctive relief to stop unconstitutional immigration policies and practices of the federal government. Because the power to regulate immigration is a federal matter, if this statute bars federal courts from issuing class-wide injunctive relief, no court would have the power to grant that relief and the function of Rule 23 therefore would diminish.

By analyzing both the text of 8 U.S.C. § 1252(f)(1) and relevant Supreme Court precedent, this article attempts to decipher the meaning of § 1252(f)(1). If a federal court were to interpret § 1252(f)(1) to be a broad bar against class-wide injunctive relief, such an interpretation would raise constitutional concerns, as the Supreme Court has ruled that individual actions based on the administrative record of a single hearing are an ineffective means to challenge an immigration pattern or practice of the federal government. The analysis in this article leads to the conclusion that the text of § 1252(f)(1) does not, in fact, demand a broad bar against the issuance of class-wide injunctive relief. This article also considers whether habeas jurisdiction is a viable alternative method to obtain class-wide injunctive relief if § 1252(f)(1) bars such relief.

II. PREVIOUS USE OF IMMIGRATION CLASS ACTIONS

A. To Begin, an Example

Faced with thousands of applications for benefits to adjudicate, how can a federal agency with limited resources reduce its backlog? One strategy is to implement an accelerated processing program and to discourage the filing of new applications. If the agency spends less time adjudicating each application and intake slows, the backlog will shrink. This strategy can cause extreme human consequences, however, if, for example, the benefit sought is asylum based on an applicant’s fear of returning to his or her country of origin.

other would have limited federal court jurisdiction over the content of the pledge of allegiance. H.R. 2028, 108th Cong. (September 23, 2004).

IIRIRA attacks court review through three main fronts. First, IIRIRA contains provisions that restrict the issues that a court may review. Second, IIRIRA contains provisions that restrict the timing of an action. Third, the legislation also affects the permissible form of an action challenging an administrative immigration adjudication.

See infra part III.

See Mathews v. Diaz, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).

See infra notes 35-70. This article reserves resolution of the constitutionality of the statute in favor of focusing on its meaning and effect, including how the presence of a serious constitutional problem may influence interpretation of the statute.
The immigration service,10 faced with a backlog of 6-7,000 asylum applications, followed the above approach and implemented an accelerated processing program to dispense with the backlog.11 Immigration judges, administrative judges who preside over immigration hearings, held approximately eighteen individual hearings per day.12 These judges afforded applicants ten days to compile and file a written claim for asylum.13 The immigration service conducted asylum interviews at a rate of forty per day and limited each interview to approximately one-half hour.14 At the rate of forty interviews per day, there was a shortage of attorneys available to represent applicants who desired counsel.15 During the accelerated program, the immigration service did not grant asylum to any applicants.16

In response to a class action lawsuit filed challenging the accelerated processing program, the Court of Appeals for the Fifth Circuit, in Haitian Refugee Center v. Smith, concluded that the program deprived applicants of due process of law.17 The court affirmed the district court’s class-wide injunction to the extent it ordered the immigration service to reprocess the affected applications in a manner consistent with due process.18

What if federal courts had no power to issue such class-wide relief? This question is not hypothetical, as access to class-wide injunctive relief in the immigration context is uncertain after IIRIRA.

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10Prior to the creation of the Department of Homeland Security in 2003, the Immigration and Naturalization Service (INS), located within the Department of Justice, administered the immigration laws of the United States. With the creation of the Department of Homeland Security, the functions of the INS were broken up into new organizations. The United States Citizenship and Immigration Service (USCIS), which administers benefit programs; Immigration and Customs Enforcement (ICE), which controls enforcement and detention issues; and United States Customs and Border Protection (CBP) are new separate entities that reside within the Department of Homeland Security. Control over the administrative appeal process remains within the Department of Justice. See Homeland Security Act of 2002, Pub. L. No. 107-296 (2002). For simplicity, this article will use the term “immigration service” to refer generally to the entities that administer the immigration laws.

11Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1029-31 (5th Cir. Unit B 1982).

12Id. at 1031. Under the accelerated processing program, the Miami district office of the immigration service processed asylum applications “at an unprecedented rate.” Id.

13Id. The district court determined that the preparation of one asylum application required between ten to forty hours of attorney work time. Id. at 1032. Given the number of applicants desiring counsel and the number of available attorneys, the district court determined that a ten-day time frame was impossible. Id. at 1031-32.

14Id. at 1031.

15Id. The Court of Appeals for the Fifth Circuit concluded that the immigration service “had knowingly made it impossible for [applicants] and their attorneys to prepare and file asylum applications in a timely manner.” Id. at 1031-32.

16Id. at 1032.

17Id. at 1040.

18Id. at 1041.
B. Why a Class Action?

Class action lawsuits filed against the immigration service over time have presented serious objections to the immigration service’s administration of the immigration laws.19 As in Haitian Refugee Center v. Smith, immigration class action litigation can change a pattern of agency behavior, whether nationwide or across an administrative region. Immigration class actions of the past can be grouped into three major categories. The first is those actions challenging the fact of or conditions attached to immigration detention,20 including the treatment of detained juveniles and adults.21 The second is those actions challenging the manner in which the immigration service implements immigration benefit programs demanded by Congress,22 including the asylum program. 23 The third category is composed of

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19It is beyond the scope of this article to judge the behavior of the immigration service or to investigate the reasons behind its alleged deficiencies. Also, while these class actions have presented serious objections to immigration service practices and procedures, not all of these cases have found success on their merits.

20The immigration service has the power to detain many classes of foreign nationals and the power to detain is not restricted to foreign nationals who have committed crimes. See, e.g., 8 U.S.C. § 1225(b)(2) (mandating detention of a broad class of foreign nationals); 8 U.S.C. § 1226(a) (authorizing detention of a foreign national pending a removal decision). This is important to understand, given that immigration detention often means incarceration in a prison.


22See, e.g., McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (determining that statute restricting judicial review of agency legalization determinations did not bar class action challenges to the administration of the 1986 legalization program); Ngwanyia v. Ashcroft, 302 F. Supp. 2d 1076 (D. Minn. 2004) (granting partial summary judgment to class challenging immigration service procedures in adjudicating permanent resident applications of those granted asylum and also challenging the procedures used in issuing documentation of work authorization to those granted asylum); Campos v. INS, 32 F. Supp. 2d 1337 (S.D. Fla. 1998) (denying, in part, the government’s motion to dismiss a class action complaint challenging naturalization procedures); Phillips v. Brock, 652 F. Supp. 1372 (D. Md. 1987), vacated as moot sub nom., Phillips v. McLaughlin, 854 F.2d 673 (4th Cir. 1988) (certifying class contesting administrative rulings regarding the employment of foreign workers but granting summary judgment to the government).

23See, e.g., Haitian Refugee Ctr., Inc. v. Baker, 553 F.2d 1498 (11th Cir. 1977) (affirming district court’s class-wide injunction to the extent it ordered the immigration service to reprocess asylum
objections to the immigration service’s procedures in removing foreign nationals from the United States,\(^{24}\) including practices used to obtain waivers of the right to a hearing,\(^{25}\) the stop and seizure practices of the United States Border Patrol,\(^{26}\) practices used in immigration workplace enforcement raids\(^{27}\) and the immigration service’s alleged unauthorized use of confidential information.\(^{28}\)

Scholars have discussed why class actions are preferable to individual actions to challenge these types of immigration service practices.\(^{29}\) One advantage of the class action device is that it allows for broad systematic reform.\(^{30}\) Due to its potentially broad nature, a class action can give relief to individuals who otherwise might not realize they are entitled to relief.\(^{31}\) The government does not provide free counsel if

\(^{24}\)Over time, federal immigration statutes have used different terminology to reflect the concepts of expulsion of a foreign national from inside the United States and of refusal to allow entry of a foreign national into the United States. IIRIRA concluded official use of the two terms deportation (referring to the act of expulsion from) and exclusion (referring to the act of refusing admittance) and replaced the two concepts with an umbrella concept called “removal.”

\(^{25}\)See, e.g., Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) (affirming certification of class challenging the immigration service’s procedures in obtaining waivers and also affirming that those procedures violated notions of due process); Perez-Funez v. INS, 611 F. Supp. 990 (C.D. Cal. 1984) (certifying class and granting preliminary injunction to class challenging the immigration service practice of obtaining waiver of a right to a hearing from unaccompanied minor foreign nationals).


\(^{27}\)See, e.g., International Molders’ & Allied Workers’ Local Union No. 164 v. Nelson, 102 F.R.D. 457 (N.D. Cal. 1983).

\(^{28}\)See, e.g., Aparicio v. Blakeway, 302 F.3d 437 (5th Cir. 2002).


\(^{30}\)See Neuman, Federal Courts Issues in Immigration Law, supra note 3, at 1681 (“When classwide litigation leads to reform of systemic practices, the benefits may be shared with unrepresented aliens; when counsel prevails at the district court level in an individual case, [the immigration service] can yield for the occasion without acquiescing in the legal principle more generally.”). Even if a claim is heard in an individual proceeding and a judgment against a practice of the immigration service is obtained, it is doubtful that this judgment would be of much value to other foreign nationals, given the restrictions presented by the doctrine of non-mutual offensive collateral estoppel and the expense of bringing hundreds or thousands of lawsuits addressing the same legal issue.

a foreign national facing removal cannot afford to hire his or her own.\textsuperscript{32} This fact, combined with the enormous complexity of immigration law, means that many foreign nationals with valid challenges to the practices of the immigration service may never be able to articulate, much less prosecute, those claims; they may never even realize that their claims exist.\textsuperscript{33} Another advantage of using the class action device in the immigration context, discussed below, is that it may be impossible to develop an adequate record to establish an unlawful agency pattern or practice through the adjudication of an individual immigration proceeding.\textsuperscript{34}

\section{C. The 1986 Legalization Cases}

Perhaps the best-known (and longest lasting) immigration class action lawsuits are those filed in the wake of the Immigration Reform and Control Act of 1986 (IRCA), which implemented a legalization program. These cases exemplify class litigation challenging the immigration service’s administration of a benefit program. Additionally, the Supreme Court’s treatment of the review-limiting provisions of the legalization statute provides perspective on deciphering the meaning of the text of § 1252(f)(1) (created by IIRIRA, the 1996 act), which is also a review-limiting provision.

The Supreme Court’s treatment of the legalization statute provides perspective in many ways, including the Supreme Court’s concern that a broad interpretation of the statutory provision at issue would have meant that pattern and practice allegations brought against the immigration service could not have been effectively heard. As discussed in part IV, infra, § 1252(f)(1) raises similar concerns. Also, a ripeness issue that concerned the Supreme Court in construing the legalization statute also leads to a narrow interpretation of § 1252(f)(1).

