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IMMIGRATION LAW AND THE PRINCIPLE OF PLENARY CONGRESSIONAL POWER

Immigration law is a constitutional oddity. "Over no conceivable subject," the Supreme Court has repeatedly said, "is the legislative power of Congress more complete."[1] At the heart of that sentiment lies the "plenary power" doctrine, under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.[2]

Why has all this happened? What is it about immigration that has engendered such radical judicial restraint? My view is that the explanation lies in the convergence of misconceived doctrinal theory with a range of external forces, and my conclusion is that the Court should abandon the special deference it has accorded Congress in the field of immigration.

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[1] See Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909), quoted approvingly in Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Accord, Oloteo v. I.N.S., 643 F.2d 679, 680 (9th Cir. 1981).

[2] See, *e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977) (gender and legitimacy); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (race); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (race).

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For purposes of my argument, the term "immigration law" will be used to describe the body of law governing the admission and the expulsion of aliens. That is the sphere in which the plenary power doctrine has operated. It should be distinguished from the more general law of aliens' rights and obligations. Common issues encompassed by the latter include aliens' eligibility for social welfare programs, for selected occupations, and for government employment; limitations on aliens' rights to own land; aliens' tax liabilities; and aliens' military status.[3] In mild contrast with the plenary Congressional power over immigration, the Supreme Court has acknowledged that federal statutes in the aliens' rights area are reviewed for rationality when challenged as discriminatory, though admittedly that review has not been intensive in practice.[4] In addition, with one rapidly expanding exception,[5] state action classifying on the basis of alienage has been subjected to strict scrutiny.[6]

Even when the term "immigration" is defined in its strict sense, the plenary power doctrine has several dimensions that require explanation. It has, first, a territorial dimension. Immigration law distinguishes the exclusion of aliens who are outside the United States and seeking admission from the deportation of aliens who are within the United States seeking only to avoid expulsion.[7] The

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[3] The leading work is MUTHARIKA, THE ALIEN UNDER AMERICAN LAW (1981) (2 vols.). See also CARLINER, THE RIGHTS OF ALIENS (1977); DAWSON & HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS, AND THE RIGHTS OF ALIENS (1971); 1 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 1.30–1.46 (1984); KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 148–218 (1946); *cf.* Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. COMP. L. 39 (1980) (comparative study).

[4] Mathews v. Diaz, 426 U.S. 67, 82–83 (1976); Flemming v. Nestor, 363 U.S. 603, 611 (1960); *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (rational basis for Congressional action will be presumed to be actual basis).

[5] States may constitutionally disqualify aliens from participating in the political community, a term that has been defined with remarkable breadth. See, *e.g.*, County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978); Foley v. Connelie, 435 U.S. 291 (1978); Skafte v. Rorex, 553 P.2d 830 (Col. 1976), *appeal dismissed*, 430 U.S. 961 (1977). But see Bernal v. Fainter, 104 S.Ct. 2312 (1984).

[6] See Bernal v. Fainter, 104 S.Ct. 2312 (1984); Nyquist v. Mauclet, 432 U.S. 1 (1977); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977); Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero, 426 U.S. 572 (1976); In re Griffiths, 413 U.S. 634 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); *cf.* Plyler v. Doe, 457 U.S. 202 (1982) (state denial of free public education to undocumented alien children violates equal protection).

[7] See generally GORDON & ROSENFIELD, note 3 *supra*, chs. 2, 4.

plenary power doctrine originated in the context of exclusion,[8] but it was soon extended to deportation[9] with certain qualifications noted below.[10]

The doctrine also has a temporal dimension. In the early years, the Court disavowed in absolute terms any judicial power to review the constitutionality of immigration legislation.[11] The more recent cases, in contrast, contain language that appears to leave the door slightly ajar.[12]

There is, moreover, what might be termed an organic dimension. In the typical case, the governmental organ whose power over immigration is held to be plenary is Congress.[13] Occasionally, however, the doctrine has effectively been extended to cover action of the Immigration and Naturalization Service (INS) as well.[14]

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[8] Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[9] Fong Yue Ting v. United States, 149 U.S. 698 (1893). Accord, Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904). But see the vigorous objections of Justice Brewer in *Fong Yue Ting*, 149 U.S. at 738. See also Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959).