Through IRCA, Congress created a program that allowed certain foreign nationals illegally present in the United States to legalize their immigration status.\textsuperscript{35} The legalization program had two main components. The first component granted the opportunity to apply for permanent residence status\textsuperscript{36} to foreign nationals who

\begin{itemize}
  \item \textsuperscript{32} 8 U.S.C. § 1362 (“In any removal proceedings . . . the person concerned shall have the privilege of being represented, at no expense to the Government, by such counsel . . . as he shall choose.”).
  \item \textsuperscript{33} See Neuman, Federal Courts Issues in Immigration Law, supra note 3, at 1680-81.
  \item \textsuperscript{34} See infra notes 47-50. For example, in Haitian Refugee Center v. Smith, the district court was able to gather necessary information about the accelerated processing program effectively and efficiently by analyzing the program as a whole, beyond the treatment of a single applicant.
  \item \textsuperscript{35} Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986). In January 2004, President George W. Bush initiated a policy discussion regarding the construction of a new temporary worker program with a legalization component. \textit{Remarks by the President, President Bush Proposes New Temporary Worker Program} (January 7, 2004), available at www.whitehouse.gov/news/releases/2004/01/20040107-3.html. When framing any new legalization program, it is important to review the immigration service’s implementation of the 1986 legalization program and also the subsequent legal challenges.
  \item \textsuperscript{36} More commonly known as “green card” status, permanent residents are not citizens of the United States, but hold more privileges than other foreign nationals in the United States, including unrestricted employment authorization and potentially infinite permission to reside
\end{itemize}
had entered the United States before January 1, 1982 and who had illegally and continuously resided in the United States since that date. The second component applied to foreign national agricultural workers who had resided in the United States for at least one year prior to May 1, 1986 and who had also performed at least 90 days of qualifying agricultural work during that same period. Agricultural workers who qualified under the second component were deemed “special agricultural workers” (SAW) and also were permitted to apply for permanent residence.

Several class action lawsuits were filed challenging the immigration service’s administration of the 1986 legalization program. In general, these lawsuits claimed that, in administering the legalization program, the immigration service excluded individuals from the program whom Congress intended to include. The stakes were high, as the difference between inclusion and exclusion was permission to reside legally in the United States.

The Supreme Court ultimately addressed whether federal district courts even had jurisdiction over the legalization class action complaints. McNary v. Haitian Refugee Center, Inc. and Reno v. Catholic Social Services, Inc., both class actions, now provide the structure for determining whether a federal district court has jurisdiction over a challenge to the administration of the 1986 legalization program.

Under the general immigration judicial review statute that existed at the time of IRCA (the 1986 act), foreign nationals subject to deportation could obtain judicial review of a final deportation order only in the appropriate federal court of appeals, bypassing the district courts. Case law existed, however, that allowed district courts to hear certain claims deemed related yet collateral to a “final order” outside of the direct court of appeals review process. Additionally, some courts of appeals had allowed district courts to hear challenges to immigration service practices even before the issuance of a final order.
The jurisdictional debate surrounding the 1986 legalization statute stemmed from the identical special judicial review provisions applicable to both the long-term residence and SAW programs. The special provisions state that “[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status [to permanent resident] under this section [the legalization program] except in accordance with this subsection.” Additionally, the sections provide that review of a denial under either legalization program is available only “in the judicial review of an order of deportation,” and that “[s]uch judicial review shall be based solely upon the administrative record established at the time of the review by the appellate [administrative] authority.”

In *McNary*, the Supreme Court determined that the special judicial review provisions quoted above did not preclude federal district court jurisdiction “over an action alleging a pattern or practice of procedural due process violations by [the immigration service] in its administration of the SAW program.”

The *McNary* plaintiffs represented a class of foreign national agricultural workers “who either had been or would be injured by unlawful practices and policies adopted by [the immigration service] in its administration of the SAW program.” Among other specific challenges, the plaintiff class claimed that the immigration service refused SAW applicants opportunities to challenge adverse evidence and to present witnesses, that the immigration service did not provide effective translators and that adequate transcripts of legalization interviews did not exist, thus inhibiting the effectiveness of administrative review. The government argued that the district court lacked jurisdiction over the class action complaint because the legalization special judicial review scheme allows for judicial review only to individuals after the conclusion of an individual hearing in a court of appeals.
To the contrary, the Supreme Court held that the district court did have jurisdiction over the class action complaint. The Supreme Court interpreted the legalization judicial review scheme to apply only to “determination[s] respecting an application.” The Court determined that the McNary class was not challenging “a determination respecting an application,” but was instead making “general collateral challenges to unconstitutional practices and policies used by the agency in processing applications.” Because of the nature of the challenge, the case fell outside the special legalization judicial review structure, and district court jurisdiction was appropriate.

The Court concluded that to deny district court review of pattern and practice collateral challenges would be the “practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.” Even if a foreign national were to subject himself or herself to a deportation proceeding, and then were to seek judicial review, the Court concluded that the reviewing court of appeals would be in a poor position to adjudicate constitutional pattern and practice claims based on the administrative record of an individual legalization application. The Court acknowledged that a court of appeals would not have the fact-finding powers to determine whether a pattern of unlawful practice was occurring in the context of an individual case. The Supreme Court also reasoned that if Congress had intended the legalization special judicial review provision to apply beyond appeal of individual determinations to pattern and practice litigation, Congress “could easily have used broader statutory language” to express that intent clearly.

McNary became muddled, however, by the Supreme Court’s decision in Reno v. Catholic Social Services. Decided two and a half years after McNary, Catholic Social Services concerned the long-term illegal resident component of the 1986 legalization program. To be eligible for the program, Congress required that several conditions be met. The applicant must have entered the United States before January 1, 1982 and also must prove illegal continuous residence in the United States since at least that date. The applicant must also show continuous physical presence in the United States since November 6, 1986 and the foreign national must have also submitted a legalization application during a one-year application period.
The legalization statute elaborates that “brief, casual, and innocent” absences are permissible under the continuous physical presence requirement.\footnote{8 U.S.C. § 1255a(a)(3)(B).} The immigration service, however, regulated that such brief, casual and innocent absences would bar the establishment of continuous physical presence if the individual had not obtained travel permission from the immigration service prior to travel.\footnote{Reno v. Catholic Soc. Serv., Inc., 509 U.S. 43, 47 (1993) (citing 8 C.F.R. § 245a.1(g)).} Regarding the illegal continuous residence requirement, the immigration service regulated that that requirement would not be satisfied if a foreign national had left the United States and re-entered with “facially valid” documentation, despite the statute allowing for brief trips abroad.\footnote{\textit{Id.} at 50; 8 U.S.C. § 1255a(g)(2)(A).} To complicate matters further, the immigration service reversed its interpretation of the illegal continuous residence requirement seven months into the one-year application period.\footnote{\textit{Catholic Soc. Serv., Inc.}, 509 U.S. at 50-51.} In both lawsuits that were consolidated into \textit{Catholic Social Services}, a district court judge invalidated the immigration service’s interpretation of the statutory terms and extended the one-year filing period to allow for applications by those discouraged by the immigration service’s interpretations of the statutory terms at issue.

On appeal, the government argued that the district court did not have jurisdiction due to the legalization program’s special judicial review scheme. According to the government, the immigration service’s interpretations of the illegal continuous residence and continuous physical presence requirements amounted to “determinations respecting an application” and were thus reviewable only during an individual hearing. In response to this argument, the Supreme Court reemphasized that the statutory phrase “a determination” refers to “a single act rather than a group of decisions or a practice or procedure employed in making decisions.”\footnote{\textit{Id.} at 55-56.} In this sense, the Court reaffirmed \textit{McNary} by reiterating that the special legalization judicial review provision does not bar district court review of collateral pattern and practice challenges, including actions challenging a regulation.\footnote{\textit{Id.} at 56.}

From there, however, the Supreme Court’s decision in \textit{Catholic Social Services} diverges from \textit{McNary}. The Supreme Court held that while the legalization statute itself would not serve as a jurisdictional bar, the \textit{Catholic Social Services} classes could not meet the ripeness justiciability standard required of all those seeking federal court review. The Court determined that the immigration service’s publication of its illegal continuous residence and continuous physical presence interpretations alone did not create a ripe claim. The Court explained that the “claim would ripen only once [an applicant] took the affirmative steps that he could take before the [immigration service] blocked his path by applying the regulation to him.”\footnote{\textit{Id.} at 59.} Without those first affirmative steps, the Court reasoned, “one cannot know whether the challenged regulation actually makes a concrete difference to a

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\item[56]Reno v. Catholic Soc. Serv., Inc., 509 U.S. 43, 47 (1993) (citing 8 C.F.R. § 245a.1(g)).
\item[57]\textit{Id.} at 50; 8 U.S.C. § 1255a(g)(2)(A).
\item[58]\textit{Catholic Soc. Serv., Inc.}, 509 U.S. at 50-51.
\item[59]\textit{Id.} at 55-56.
\item[60]\textit{Id.} at 56.
\item[61]\textit{Id.} at 59.
\end{footnotes}
particular alien until one knows that he will take those affirmative steps and will satisfy the other conditions.”

The Court, however, elaborated that if a challenged regulatory interpretation is applied detrimentally to an applicant and the applicant asserts his or her ripe claim, the applicant would be challenging “a determination.” Thus, the special judicial review provision is triggered and district court review is precluded. The Court explained that “Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act’s limited scheme.”

The Catholic Social Services class is different from the McNary class, the Court reasoned, because a Catholic Social Services class member could challenge the immigration service’s interpretation of the statutory terms in an individual deportation hearing, while a McNary class member could not adequately present his or her pattern or practice challenge in the context of an individual hearing.

The Supreme Court left open the possibility of district court review, however, for Catholic Social Services class members subject to an alleged “front-desking” policy. The immigration service instructed front desk clerks to review legalization applications in the presence of the applicant. If the clerk determined based on a facial review that the applicant was ineligible under the legalization statute, the instructions directed the clerk to refuse the application for filing and return it immediately to the applicant. Applicants subjected to this “front-desking” procedure held ripe claims because these applicants would have felt the application of the challenged regulations “in a particularly concrete manner.” The “front-desked” applicant would also face a McNary-like deprivation of judicial review, according to the Court. Because “front-desking” amounted only to an informal denial, the applicant could not file an administrative appeal. Therefore, the Court reasoned, blocking district court review of applications refused at the front desk would leave those applicants effectively with no meaningful review.

Lower courts, in applying McNary and Catholic Social Services, have found significant whether review would be available if it is not permitted in a district court.

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62 Id. at 59 n.20.
63 Id. at 60.
64 Id. at 60-61.
65 Id. at 61-62.
66 Id. at 63-64.
67 Id. at 64.
68 Id. Section 377 of IIRIRA (the 1996 act) limited jurisdiction of claims brought under the 1986 legalization act to those brought by individuals who had actually filed or had attempted to file applications, leaving those who had not even attempted to file applications (discouraged by stories of those subjected to “front-desking”) outside of the circle of jurisdiction. The Legal Immigration Family Equity Act (LIFE Act) of 2000, however, repealed this aspect of IIRIRA with regard to certain legalization class members. Pub. L. No. 106-553 § 1104 (2000) (Title XI).
in a class action format.\textsuperscript{69} In the legalization context, lower courts have emphasized the distinction between review of a challenge to “a determination” and review of a challenge to a widely employed practice or procedure.\textsuperscript{70}

The special judicial review provisions of the legalization program represented a big challenge to the availability of class-wide relief in the immigration context. Both \textit{McNary} and \textit{Catholic Social Services} are important lessons in the Supreme Court’s review of immigration statutes potentially limiting the form of a federal court action under the specter of constitutional concerns. \textit{McNary} and \textit{Catholic Social Services}, however, concern “special” judicial review statutes that were aberrations from the norm. As explained above, at the time of \textit{McNary}, courts had held that the “regular” judicial review scheme underlying the “special” judicial review scheme of the legalization program allowed for pattern and practice class action challenges in a district court before the issuance of an administrative final order. IIRIRA, the 1996 law, presents an even bigger issue, because IIRIRA fundamentally changed the underlying review scheme. IIRIRA raises the question whether the “regular” system still allows for class-wide injunctive relief in the immigration context. Before the connections between the legalization cases and § 1252(f)(1) can be explained, it is necessary to first engage in a brief review of the major review-limiting provisions of IIRIRA.

III. MAJOR REVIEW-LIMITING PROVISIONS OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

As described by many commentators, IIRIRA drastically remodeled the Immigration and Nationality Act.\textsuperscript{71} A major theme of IIRIRA is the curtailment of court review of administrative action in enforcing the immigration laws. IIRIRA transformed the Immigration and Nationality Act by deleting the existing review provisions and adding § 1252, “Judicial review of orders of removal.” Because IIRIRA is so complex and its review-limiting provisions are interrelated, it is

\textsuperscript{69}See, e.g., \textit{Yi v. Maugans}, 24 F.3d 500, 505 (3d Cir. 1994) (affirming denial of class certification, among other reasons, where denial “would not foreclose all forms of meaningful judicial review”).

\textsuperscript{70}For example, the Ninth Circuit deduced two guiding principles from \textit{McNary} and \textit{Catholic Social Services}. The first principle is that a district court can review a legalization procedure or practice of the immigration service, collateral to substantive adjudication, provided that the claim is ripe. The second is that challenges to the immigration service’s interpretation or application of substantive criteria may only occur within the confines of the legalization program’s special judicial review structure (only during review of a final order of deportation). Proyecto San Pablo v. INS, 189 F.3d 1130, 1137 (9th Cir. 1999) (citing \textit{Ortiz v. Meissner}, 179 F.3d 718, 720-23 (9th Cir. 1999)). For other lower court decisions applying \textit{McNary} and \textit{Catholic Social Services}, see, for example, Aparicio v. Blakeway, 302 F.3d 437 (5th Cir. 2002); Immigrant Assistance Project of the Los Angeles County Federation of Labor v. INS, 306 F.3d 842 (9th Cir. 2002); Abdullah v. INS, 184 F.3d 158 (2d Cir. 1999); Naranjo-Aguilera v. INS, 30 F.3d 1106 (9th Cir. 1994); Ayuda, Inc. v. Reno, 7 F.3d 246 (D.C. Cir. 1993).

necessary to describe IIRIRA’s major restrictions and the Supreme Court’s treatment of these restrictions so far before any discussion of a specific provision of IIRIRA.

Section 1252 carves out a wide selection of substantive matters not subject to judicial review. These matters include a decision to execute expedited removal against a foreign national, certain decisions involving discretionary acts of government officials and decisions to remove foreign nationals convicted of committing certain crimes. A further substantive restriction on review contained in IIRIRA, § 1252(g), provides as follows:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

In addition to substantive restrictions, § 1252 contains a timing restriction. Section 1252(b)(9), entitled “Consolidation of questions for judicial review,” states:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the

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72 Expedited removal is a concept added to the Immigration and Nationality Act by IIRIRA. Expedited removal permits border officers to enforce the immediate removal of certain individuals without a formal hearing. If a border officer determines that a foreign national is inadmissible into the United States due to fraud or due to a lack of appropriate documentation, the officer can order the removal of the individual “without further hearing or review.” 8 U.S.C. § 1225(b)(1)(A)(i). The border officer cannot order expedited removal, however, if the individual expresses intent to apply for asylum or expresses fear of persecution and the individual passes a credible fear of persecution interview. 8 U.S.C. § 1225(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(B)(i)-(iii). The applicant may seek administrative review of an adverse credible fear determination, but the individual may be detained while awaiting this administrative review. 8 U.S.C. § 1225(b)(1)(B)(iii)(III)-(IV). For more information about the expedited removal process, see GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, supra note 36, at § 64.06.

73 8 U.S.C. § 1252(e).

74 According to IIRIRA, “no court shall have jurisdiction to review” any decision whether to grant certain relief from removal, any decision whether to grant cancellation of removal, any decision whether to grant voluntary departure, or any decision whether to adjust an individual’s status to legal permanent residence. 8 U.S.C. § 1252(a)(2)(B)(i). Additionally, IIRIRA prevents judicial review of “any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General other than the granting of relief under section 1158(a) of this title.” 8 U.S.C. § 1252(a)(2)(B)(ii). Section 1158(a) refers to a decision whether to grant asylum.

75 IIRIRA prohibits judicial review of a final removal order based on the commission of a crime of moral turpitude, an aggravated felony, or a controlled substance crime, among other crimes. 8 U.S.C. § 1252(a)(2)(C). For further information on the criminal bases for removal, including what constitutes a crime of moral turpitude and an aggravated felony, see GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, supra note 36, at §§ 63.03, 71.05.
United States under this subchapter shall be available only in judicial
review of a final order under this section.76

There are two form-restricting provisions in § 1252 that may affect the use of
multi-party litigation. Regarding expedited removal, IIRIRA provides that “no court
may – certify a class under Rule 23 of the Federal Rules of Civil Procedure” in any
of the narrow instances where the statute permits judicial review of expedited
removal issues.77 The second form-restricting provision, 8 U.S.C. § 1252(f)(1), falls
under § 1252(f), which is entitled “Limit on injunctive relief.” Section 1252(f)(1)
reads:

(1) In general.

Regardless of the nature of the action or claim or of the identity of the
party or parties bringing the action, no court (other than the Supreme
Court) shall have jurisdiction or authority to enjoin or restrain the
operation of the provisions of part IV of this subchapter,78 as amended by
the Illegal Immigration Reform and Immigrant Responsibility Act of
1996, other than with respect to the application of such provisions to an
individual alien against whom proceedings under such part have been
initiated.

Over eight years since the passage of IIRIRA, federal courts still are debating the
meaning and effect of many of its review-limiting provisions. The Supreme Court
has addressed directly two major review-limiting issues, but the Court has not yet
addressed directly the effect of the timing provision (§ 1252(b)(9)) or the form-
limiting § 1252(f)(1).

The Supreme Court first considered § 1252(g). In Reno v. American-Arab Anti-
Discrimination Committee,79 a group of Palestinians brought a selective prosecution

76This provision is reminiscent of the “special” judicial review provision in McNary and
also implicates the use of pattern and practice litigation. In fact, Professor Motomura has
compared McNary to § 1252(b)(9). Motomura, Judicial Review in Immigration Cases After
AADC, supra note 41, at 434-38. He argues that the reasoning of McNary survives
§ 1252(b)(9) and that § 1252(b)(9) should be construed narrowly to allow for district court
jurisdiction over pre-final order pattern and practice litigation. Id. at 434-38. A further
potential challenge to pattern and practice litigation is § 1252(d), which requires exhaustion of
administrative remedies before a court may review a “final order” of removal. Professor
Motomura argues that the exhaustion requirement should not apply to pattern and practice
litigation because such matters are independent from a “final order” of removal. Id. at 440-41.

of expedited removal decisions; also it allowed for judicial review of the constitutionality of
the expedited removal program only in the District Court for the District of Columbia and only
if the lawsuit challenging the program was filed no later than 60 days after the program was
first implemented. 8 U.S.C. § 1252(e)(2)-(3).

78“Part IV of this subchapter” refers to the part entitled “Inspection, Apprehension,
Examination, Exclusion, and Removal” and is comprised of 8 U.S.C. §§ 1221-1231.

79525 U.S. 471 (1999). For in-depth discussion of this litigation and issues raised in this
case, see, for example, David Martin, On Counterintuitive Consequences and Choosing the
Right Control Group: A Defense of Reno v. AADC, 14 Geo. Immigr. L.J. 363 (2000); Motomura,
Judicial Review in Immigration Cases After AADC, supra note 41, at 393-95;
claim against the immigration service. The Court adopted a narrow interpretation of § 1252(g), determining that it restricts review of only three discrete actions, the decision or action to (1) commence proceedings; (2) adjudicate cases; or (3) execute removal orders. Rejecting the immigration service’s argument that § 1252(g) applies to “the universe of deportation claims,” the Court explained that § 1252(g) would bar only a pre-final order challenge to the immigration service’s exercise of discretion with respect to the three discrete acts mentioned in the statute. The Court determined that federal courts lack pre-final order jurisdiction over selective prosecution claims as the claim involves the discrete act whether to commence proceedings.

In 2001, the Supreme Court addressed whether IIRIRA’s review-limiting provisions foreclosed habeas corpus actions in the federal district courts. INS v. St. Cyr concerned a habeas petition challenging the retroactive application of IIRIRA’s elimination of a type of deportation waiver. Mr. St. Cyr pled guilty to a deportable crime before IIRIRA’s enactment, during the existence of a waiver that could have allowed him to remain in the United States despite his plea. IIRIRA eliminated the waiver for which Mr. St. Cyr could have been eligible.

The immigration service argued in St. Cyr that no federal court had jurisdiction to consider Mr. St. Cyr’s claim that the pre-IIRIRA waiver should apply to him. The Supreme Court concluded that if it accepted the immigration service’s argument, individuals like Mr. St. Cyr would be left without any judicial forum to bring challenges consisting of pure questions of law. The Court determined that “the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.”

Emphasizing the historical difference between judicial review and habeas corpus review of immigration

Gerald L. Neuman, Terrorism, Selective Deportation and the First Amendment after Reno v. AADC, 14 GEO. IMMIGR. L.J. 313 (2000). For discussion of the role of this Supreme Court decision in the ongoing debate over congressional control of federal court jurisdiction, see Anderson, Congressional Control, supra note 2, at 436-37.

80 American-Arab, 525 U.S. at 482.
81 Id. at 483. Section 1252(g) prevents review of those three acts “[e]xcept as provided in this section.” Theoretically, if a foreign national is eligible for judicial review under § 1252, a court would have jurisdiction over a claim challenging any of the three acts mentioned in § 1252(g) when reviewing a final order pursuant to § 1252. The plaintiffs in American-Arab were seeking pre-final order review in a district court.
82 American-Arab, 525 U.S. at 482.
83 Id. at 487. The Court determined that the doctrine of constitutional doubt played no role in the case before it because “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.” Id. at 488.
85 Id. at 292-93.
86 Id. at 314.
administrative actions,87 the Court concluded that no part of IIRIRA “speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.”88 “At no point . . . does IIRIRA make express reference to § 2241.”89 Therefore, the Court concluded that habeas jurisdiction survived IIRIRA.90

The Supreme Court has yet to address directly the meaning and effect of § 1252(f)(1), but commentators (including the Supreme Court in dicta) have described this section as a limitation on the issuance of class-wide injunctions.91 The following part will analyze the statutory text of § 1252(f)(1) and, using McNary and Catholic Social Services as guides, attempt to parse out its effect.

IV. DECIPHERING 8 U.S.C. § 1252(f)(1)

While the Supreme Court has yet to interpret § 1252(f)(1) directly, the Court gave brief mention to the entire § 1252(f) in American-Arab. In that case, the Court

87The Court explained that judicial review and habeas review are two distinct, co-existing concepts in immigration law. Id. at 311-13. Originally, a habeas petition was the sole method to seek federal court review of administrative immigration decisions. In 1961, Congress enacted a judicial review statute that supplemented the existing habeas review with a petition for review process calling for a petition to be filed directly in the appropriate court of appeals. See Motomura, Judicial Review in Immigration Cases After AADC, supra note 41, at 395-96. While IIRIRA revamped “judicial review” of immigration administrative actions, the Court concluded that the provisions of IIRIRA at issue in St. Cyr did not also revamp “habeas review.” St. Cyr, 533 U.S. at 313-14.

88St. Cyr, 533 U.S. at 313.

89Id. at 312 n.36. In his dissent, Justice Scalia argued that:

[T]he Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all other courts) to entertain the claims of aliens such as respondent St. Cyr, who have been found deportable by reason of their criminal acts. It fabricates a superclear statement, ‘magic words’ requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence.

Id. at 326-27 (Scalia, J., dissenting).

90Id. at 312-14. For further discussion of St. Cyr and its underlying issues, see, for example, Lee Gelernt, The 1996 Immigration Legislation and the Assault on the Courts, 67 BROOK. L. REV. 455 (2001); Daniel Kanstroom, St. Cyr or Insincere? The Strange Quality of Supreme Court Victory, 16 GEO. IMMIGR. L.J. 413 (2002); David A. Martin, Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen, 16 GEO. IMMIGR. L.J. 313 (2002); Gerald L. Neuman, Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 HARV. L. REV. 1963 (2000).

rejected the Court of Appeals for the Ninth Circuit’s determination that § 1252(f) contains an independent, affirmative grant of jurisdiction. The Court stated:

Even respondents scarcely try to defend the Ninth Circuit’s reading of § 1252(f) as a jurisdictional grant. By its plain terms, and even by its title, that provision is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases. To find in this an affirmative grant of jurisdiction is to go beyond what the language will bear.92

But what, exactly, is the effect of § 1252(f)(1)? Does it indeed prohibit “federal courts from granting class-wide injunctive relief against the operation of §§ 1221-1231?” If so, what does it mean to prohibit class-wide injunctive relief “against the operation of” those statutory provisions? To answer these questions, this article will conduct a textual review of the statute itself first, then incorporate the lessons of McNary and Catholic Social Services and finally will discuss the role of the serious constitutional problem in deciphering § 1252(f)(1). It will be helpful here to review the exact language of § 1252(f)(1):

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.93

A. Textual Review

The text of § 1252(f)(1) does not make obvious what the section bars. A closer intrinsic review of the text of the statutory section alone may cause the Supreme Court to backtrack from the simplicity of its dicta in American-Arab that the section “prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231 . . . .”94 To be sure, the title of § 1252(f) (“Limit on injunctive relief”) suggests some sort of limit on injunctive relief, but under what circumstances is not clear.95

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92 American-Arab, 525 U.S. at 481-82 (Scalia, J).
94525 U.S. at 481.
95The general title of § 1252 (“Judicial review of orders of removal”) only adds further uncertainty. Courts have considered whether § 1252 as a whole applies only in the context of removal proceedings, or whether its provisions also apply to review of immigration service actions that are not a part of removal proceedings. The immigration service performs many functions that do not necessarily involve the institution of removal proceedings, including the administration of benefit programs (such as adjudicating asylum applications, applications for permanent residency and applications for temporary visas). Whether § 1252 applies to review
The text of § 1252(f)(1) is self-limiting in several ways. Remember, the section states that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter.” The meaning of this phrase is critical in determining the scope of § 1252(f)(1). Just as “a determination” was a critical term in McNary, § 1252(f)(1) has its own critical terms.

For example, “operation of” is a critical term in § 1252(f)(1). What does it mean to enjoin or restrain the “operation of” the specified statutes? This issue has already received some attention. Courts have determined that to give effect to the inclusion of the term “operation of,” § 1252(f)(1) should be interpreted to mean that no court may issue class-wide injunctive relief eliminating the total function of a statute, but that a court may issue class-wide injunctive relief to remedy the way in which the immigration service is causing a statute to function. In other words, to enjoin the “operation of” a statute is to foreclose completely its application in any instance, an entirely different concept than issuing an injunction preventing the immigration service from implementing a statute in an impermissible manner.

For example, a foreign national sought to amend his complaint to create a class action challenging the immigration service’s detention practices. The class action complaint requested injunctive relief. The district court held that § 1252(f)(1) did not affect the class action complaint because the complaint did not seek an injunction against the operation of the applicable sections, but rather sought “to enjoin alleged constitutional violations by [the immigration service] in its administration of [the statute] and/or its own regulations.”

Similarly, in a case that arose prior to the effective date of § 1252(f)(1), a district court speculated that § 1252(f)(1) does not apply to a situation where a class seeks to “enjoin constitutional violations and policies and practices.” The court recognized of these types of administrative actions is unsettled. See, e.g., Spencer Enter., Inc. v. United States, 345 F.3d 683, 692 (9th Cir. 2003) (discussing but declining to reach the issue of whether § 1252(a)(2)(B)(ii) applies outside the context of removal proceedings); Samirah v. O’Connell, 335 F.3d 545, 549 (7th Cir. 2003), cert. denied sub nom., Samirah v. Ashcroft, 124 S. Ct. 2811 (2004) (concluding that § 1252(a)(2)(B)(ii) applies beyond review of orders of removal); CDI Info. Servs., Inc. v. Reno, 278 F.3d 616, 618-20 (6th Cir. 2002) (same); Van Dinh v. Reno, 197 F.3d 427, 432 (10th Cir. 1999) (same). For an example of a congressional effort to clarify the reach of § 1252, see H.R. 418, 109th Cong. (2005).


Professors Motomura, Neuman and Volpp have also discussed this concept. See Judicial Review in Immigration Cases After AADC, supra note 41, at 439; Federal Courts Issues in Immigration Law, supra note 3, at 1682-83; Court-Stripping and Class-Wide Relief, supra note 29, at 473.


a distinction between an injunction preventing the operation of a statute and an injunction ordering implementation of a statute “under the appropriate standard.”

The Ninth Circuit affirmed this approach in *Ali v. Ashcroft*, a case founded on a class action habeas petition seeking to enjoin the government from enforcing removal to Somalia because that country has no functioning central government. The Ninth Circuit upheld the district court’s determination that § 1252(f)(1) does not apply to class actions challenging the manner in which a statute is implemented. Giving effect to the use of the term “operation of,” the Ninth Circuit explained that § 1252(f)(1) “limits the district court’s authority to enjoin [the immigration service] from carrying out legitimate removal orders. Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated.”

The Court of Appeals for the District of Columbia lent support to this interpretation of § 1252(f)(1). The Court stated, “[o]ne cannot come away from reading this section [section 1252] without having the distinct impression that Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied.” Thus, challenges to the new system fall under § 1252(f)(1), but those challenges do not necessarily include challenges to the way the immigration service is implementing the new system.

The legislative history also supports the argument that “operation of” signifies that Congress meant only to block injunctive relief halting the functioning of the new system. The House Committee Report for the House of Representatives version of IIRIRA, which contains an identical version to what became § 1252(f)(1), states that the purpose of § 1252(f) is to prevent federal courts, other than the Supreme Court, from:

> [E]njoin[ing] the operation of the new removal procedures established in this legislation. *These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending.* In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights. However, single district courts or courts of appeal do

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100 Id.

101 *Ali*, 346 F.3d at 877. The Immigration and Nationality Act governs to which countries a foreign national may be removed. 8 U.S.C. § 1231(b)(2)(E). The Supreme Court determined ultimately that the Act does not prevent the government from removing a foreign national without obtaining advance consent, thus rejecting the substantive claim of this class action. *See Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005).

102 *Ali*, 346 F.3d at 886.

103 American Immigration Lawyers Ass’n v. Reno, 199 F.3d 1352, 1359-60 (D.C. Cir. 2000) (emphasis added). In *American Immigration Lawyers*, the court held that organizational plaintiffs did not have standing to bring statutory or constitutional claims challenging IIRIRA’s expedited removal program. The court concluded that Congress “contemplated that lawsuits challenging its enactment would be brought, if it all, by individual aliens who—during the sixty-day period—were aggrieved by the statute’s implementation.” *Id.* at 1359.
not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.\textsuperscript{104}

This statement evidences the House Committee’s concern that injunctions would bring the entire new system to a grinding halt. This is a different issue from whether the immigration service is implementing the system consistent with the statute and the Constitution.

Thus, giving effect to the term “operation of” leads to an interpretation where courts may not issue injunctive relief challenging the legality of the whole system of review created by IIRIRA, but may issue injunctive relief preventing the immigration service from administering the system in an inappropriate manner.

Section 1252(f)(1) is also self-limiting in that only the “operation of” part IV is implicated. Part IV is entitled “Inspection, Apprehension, Examination, Exclusion, and Removal,” and encompasses §§ 1221 - 1231. This part contains many important provisions, including provisions governing expedited removal, arrest of foreign nationals, release pursuant to bond, detention of foreign nationals, determinations as to who is removable from the United States, the procedures to be employed during removal proceedings, cancellation of removal,\textsuperscript{105} voluntary departure\textsuperscript{106} and the procedures to be employed in actually removing foreign nationals from the United States (including detention pending removal). There are many important administrative functions authorized by statutes residing outside of part IV, however. If a case involves a function authorized outside of part IV, § 1252(f)(1) should not apply. In fact, plaintiffs continue to bring class actions challenging how the immigration service is administering portions of the Immigration and Nationality Act housed outside of part IV.\textsuperscript{107}

At times, the line between part IV and other parts is blurred, as there are cases that involve interrelated actions authorized under and outside of part IV.\textsuperscript{108} This raises the issue of when a court is restraining or enjoining the operation of part IV to


\textsuperscript{105}Cancellation of removal allows for quashing of removal in very narrow circumstances. See GORDON ET AL., IMMIGRATION LAW & PROCEDURE, supra note 36, at § 64.04.

\textsuperscript{106}Voluntary departure is a procedure through which an immigration judge allows a foreign national to depart voluntarily from the United States during a specified time frame in lieu of formal removal. See id. at § 64.05.

\textsuperscript{107}See, e.g., Ngwanyia v. Ashcroft, 302 F. Supp. 2d 1076 (D. Minn. 2004) (granting, without addressing § 1252(f)(1), partial summary judgment to class challenging immigration service procedures in adjudicating permanent residence applications of those granted asylum and challenging the procedures used in issuing documentation of work authorization to those granted asylum).

\textsuperscript{108}For example, the Court of Appeals for the Third Circuit recently noted that § 1252(a)(2)(C) (which bars judicial review of orders against foreign nationals based on the commission of certain crimes), would bar review of the asylum application of a foreign national subject to removal under that section, despite that § 1252 generally permits judicial review of asylum determinations. In other words, the Third Circuit determined that the bar against judicial review of removal orders based on criminal conduct trumps the normal availability of judicial review of asylum determinations. Bakhtriger v. Elwood, 360 F.3d 414, 419 n.4 (3d Cir. 2004).
trigger the limitations of § 1252(f)(1). For example, the asylum benefit is authorized under part I. It is possible, however, to seek asylum during a removal proceeding governed by part IV. Similarly, adjustment of status to legal permanent resident is covered in part V, but a foreign national may seek adjustment of status during a part IV removal proceeding in certain circumstances.\(^{109}\)

The statute’s specific reference to part IV, instead of referring to the entire subchapter or the entire Immigration and Nationality Act, counteracts an interpretation that § 1252(f)(1) is triggered any time part IV is implicated.\(^{110}\) Courts have implemented this reasoning. For example, a class of individuals illegally residing in the United States who prematurely had filed adjustment of status applications sought to prevent the immigration service from using information in those applications to remove them from the United States. The district court held that § 1252(f)(1) would not prevent the issuance of injunctive relief because the statute’s “own terms” restricted its scope to part IV.\(^{111}\) The court interpreted the class claim before it as addressing the proper procedure for handling a prematurely filed application for adjustment of status, and concluded that those procedures are not found in part IV. Similarly, the Ninth Circuit, sitting en banc, held that § 1252(f)(1) did not preclude a preliminary injunction issued under a part other than part IV.\(^{112}\)

An intrinsic textual analysis of § 1252(f)(1) reasonably can lead to the conclusion that the statute does not block injunctions ordering the immigration service to implement the immigration laws in a permissible manner, and also that the restrictions of § 1252(f)(1), whatever they may be, only apply to the actions specified in part IV, and not to those actions that may interact with part IV. Returning to the class-wide injunction issued in Haitian Refugee Center v. Smith (the asylum accelerated processing program case), if a court were to adopt this interpretation of § 1252(f)(1), had § 1252(f)(1) existed at the time, it would not have affected the class-wide injunction issued in that case. First, the injunction in Haitian Refugee Center v. Smith did not enjoin or restrain the “operation of” a statute, rather it


\(^{110}\)Section 1252(f)(1) contrasts with other sections of IIRIRA that do not restrict their reach to only one part of the Immigration and Nationality Act. For example, § 1252(a)(2)(B)(ii) removes federal court jurisdiction over acts “the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . .” (emphasis added).


\(^{112}\)Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1149-50 (9th Cir. 2000) (en banc). This is the same Catholic Social Services class described supra notes 56 to 68. The original panel had held that the injunction ultimately interfered with actions related to part IV, and therefore § 1252(f)(1) barred injunctive relief. Catholic Soc. Servs., Inc. v. INS, 182 F.3d 1053, 1061-62 (9th Cir. 1999), rev’d en banc, 232 F.3d 1139 (9th Cir. 2000).
affected how the immigration service implemented a statute. Second, the injunction affected asylum procedures authorized outside of part IV, even though some of the asylum procedures took place during a part IV removal hearing.

B. Textual Review and the Connection to the Legalization Cases

The legalization cases are external sources that help to decipher the text of § 1252(f)(1). As explained above, the textual significance of the term “operation of” in § 1252(f)(1) is reminiscent of the textual significance of “a determination” in McNary. Also, the distinction between injunctions that foreclose the operation of a statute and injunctions that remedy the unlawful administration of a statute is analogous to the procedural/substantive distinction emphasized by lower courts in applying McNary and Catholic Social Services.113 Perhaps, however, the connection between § 1252(f)(1) and McNary and Catholic Social Services is more significant than analogy.

An intrinsic analysis of § 1252(f)(1) does not reveal any textual mention of class actions or Federal Rule of Civil Procedure 23. It seems the assumption that § 1252(f)(1) limits injunctive relief to individual actions only stems from a particular reading of the last phrase of § 1252(f)(1), which this article has not discussed yet. That last phrase reads “other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” The reading that presumably leads to the conclusion that § 1252(f)(1) prohibits certain class-wide injunctions is that the use of the word “individual” means that no court may enjoin or restrain the operation of part IV except in the context of an individual action. But that is not the only possible reading of the section. Catholic Social Services reminds us that a major issue in the legalization class action litigation was whether individuals deterred by the immigration service’s regulations could seek review, despite that the challenged regulation was never specifically applied to them. The Supreme Court held in Catholic Social Services that individuals must feel the application of an immigration statute or regulation in some concrete way before that individual has standing to seek review. Looking through the lens of Catholic Social Services, it is interesting to look again at § 1252(f)(1).

Again, the relevant last phrase states that no court may enjoin or restrain “other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” Could the aim of § 1252(f)(1) simply be to thwart the ripeness issue of Catholic Social Services? Perhaps § 1252(f)(1) can be satisfied, and a class-wide injunction may issue, as long as the class is comprised of individuals actually subjected to the application of a provision of part IV during removal proceedings.114 In other words, perhaps the

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113Lower courts have recognized a distinction between challenges to the policies and procedures the immigration service used to administer the legalization program versus challenges to substantive determinations under the statute. See supra note 70.

114The language of this last phrase of § 1252(f)(1) restricting the issuance of injunctive relief unless proceedings have already been initiated makes sense in this context. This language describes the kinds of individuals who may obtain injunctive relief – those “against whom proceedings under such part have been initiated.” This language also serves to emphasize that part IV is the only concern of the section, see supra notes 105-112, as the section limits injunctive relief to an individual alien in removal proceedings.
statute does not limit injunctive relief to individual actions, but rather aims to limit injunctive relief to individuals who actually have felt the application of the provision at issue. After all, § 1252(f)(1) does not explicitly limit injunctive relief to “individual actions,” but rather limits injunctive relief to individuals subjected to the application of a provision and against whom proceedings have been initiated.

This interpretation of § 1252(f)(1) coincides with the nature of class actions generally. A class action is a procedural device that allows for representative suits, relying on named plaintiffs to establish relevant statutory requirements. If an individual qualifying under § 1252(f)(1) seeks an injunction, the availability of injunctive relief should not depend on whether that individual is representing a class, unless, of course, Congress explicitly stated that it should.

The language of the section governing review of expedited removal decisions supports this interpretation that Congress did not expressly bar class-wide injunctions through the text of § 1252(f)(1). The expedited removal section instructs that “no court may—certify a class under Rule 23 of the Federal Rules of Civil Procedure” in proceedings involving the expedited removal scheme. That clearer language is evidence that Congress knows how to include clear terms to explain when it means to limit the use of the class action device. Section 1252(f)(1), however, does not even contain any variation of the term “class,” nor does it mention Rule 23 in any way. The only term that can be interpreted to limit representative action is the use of the word “individual,” but, as explained above, the use of the term “individual” could be interpreted as limiting injunctive relief to those individuals who have felt the effects of a challenged provision, and not limiting injunctive relief to individual actions.

In the social security context, the Supreme Court held that a statute must contain a clear, express intent to exempt an action from a rule of civil procedure. The Supreme Court did not find in 42 U.S.C. § 405(g) “the necessary clear expression of congressional intent” to prohibit the use of the class action device. That section provided that “any individual” could obtain federal court review of certain social

116 Referring to § 1252(e) to determine the meaning of § 1252(f)(1) is especially appropriate given that § 1252(f)(1) was enacted at the same time as § 1252(e), as both were entirely new provisions enacted by Congress through IIRIRA.
118 Professor Volpp has argued that § 1252(f)(1) “nowhere addresses joinder, and only addresses relief.” Court Stripping and Class-Wide Relief, supra note 29, at 471. Professor Volpp has also argued that § 1252(f)(1) does not bar forms of relief other than injunctive. Id. at 473-74; see also Neuman, Federal Courts Issues in Immigration Law, supra note 3, at 1684-85. As explained by Professors Volpp and Neuman, in the context of expedited removal, Congress wrote that no court may “enter declaratory, injunctive, or other equitable relief.” Id. discussing 8 U.S.C. § 1252(e)(1)(A). For an argument that the statute does bar both injunctive and declaratory relief, see Wilson, Rights Without Remedies, supra note 91, at 757.
120 Id. at 700.
Recognizing that “a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs,” the Court determined that the use of the phrase “any individual” was not a “necessary clear expression of congressional intent.” The Court explained that “it is not unusual that [§ 405(g)] . . . speaks in terms of an individual plaintiff, since the Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” Similar to 42 U.S.C § 405(g), 8 U.S.C. § 1252(f)(1) refers to “an individual alien,” but contains no “necessary clear expression of congressional intent” to exempt immigration actions from Rule 23.

Congress’ inclusion of a broad restriction on types of relief and a specific ban on class actions in the expedited removal section stands in sharp contrast to § 1252(f)(1). If Congress meant to bar all class-wide injunctive relief, why does § 1252(f)(1) contain the ambiguous reference to “individual” and none to Rule 23? Perhaps the answer is that § 1252(f)(1) does not bar class-wide injunctive relief but would bar injunctive relief to an individual or to a class comprised of individuals not yet subjected to the application of a provision and against whom proceedings have not been initiated.

This reading of § 1252(f)(1) – that the statute is focused on a concern that individuals not yet subject to the application of a provision and not yet in proceedings would obtain injunctions against a statutory provision–receives additional support from McNary. In McNary, the Supreme Court reasoned that, if Congress had intended the legalization special judicial review provision to apply to every possible action, Congress could have used more explicit statutory language to express that intent. Similarly, Congress could have used clearer language in § 1252(f)(1), as it did in the expedited removal section, to indicate that it meant to bar class-wide injunctive relief. Also, the Supreme Court in McNary relied on the strong presumption of judicial review of administrative action. These principles support the above reading of § 1252(f)(1).

C. The Role of the Serious Constitutional Problem

Scholars have commented on the Supreme Court’s evolving habit, in the immigration context and in other contexts, to avoid deciding cases on constitutional grounds in favor of resolving cases through statutory interpretation that buries the constitutional issue. This trend holds true in the context of immigration statutes

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121 Id. at 698 n.12.
122 Id. at 700.
123 Id. at 700-01.
124 The legislative history quoted above, see supra note 104, could be cited as evidence that Congress did intend to limit the use of the class action device through § 1252(f)(1). The excerpt from the House Report, however, also does not contain a clear statement regarding this issue.
126 Id. at 496.
purporting to limit federal court review. *McNary, Catholic Social Services, American-Arab* and *St. Cyr* are examples of this trend.\(^{128}\)

At first glance, this practice appears to have little effect in the context of § 1252(f)(1). In *St. Cyr*, the Court faced a proposed interpretation of a statute that would have eliminated all avenues of federal court review of constitutional claims. In the case of § 1252(f)(1), however, a broad reading is that no court (other than the Supreme Court) may issue class-wide injunctive relief regarding anything that arguably relates to part IV.\(^{129}\) While this broad reading would no doubt amount to a substantial disruption of the status quo and also would eliminate an important method to challenge the behavior of the immigration service, individual injunctions would still be permitted, and the Supreme Court could still issue class-wide injunctive relief.\(^{130}\) Therefore, it is appropriate to question whether the Supreme Court would base its interpretation of § 1252(f)(1) to avoid a serious constitutional problem.\(^{131}\)

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\(^{128}\) In *McNary* and *Catholic Social Services*, the Court held that the special review provisions of the legalization program allowed for certain claims to be brought in the district court rather than address the issue of whether total preclusion of those claims in the federal courts would be constitutional. Likewise, in *St. Cyr*, the Court held that IIRIRA did not preclude habeas jurisdiction, rather than address the issue of whether Congress constitutionally could have eliminated all federal court jurisdiction over certain claims. “[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems.” INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (citations omitted). Another recent example of this trend in the immigration context is *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, the Supreme Court interpreted a statute governing post-final order detention to include an implicit reasonable time limitation. The Court interpreted the statute in such a manner because “serious constitutional concerns” would be raised if the statute permitted indefinite detention. 533 U.S. at 682.

\(^{129}\) For an argument advocating that the section bars class certification, an even broader reading of the section, see Wilson, *Rights Without Remedies*, supra note 91.

\(^{130}\) Professor Neuman has questioned the exact nature of the Supreme Court’s role created by § 1252(f)(1) and whether it “amount[s] to an improper exercise of original jurisdiction.” Neuman, *Federal Courts Issues in Immigration Law*, supra note 3, at 1686. If the Supreme Court’s ability to issue injunctive relief under § 1252(f)(1) arises under its appellate jurisdiction, Professor Neuman has questioned whether the Supreme Court could issue injunctive relief upon appellate review of a lower court’s issuance of a form of relief other than injunctive. *Id.*

\(^{131}\) This question is related to, yet different from, the question whether the statute represents a constitutional exercise of congressional power. The question addressed here is whether anticipated constitutional issues would influence the Supreme Court’s interpretation of the meaning and effect of the statute.
It is arguable, however, that this broad reading of § 1252(f)(1) would trigger the same potential deprivation of review that concerned the Court in McNary. In McNary, the Supreme Court determined that individual actions based on the administrative record of a single hearing were an ineffective means to challenge a pattern or practice of the immigration service. If injunctive relief is available only to individuals, but individuals cannot effectively bring pattern and practice claims, can a court actually address a pattern and practice claim under this broad reading of § 1252(f)(1)? If not, this broad reading of § 1252(f)(1) effectively would foreclose pattern and practice claims.

There are ample reasons and arguments to construe § 1252(f)(1) to allow the use of class-wide injunctive relief. Suppose, however, that § 1252(f)(1) is read to bar broadly the use of class-wide injunctive relief. As described above, St. Cyr cemented habeas corpus jurisdiction as a distinct method to access federal court review. In the wake of St. Cyr, the next part discusses whether habeas corpus jurisdiction can preserve what § 1252(f)(1) may take away.

V. HABEAS JURISDICTION AND IMMIGRATION CLASS ACTIONS

What if there existed a parallel universe where § 1252(f)(1) could be ignored? If § 1252(f)(1) were interpreted to be a broad bar against class-wide injunctive relief, is there an alternative method to obtain such relief? One possible alternative method is immigration class action litigation via habeas corpus jurisdiction. As described below, however, this alternative presents its own set of roadblocks.

In St. Cyr, the Supreme Court based its decision that habeas corpus review survived IIRIRA on the absence of a clear statement precluding habeas review. 135

132 Section 1252(f)(1) could implicate other potential constitutional issues. Professor Volpp has suggested that § 1252(f) could be challenged as violating Article III of the Constitution, as well as violating notions of due process and equal protection. Volpp, Court Stripping and Class-Wide Relief, supra note 29, at 475-77. Another potential constitutional issue is whether Congress created a proper role for the Supreme Court in § 1252(f)(1). See supra note 130. The Court may be swayed to interpret § 1252(f)(1) to eliminate the need to reach that issue.

133 The potential deprivation of review is amplified if § 1252(f)(1) were interpreted to bar all types of class-wide relief. See supra note 118.

134 There are provisions in § 1252 other than § 1252(f)(1) that are problematic to immigration class actions, including § 1252(b)(9). Professor Motomura has argued that courts should allow pattern and practice litigation to proceed despite §§ 1252(b)(9) and 1252(f)(1). Motomura, Judicial Review In Immigration Cases After AADC, supra note 41, at 434-39; see supra note 76. He concludes that § 1252(b)(9) “probably does not supersede McNary.” Judicial Review In Immigration Cases After AADC, supra note 41, at 437. Professor Motomura’s article appeared before the Supreme Court’s opinion in St. Cyr. This part will analyze whether the Court’s opinion in St. Cyr offers another possible method to maintain an immigration class action out of the reach of § 1252.

135 See supra note 86. The statute could be amended to include such a statement. For example, the House of Representatives passed a bill that would amend § 1252 to include specific references to the curtailment of habeas review. H.R. 418, 109th Cong. (2005). The bill also provides that nothing in “any . . . provision of this Act which limits or eliminates judicial review shall be construed as precluding review of constitutional claims or pure questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” Such an amendment to § 1252, if ultimately enacted, does not,
The absence of a specific mention of habeas jurisdiction is crucial, according to the Court, because “in the immigration context, ‘judicial review’ and ‘habeas corpus’ have historically distinct meanings.” Because IIRIRA did not eliminate habeas jurisdiction, the Court held that a district court could hear, via the independent realm of habeas jurisdiction, claims that § 1252 otherwise would bar.

A. The Reach of 8 U.S.C. § 1252 After INS v. St. Cyr

A reasonable question following St. Cyr is whether § 1252 contains limits that only apply to petitions for review, but not to petitions for habeas corpus. After St. Cyr, individual habeas actions are now permissible despite that § 1252 would bar “judicial review” of the same action. If § 1252(f)(1) were interpreted to bar class-wide relief broadly, could a court issue that same relief in the context of a habeas class action?

Because the Court in St. Cyr specifically examined only three provisions of § 1252 (§§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9)), courts have analyzed, post St. Cyr, whether other provisions of § 1252 affect habeas review. Therefore, a court might examine whether the restrictions of § 1252(f)(1) would apply to a habeas action, despite St. Cyr. A court determining whether the restrictions of § 1252(f)(1) would apply to a habeas action likely will analyze two issues. First, the court probably would consider whether § 1252(f)(1) itself bars habeas review. If not, it likely would consider whether the restrictions of § 1252(f)(1) apply both to judicial review and to habeas review.

however, address the problem faced by pattern and practice litigants, as the petition for review process established by § 1252 may never grant them adequate review of their claims. As explained in McNary, the administrative record of an individual proceeding may not be sufficient to support a pattern or practice claim. See supra notes 47-49.

INS v. St. Cyr, 533 U.S. 289, 311 (2001). In St. Cyr, the Supreme Court specifically reviewed IIRIRA §§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9) to determine whether those sections contained a “clear and unambiguous statement of Congress’ intent to bar [habeas] petitions.” Id. at 308, 310-11.

Specifically, in St. Cyr the Supreme Court held that a district court could review, via a habeas petition, the legal challenges of a foreign national with a criminal history despite § 1252(a)(2)(C), which forbids judicial review of removal orders based on the commission of certain crimes.

If § 1252 applies only to judicial review, then a habeas class action would not be subject to any of the provisions in § 1252. This would be an important benefit of styling an action as a habeas class action. Not only would § 1252(f)(1) not apply, but also the timing provision of § 1252(b)(9), which allows for judicial review of final administrative orders only, would not apply. The practical effect of the restrictions against review of discretionary actions contained in § 1252 (§§ 1252(a)(2)(B) and 1252(g), for example), however, may independently exist in the habeas realm. Courts have held that review of discretionary actions is not permissible under habeas jurisdiction. See infra notes 176-184.

See infra notes 142-153.

Courts of appeals have employed this two-step analysis to determine whether § 1252(d), which requires exhaustion of administrative remedies, applies to habeas proceedings. See infra notes 150-153.
Regarding the first issue, similar to the specific subsections referenced in *St. Cyr*, § 1252(f)(1) also contains no clear and unambiguous statement of Congress’ intent to abolish habeas review. Again, in *St. Cyr* the Court specifically required that “[f]or [the immigration service] to prevail it must overcome both 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.” While the government may argue that the language of § 1252(f)(1) is distinct enough from the sections considered in *St. Cyr* to justify a holding that § 1252(f)(1) does bar habeas review, such an argument contradicts the Supreme Court’s clear statement requirement established in *St. Cyr*.

The Supreme Court’s recent decision in *Demore v. Kim* supports the argument that § 1252(f)(1) does not contain a clear statement eliminating habeas corpus review. Applying the clear statement principles it emphasized in *St. Cyr*, the Court held that 8 U.S.C. § 1226(e) (which governs “judicial review” of claims challenging detention during removal proceedings) did not bar habeas review. The language of § 1226(e) reads as follows:

The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Justice O’Connor, joined by Justices Scalia and Thomas, argued in her dissent that the “[n]o court may set aside any action or decision” language of § 1226(e) is sufficient to repeal habeas jurisdiction, especially because the text of the statutory subsections at issue in *St. Cyr* all specifically mentioned the term “judicial review,” and the provision at issue in *Demore v. Kim* does not.

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141 *St. Cyr*, 533 U.S. at 298.

142 The government has argued subsequent to *St. Cyr* that parts of § 1252, other than those specifically considered in *St. Cyr*, bar habeas review. For example, courts have applied the reasoning of *St. Cyr* to hold that § 1252(g) (which was not directly at issue in *St. Cyr*) does not bar habeas review. See, e.g., Carranza v. INS, 277 F.3d 65, 71 (1st Cir. 2002) (“In light of *St. Cyr*, [the immigration service’s] principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction . . . is a dead letter.”). Similarly, at least five courts of appeals have examined the language of the statute implementing the Convention Against Torture in light of *St. Cyr* and have concluded that it also does not contain an express revocation of habeas jurisdiction. See Cadet v. Bulger, 377 F.3d 1173, 1182 (11th Cir. 2004); Saint Fort v. Ashcroft, 329 F.3d 191, 202 (1st Cir. 2003); Wang v. Ashcroft, 320 F.3d 130, 141 (2d Cir. 2003); Singh v. Ashcroft, 351 F.3d 435, 441 (9th Cir. 2003); Ogbudimkpa v. Ashcroft, 342 F.3d 207, 209 (3d Cir. 2003). The legislation described in note 135, *supra*, would also clarify the Convention Against Torture to contain an express revocation of habeas jurisdiction. No court has addressed whether § 1252(f)(1) eliminates habeas jurisdiction.


144 *Id.* at 534-35 (O’Connor, J., dissenting). While the title of § 1226(e) contains the term “judicial review,” Justice O’Connor commented that statutory titles do not per se control the meaning of statutory text. *Id.* at 535.
The language of the text of § 1252(f)(1) also does not mention the term “judicial review” and, similar to the statute in Demore v. Kim, states, “[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court . . . shall have jurisdiction or authority to.” Yet, the majority of the Court remained firm in its clear statement requirement in Demore v. Kim, finding no “explicit provision barring habeas review” in the similar language of § 1226(e). It seems probable that the Supreme Court would not find a statement in § 1252(f)(1) sufficient to signal the elimination of habeas jurisdiction.

The resolution of the second inquiry, whether the restrictions of § 1252(f)(1) are applicable to habeas actions, is more complicated. The historical separation of judicial review from habeas jurisdiction supports an argument that § 1252(f)(1) is of no effect in the habeas realm. Section 1252(f)(1) is a part of the judicial review program established by § 1252, and in St. Cyr the Court held that certain review-limiting provisions of § 1252 did not apply to habeas actions. It is uncertain, however, whether courts would adopt this argument in the context of § 1252(f)(1).

Courts are facing the challenge of balancing the autonomous nature of the habeas realm with the restrictions of § 1252. For example, the Ninth Circuit applied § 1252(f)(1) to a habeas action but did not first discuss whether § 1252(f)(1) plays any role in a habeas action. Courts also struggle to define the proper role of § 1252(g) in a habeas action. The Court of Appeals for the Seventh Circuit determined that, even after St. Cyr, § 1252(g) forbids habeas review of a challenge of a decision to commence proceedings, adjudicate cases or execute removal orders. The Ninth Circuit determined that § 1252(g) itself does not bar habeas jurisdiction (the first inquiry described above), but in doing so emphasized that the class before the court was not seeking review of a discretionary act (thus applying the substance of the challenge).

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145 Id. at 517. Section 1252(f)(1) does contain the additional language “regardless of the nature of the action,” but this statement does not explicitly mention habeas review.

146 Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003), overruled on other grounds, Jama v. Immigration and Customs Enforcement, 125 S. Ct. 694 (2005). The Ninth Circuit determined that § 1252(f)(1) did not preclude any relief because the “operation of” part IV was not challenged. See supra note 96.

147 Sharif v. Ashcroft, 280 F.3d 786, 787 (7th Cir. 2002) (determining that St. Cyr “does not disturb the holding of [Reno v. American-Arab Anti-Discrimination Committee] that 8 U.S.C. § 1252(g) blocks review in the district court of particular kinds of administrative decisions”; see also Latu v. Ashcroft, 375 F.3d 1012, 1019 (10th Cir. 2004) (acknowledging that § 1252(g) “does not strip the district court of § 2241 habeas jurisdiction,” but incorporating § 1252(g) into its decision that discretionary acts are not reviewable via habeas jurisdiction). The Court of Appeals for the Sixth Circuit has also applied § 1252(g) to a habeas action, but in an unpublished opinion. Mendez v. Johnson, No. 03-5194, 2004 WL 1088249 at *1 (6th Cir. May 12, 2004). But see, e.g., Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999) (stating, in a decision that pre-dates St. Cyr, that the court is “unwilling to read section [1252(g)] as depriving the court of authority to issue traditional ancillary relief needed to protect its authority to issue the writ [of habeas corpus]” and that “[t]o maintain habeas in the face of section [1252(g)], but deny the ancillary relief needed to make it meaningful, would be to strain at the gnat after swallowing the camel”); Foroglou v. Reno, 241 F.3d 111, 114 (1st Cir. 2001) (explaining in a decision issued before the Supreme Court’s decision in St. Cyr that the reasoning of Wallace applies only when a habeas petitioner has no other available forum for judicial review).
of § 1252(g)).  Also, the Court of Appeals for the Second Circuit discussed § 1252(g) in support of its conclusion that review of discretionary acts is not cognizable under habeas jurisdiction.

Additionally, a majority of courts of appeals have held that 8 U.S.C. § 1252(d), which requires exhaustion of administrative remedies before "a court may review a final order of removal," applies to habeas actions despite St. Cyr. These courts rejected the argument that the word "review" as used in § 1252(d) refers only to "judicial review," and does not encompass habeas review. Distinguishing § 1252(d) from the provisions of § 1252 at issue in St. Cyr, these courts determined that § 1252(d) does not eliminate jurisdiction wholesale and only sets a condition on jurisdiction. Because only a condition on jurisdiction is implicated, the courts reasoned, § 1252(d), as applied to habeas review, does not present a substantial constitutional question. According to this reasoning, the absence of a substantial constitutional question allows the term "review" in § 1252(d) to encompass both judicial review and habeas review.

Setting aside a discussion of the soundness of the legal analyses employed by these courts of appeals, the question arises whether courts will follow this mode of

148Ali, 346 F.3d at 878-79. The Ninth Circuit reasoned that because a discretionary determination was not at issue, § 1252(g) would not apply, yet left open (but did not address) the possibility that § 1252(g) could bar a habeas action if a discretionary action were at issue. For similar analysis, see Jama v. INS, 329 F.3d 630, 632-33 (8th Cir. 2003), aff’d on other grounds sub nom., Jama v. Immigration and Customs Enforcement, 125 S. Ct. 694 (2005). The District Court in Ali more definitively had stated that § 1252(g) "does not limit judicial review on a petition for a writ of habeas corpus," and concluded that the section is not applicable to habeas actions. Ali v. Ashcroft, 213 F.R.D. 390, 398 (W.D. Wash. 2003).

149Liu v. INS, 293 F.3d 36, 41 (2d Cir. 2002). An alternative approach is to base the conclusion that habeas review does not extend to review of discretionary acts solely in habeas jurisprudence, and not to use § 1252 to support the decision. See also Latu, 375 F.3d at 1019 (employing a similar analysis to that used in Liu).

150Soberanes v. Comfort, 388 F.3d 1305, 1308-09 (10th Cir. 2004); Sayyah v. Farquharson, 382 F.3d 20, 26 (1st Cir. 2004); Sun v. Ashcroft, 370 F.3d 932, 939 (9th Cir. 2004); Theodoropoulos v. INS, 358 F.3d 162, 171 (2d Cir. 2004), cert. denied, 125 S. Ct. 37 (2004); Duvall v. Elwood, 336 F.3d 228, 233-34 (3d Cir. 2003); Sundar v. INS, 328 F.3d 1320, 1321 (11th Cir. 2003), cert. denied, 124 S. Ct. 531 (2003).

151See, e.g., Sun, 370 F.3d at 940-41; Sundar, 328 F.3d at 1324-25.

152See, e.g., Sun, 370 F.3d at 939; Sundar, 328 F.3d at 1324-25.

analysis with regard to § 1252(f)(1). If so, the relevant determination is whether § 1252(f)(1) is more akin to those provisions at issue in St. Cyr (eliminating jurisdiction) or more akin to § 1252(d) (setting a condition on jurisdiction). The answer is linked to the resolution of the issue raised earlier, whether there is a serious constitutional problem lurking in § 1252(f)(1).154 A likely government argument is that § 1252(f)(1) bars only a form of relief, and therefore does not bar jurisdiction altogether. The counter-argument is that § 1252(f)(1), if interpreted broadly, could bar meaningful review of pattern and practice claims, and therefore should not apply to habeas actions.155

B. Challenges Facing Habeas Class Actions

Even if the restrictions of § 1252(f)(1) do not apply in the habeas context, are habeas class actions a viable alternative to non-habeas class actions? Habeas class actions face their own set of roadblocks. To begin, a habeas class action is not necessarily governed by Federal Rule of Civil Procedure 23 and may be subject to more stringent requirements. Further, the maintenance of a habeas class action depends on a custody requirement and whether the scope of habeas review allows a court to review the challenged behavior.156

While courts have adopted the class action device in habeas actions, habeas class actions are not identical to Rule 23 class actions. The Ninth Circuit recently imported Rule 23 to govern a habeas immigration class action157 and courts have allowed habeas class actions in non-immigration contexts,158 but courts have

154See supra notes 127-133.

155Interestingly, if § 1252(f)(1) were held to apply in the habeas realm, that circumstance could bolster the argument that § 1252(f)(1) should be interpreted so as to avoid a serious constitutional problem-the total unavailability of class-wide injunctive relief to remedy pattern and practice violations.

156The relevant habeas statute is 28 U.S.C. § 2241, which provides that a writ of habeas corpus may not be granted unless a “prisoner” is “in custody,” among other requirements. For an in-depth discussion of the history of the writ of habeas corpus in the immigration context, see Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 COLUM. L. REV. 961 (1998).


158See, e.g., United States ex rel. Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) (affirming certification of habeas class of state prisoners); Bijeol v. Benson, 513 F.2d 965, 969 (7th Cir. 1975) (partially affirming certification of class of federal prisoners); United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1126-27 (2d Cir. 1974) (approving of certification of habeas class of state prisoners); Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (reversing district court conclusion that a habeas class action could never be appropriate); see
explained that Rule 23 does not necessarily govern habeas class actions. As the Ninth Circuit observed in *Ali v. Ashcroft*, courts have looked to Rule 23 for guidance in adjudicating habeas class actions and have even applied the provisions of Rule 23 to determine whether to certify a habeas class, but technically Rule 23 does not apply to habeas proceedings. Courts have emphasized that a habeas class action is only a case management option available to federal courts, not a form of litigation authorized by the Federal Rules of Civil Procedure, and that courts sitting in habeas jurisdiction may apply a tougher version of the Rule 23 requirements. Therefore, meeting the requirements of Rule 23 is not a guarantee that a federal court will agree to hear a habeas action as a class action.

If a court agrees to borrow the class action device and apply it to a habeas action, the habeas custody requirement presents a further challenge. The custody requirement raises the issues of whether the petitioner is “in custody” and the identity of the proper custodian in an immigration habeas case.

Addressing the second issue first, the identity of the proper custodian is important because the geographical scope of a putative habeas immigration class injunction is only as wide as the court’s jurisdiction over the proper custodian. A narrow view of the identity of the proper custodian could diminish the potential effectiveness of a habeas class to rectify a widely implemented practice or policy of the immigration service. If the proper custodian is the warden of one specific detention center where a foreign national is detained, then a district court’s reach is limited to that custodian, and any injunction could only reach those held by that specific custodian. If, however, the proper custodian were a national official, such as the Attorney General or the Secretary of Homeland Security, then a district court would have potential nationwide jurisdiction.


*Ali*, 346 F.3d at 890-91 (citing *Sero*, 506 F.2d at 1125 and *Bijeol*, 513 F.2d at 968).

*Sero*, 506 F.2d at 1125. According to the Second Circuit in *Sero*, while the class action device as governed by Rule 23 may not be imported directly into habeas actions, federal courts do have the power to create procedural devices in habeas actions that borrow from the Federal Rules of Civil Procedure. *Id.* In *Sero*, the Second Circuit explained that “the unusual circumstances” of the case were a “compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure.” *Id.* *See also* Bertrand, 535 F. Supp. at 1024 (explaining that “a federal court may permit multi-party habeas actions similar to the class actions authorized by the Rules of Civil Procedure when the nature of the claim so requires”) (emphasis added).

*See* Yi v. Maugans, 24 F.3d 500, 507 (3d Cir. 1994) (refusing to certify nationwide habeas class of immigrant detainees based on custodian issue); Wang, 862 F. Supp. at 811-12 (refusing to certify subclass based on custodian issue).

Courts have disagreed over who is the proper custodian in an immigration habeas action. The Supreme Court recently declined to reach the issue “whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation” in Rumsfeld v. Padilla. The Court did hold that when present physical confinement is challenged, the only proper respondent is the immediate custodian and that jurisdiction lies only in the district of confinement. The Court further explained that “a habeas petitioner who challenges a form of ‘custody’ other than present physical confinement may name as respondent the entity or person who exercises legal control with respect to the challenged ‘custody.’” Under Padilla, a court would have ample reason to limit any habeas class-wide relief affecting present physical confinement to those under the control of the immediate custodian.

The first issue involves the question of who is “in custody” to satisfy the requirements of 28 U.S.C. § 2241. The determination is inherently case-specific, but an important point is that actual physical restraint may not be required to meet the “in custody” requirement. For example, whatever exactly constitutes “in custody,” a habeas petitioner need only be “in custody” at the time the habeas petition is filed. For example, courts have held that the physical removal of an alien is not a sufficient basis for habeas relief. See, e.g., Armentero v. INS, 340 F.3d 1058, 1074 (9th Cir. 2003) (concluding that the Attorney General or the Secretary of the Department of Homeland Security is the proper respondent), withdrawn, 382 F. 3d 1153 (2004); Chavez-Rivas v. Olsen, 194 F. Supp. 2d 368, 376 (D.N.J. 2002) (holding that the Attorney General is a proper respondent in an immigration habeas action in the circumstance where a detainee is transferred, after the filing of a habeas action, to a facility outside the jurisdiction of the original district court). But see Yi, 24 F.3d at 507 (concluding that the habeas custodian is the warden of the prison where the detainee is held in the context of a putative nationwide class action of immigrant detainees); Wang, 862 F. Supp. at 811-12 (refusing to certify a class partially comprised of immigrant detainees housed outside of the district based on the conclusion that the warden of each specific facility is the custodian for habeas purposes); see also Rosenbloom and Ferstenfeld-Torres, supra note 163, for a thorough discussion of the conflict among the courts regarding this issue.

In Rumsfeld v. Padilla, a United States citizen challenged his custody based on his designation as an enemy combatant. Id. at 2715. This holding led the Ninth Circuit to withdraw its decision in Armentero, and to grant the government’s petition for rehearing.


Spencer v. Kemna, 523 U.S. 1, 7 (1998); Zalawadia v. Ashcroft, 371 F.3d 292, 297 (5th Cir. 2004) (explaining that “the Supreme Court has made it clear that the ‘in custody’ determination is made at the time the habeas petition is filed”) (quoting Spencer, 523 U.S. at 7); Lopez v. Heinauer, 332 F.3d 507, 510 (8th Cir. 2003).
individual from the United States does not prevent the custody requirement from being met as long as the individual was “in custody” at the time of filing.\textsuperscript{170} The Supreme Court, however, has determined that while release does not break the “in custody” requirement, every habeas case must still satisfy the case or controversy requirement of Article III, section 2 of the Constitution.\textsuperscript{171} Therefore, it is possible that release could moot the case underlying the habeas petition even if it does not technically break the “in custody” requirement.\textsuperscript{172}

The requirement that a habeas petitioner be “in custody” at least at the time of filing the petition limits the range of patterns and practices that could be challenged via a habeas class action. Earlier, this article discussed three major groups of immigration class actions of the past: those challenging immigration detention; those challenging the way the immigration service implements a benefit program; and those actions challenging the immigration service’s procedures employed in removing foreign nationals from the United States.\textsuperscript{173} Of the three groups, those actions challenging immigration detention clearly face the least difficulty regarding the “in custody” requirement. The custody requirement presents a greater roadblock to the other two groups, as those actions may or may not involve actual physical custody at some point.


\textsuperscript{171}Spencer, 523 U.S. at 7. In Spencer, the Supreme Court determined that a prisoner’s completion of his sentence mooted his habeas petition challenging the revocation of his parole. The Court did not recognize any actual injury likely to be addressed by the habeas action. Id. at 14-16.

\textsuperscript{172}Id.; see also Zalawadia, 371 F.3d at 298 (relying on Spencer to determine that a habeas case is not moot where the petitioner was deported but faces a bar to reentry to the United States); Rosales-Garcia v. Holland, 322 F.3d 386, 395-96 (6th Cir. 2003), cert. denied sub nom., Snyder v. Rosales-Garcia, 539 U.S. 941 (2003) (acknowledging Spencer but determining that a live case or controversy existed where individuals with final orders of removal were released on parole pending removal); Chong, 264 F.3d at 383-85 (holding that deportation of habeas petitioner did not render petition moot because the petitioner’s deportation carried the collateral consequence of a bar against reentering the United States and stating that the exceptions to the general mootness doctrine apply in the habeas context). But see Patel v. United States Attorney Gen., 334 F. 3d 1259, 1263 (11th Cir. 2003) (determining that restrictions on returning to the United States are not sufficient restraints to satisfy the habeas “in custody” requirement in the context of a habeas petition filed after removal). See also Parker, supra note 168 (discussing post-removal standing issues).

\textsuperscript{173}See supra notes 20-28.
Even if a court were to agree to recognize a habeas class action and the “in custody” requirement were satisfied, the class claim must also be cognizable under habeas jurisdiction. After *St. Cyr*, courts are considering what types of claims are appropriate for habeas review.174

Courts have determined that the substantive scope of habeas review after *St. Cyr* does not replenish all of the review carved out by IIRIRA.175 For example, the

174Another post-*St. Cyr* issue is whether habeas jurisdiction is available to those who could also seek relief under § 1252. Such a scenario raises the issue of how to interpret and apply a statute previously interpreted to avoid a serious constitutional problem when subsequent application may not raise constitutional concerns, an issue recently addressed by the Supreme Court in Clark v. Martinez, 125 S. Ct. 716 (2005). At least three courts of appeals have held that foreign nationals may bring habeas actions even if judicial review is also available under § 1252. See Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001); Liu v. INS, 293 F.3d 36 (2d Cir. 2002); Riley v. INS, 310 F.3d 1253 (10th Cir. 2002). In *Chmakov*, the Third Circuit held that habeas review of an application for asylum was permissible, even though judicial review of asylum determinations is permitted under § 1252. The petitioners in *Chmakov* had failed to file a timely petition for judicial review. *Chmakov*, 266 F.3d at 212-13. The Third Circuit reasoned that while no suspension clause problem would exist if Congress had removed habeas jurisdiction for those with some other avenue of federal court review, “it is now beyond dispute” that Congress did not explicitly foreclose habeas jurisdiction in IIRIRA. *Id.* at 214. The Third Circuit rejected the immigration service’s arguments that Congress need only provide a clear statement to repeal habeas jurisdiction if a suspension clause problem is present and that IIRIRA does contain a clear statement to abolish habeas review for foreign nationals without criminal convictions. *Id.* at 214-15. The Court of Appeals for the Eighth Circuit has disagreed with *Chmakov*, holding that when judicial review under § 1252 is available, habeas review is not also available. *Lopez*, 332 F.3d at 510-11. Also in contrast with *Chmakov*, the Court of Appeals for the First Circuit affirmed the dismissal of a habeas petition where the habeas petitioner could have filed a petition for review but did not timely do so. Rivera-Martinez v. Ashcroft, 389 F.3d 207, 210 (1st Cir. 2004). Additionally, the Ninth Circuit has dismissed habeas petitions based on the principle of exhaustion of judicial remedies (i.e. failure to file a timely petition for review under § 1252) and has denied to re-hear en banc a case where the original panel used the doctrine of issue preclusion to prevent consideration of an issue on habeas originally presented in a § 1252 petition for review. *Laing* v. Ashcroft, 370 F.3d 994, 998 (9th Cir. 2004) (exhaustion of judicial remedies); *Nunes* v. Ashcroft, 375 F.3d 810, 811 (9th Cir. 2004), *cert. denied sub nom.* *Nunes* v. Gonzales, 125 S. Ct. 1395 (2005) (issue preclusion).

175A further developing issue is the scope of relief available in a habeas action. While a habeas class action may avoid any restrictions on relief of § 1252(f)(1), a habeas class action is limited inherently to the relief that is available in a habeas action. The Fifth Circuit recently held that under habeas review the only relief a district court may grant is relief necessary to undo restraints on liberty. In *Zalawadia*, the government deported the habeas petitioner before the Supreme Court issued its decision in *St. Cyr*, despite that the petitioner also argued that IIRIRA should not apply retroactively. 371 F.3d at 295-96. The Supreme Court remanded Mr. Zalawadia’s case in light of *St. Cyr*. On remand, Mr. Zalawadia sought a determination, under the pre-IIRIRA standard, whether he is entitled to a deportation waiver. The Fifth Circuit refused to order the determination and concluded that the only appropriate relief is to vacate the illegal deportation order. *Id.* at 298-99. The dissent objected that that relief is inadequate because it does not remove all of the collateral effects of the illegal deportation order. According to the dissent, Mr. Zalawadia, now deported, will never be able to obtain a waiver determination under the pre-IIRIRA standard, a determination that he was entitled to at the time of his deportation proceeding. *Id.* at 303 (Wiener, J. dissenting). According to the majority, habeas “cannot be used to bootstrap other claims for relief” and “is not a tool that
First, second, third, fourth, fifth, ninth, and eleventh circuits have determined that habeas review is available (after St. Cyr and IIRIRA) only to address constitutional and statutory issues, and not to challenge discretionary determinations. These courts of appeals sanction the use of habeas jurisdiction to address pure questions of law, including constitutional and statutory challenges, but have refused to allow habeas jurisdiction to encompass review of whether administrative decisions in a particular case amount to an abuse of discretion or to challenge underlying

can be broadly employed to restore the habeas petitioner to his or her status quo ante beyond freeing him from the restraints on liberty arising directly from the illegal order of judgment.”

Id. at 300.

176 Carranza v. INS, 277 F.3d 65 (1st Cir. 2002). The Court of Appeals for the First Circuit held that a claim that the immigration service failed to exercise any discretion is not cognizable under habeas jurisdiction where the foreign national has no statutory right to any discretionary process. Id. at 72. The First Circuit distinguished Mr. Carranza’s claims from those in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), where the Supreme Court held that a foreign national could state a claim under habeas jurisdiction that the immigration service failed to implement a statutorily-granted discretionary process. Carranza, 277 F.3d at 68-69, 72.

177 Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001) (holding that the scope of habeas review does not extend to review of the immigration service’s discretionary determinations, including whether administrative decisions lack adequate support from the record, which would involve a reconsideration of evidence).

178 Bakhtriger v. Elwood, 360 F.3d 414, 420-21 (3d Cir. 2004) (reasoning that the scope of habeas review that survived IIRIRA is no greater than the traditional scope of habeas review, which did not include review of discretionary acts).

179 Bowrin v. INS, 194 F.3d 483 (4th Cir. 1999). In this pre-St. Cyr decision, the Court of Appeals for the Fourth Circuit reached the conclusion ultimately reached by the Supreme Court in St. Cyr – that habeas jurisdiction survived IIRIRA. Id. at 488-89. The court further stated that the habeas jurisdiction that survived IIRIRA was not broad enough to encompass review of factual or discretionary issues. Id. at 490.

180 Bravo v. Ashcroft, 341 F.3d 590, 592-93 (5th Cir. 2003) (affirming the district court’s determination that habeas jurisdiction does not allow review of an immigration judge’s discretionary determination that a United States citizen child would not suffer extreme hardship if deported with his parents).

181 Gutierrez-Chavez v. INS, 298 F.3d 824 (9th Cir. 2002). In Gutierrez-Chavez, the Ninth Circuit held that habeas review is not available to examine the “equitable balance” reached by the immigration service in determining whether a foreign national is entitled to relief from removal. Id. at 829. The court also stated, however, that jurisdiction could lie under 8 U.S.C. § 2241 to review a claim that an impermissible process was employed in reaching a discretionary decision. Id.

182 Cadet v. Bulger, 377 F.3d 1173, 1184 (11th Cir. 2004) (recognizing that no court of appeals has ruled that review of discretionary acts is appropriate via habeas jurisdiction, the Court of Appeals for the Eleventh Circuit held that the “scope of habeas review available in § 2241 petitions by aliens challenging removal orders (1) includes constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, and (2) does not include review of administrative fact findings or the exercise of discretion”).
factual determinations. A few courts, however, have held that review of constitutional or statutory issues includes review of whether law was applied correctly to undisputed facts. The restriction of habeas review to statutory and constitutional issues is probably not debilitating to pattern and practice cases, as such actions are likely to present statutory and constitutional challenges. For example, the plaintiff class in Haitian Refugee Center v. Smith raised constitutional challenges.

In summary, obtaining class-wide injunctive relief in a habeas class action (assuming that the class would succeed on the merits) faces many hurdles, including: (1) satisfying the “in custody” requirement; (2) obtaining a determination that the proper custodian is an official who has custody over enough foreign nationals to make any class-wide injunction effective; (3) winning the district court’s agreement that the class action device should be imported to the particular habeas case; (4) satisfying the requirements imposed by the district court judge (likely borrowed from Federal Rule of Civil Procedure 23); and (5) presenting claims reviewable in a habeas action.

VI. CONCLUSION

The availability of class-wide injunctive relief in the immigration context is uncertain. This article has addressed how the source of the uncertainty, 8 U.S.C. § 1252(f)(1), is a complex statute that needs deciphering. It contains text that is self-limiting in several ways and that may be interpreted to limit injunctive relief against the operation of limited statutory provisions, but injunctive relief may not be against the operation of those provisions if it seeks to correct the way the immigration service is implementing those provisions. Further, close review of the section with the aid of Supreme Court precedent reveals that the assumption that Congress expressly intended the section to restrict the use of the class action device in the immigration context may be incorrect. Also, the presence of a serious constitutional problem may influence the interpretation of the statute. If, however, courts interpret the statute to bar class-wide injunctive relief broadly, habeas jurisdiction provides a problematic potential alternative method to obtain that relief.

What if federal courts could not issue class-wide injunctive relief ordering the immigration service to stop or to correct unconstitutional practices or procedures? This article reserves the question of the constitutionality of § 1252(f)(1) in favor of focus on the meaning and effect of the section. What is readily apparent, however, is that the Supreme Court’s future interpretation of this specific section, especially if the Court interprets the section as broadly barring federal courts from issuing class-

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183 See, e.g., Bakhtriger, 360 F.3d at 420 (holding that “habeas proceedings do not embrace review of the exercise of discretion, or the sufficiency of the evidence”). For an argument that habeas review properly may encompass review of discretionary acts, see Cole, Jurisdiction and Liberty, supra note 3, at 2503-05.

184 Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3d Cir. 2003) (explaining that habeas review is permissible where a petitioner claims that a law is applied wrongly in an immigration administrative proceeding); Wang v. Ashcroft, 320 F.3d 130, 142-43 (2d Cir. 2003) (determining that the “Constitution requires habeas review to extend to claims of erroneous application or interpretation of statutes,” and holding that habeas review is proper over a claim that the immigration service wrongly applied the Convention Against Torture to the facts of a case); see also Cadet, 377 F. 3d at 1184.
wide injunctive relief in immigration cases, is an essential element of the more general debate addressing congressional power to limit federal court jurisdiction.