[10] See notes 23–24 *infra* and accompanying text.

[11] *E.g.*, Lees v. United States, 150 U.S. 476, 480 (1893) (Congressional exclusion power is "absolute" and "not open to challenge in the courts"); Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893) ("conclusive upon the Judiciary"); Ekiu v. United States, 142 U.S. 651, 659 (1892) (power "belongs to the political department"); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("conclusive upon the Judiciary").

[12] *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (power "*largely* immune" from judicial review) (emphasis added), 793 n.5 (accepting a "limited" judicial responsibility to review even those Congressional decisions concerning the exclusion of aliens); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (Congressional decision "largely immune from judicial interference"); *cf.* Kleindienst v. Mandel, 408 U.S. 753, 769, 770 (1972) (executive action excluding alien withstands First Amendment challenge at least when "facially legitimate and bona fide" reason given). See especially the discussion of *Chadha*, notes 226–43 *infra* and accompanying text.

[13] See notes 7–12 *supra* and notes 15–26 *infra* and accompanying text.

[14] In Kleindienst v. Mandel, 408 U.S. 753 (1972), an alien was excluded under statutory provisions barring the admission of those who advocate, 8 U.S.C. § 1182(a)(28)(D), or write about, *id.* § 1182 (a)(28)(G)(v), world Communism. The statute allowed for discretionary waivers in the case of nonimmigrants. *Id.* § 1182(c)(3). The INS denied discretionary relief. The American university professors who had invited the alien to speak argued that, as applied by the INS, the statute violated their First Amendment rights. Although restrictions on political speech are ordinarily subjected to rigorous review, see note 21 *infra*, the Court relied on the plenary power doctrine, 408 U.S. at 765–67, in holding that the presence of a "facially legitimate and bona fide reason" would be enough to validate the executive action. When foreign affairs are implicated, some of the lower court decisions involving Iranian

Finally, the principle of plenary Congressional power over immigration has a rights dimension. Cutting across a wide spectrum of individual rights, the principle has been applied with greatest consistency to challenges based on constitutional provisions that protect substantive rights. As will be seen, its application to procedural due process is less certain.

Among the constitutional attacks on various immigration provisions have been those invoking substantive components of Fifth Amendment due process. Whether the claim is based directly on the infringement of a liberty interest or on discrimination between specified classes of aliens, the Supreme Court has effectively withheld review in those cases.[15]

The deference was especially noticeable in *Fiallo v. Bell.*[16] At issue was the constitutionality of an Immigration and Nationality Act provision discriminating against aliens who were illegitimate children and against the alien fathers of illegitimate American citizen children.[17] The classifications thus turned not only on alienage but also on such normally well scrutinized criteria as gender and legitimacy. The interest of which the plaintiffs were being deprived, though not one the Court has recognized as fundamental,[18] was an important one—family reunification. And, as the alien pointed out,[19] judicial review would in no way affect foreign affairs. Again, however, the Court declared the Congressional power "largely immune from judicial control" and declined to intervene.[20]

Similarly selective restraint is evident in those immigration cases raising First Amendment issues. During this century, the Court

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students similarly suggest a plenary INS power. See notes 203–12 *infra* and accompanying text.

[15] *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("largely immune from judicial control"); Galvan v. Press, 347 U.S. 522, 530–31 (1954) ("formulation of these policies is entrusted exclusively to Congress"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) ("largely immune from judicial interference"); Lees v. United States, 150 U.S. 476, 480 (1893) ("not open to challenge in the courts").

[16] 430 U.S. 787 (1977).

[17] 8 U.S.C. § 1101(b)(1)(D).

[18] Justice Marshall, dissenting, argued *inter alia* that the interest in family unity should be regarded as fundamental. 430 U.S. at 810.

[19] 430 U.S. at 796.

[20] *Id.* at 792. Compare *Fiallo* with Trimble v. Gordon, 430 U.S. 762 (1977). In *Trimble*, decided the same day as *Fiallo*, the Court struck down a state statute that prevented illegitimate children from inheriting by intestate succession from their fathers. But see *Fiallo*, 430 U.S. at 793 n.5 (accepting some limited judicial responsibility even in immigration cases).

has ordinarily reviewed speech restrictions by balancing the individual interest in free expression against the governmental interest asserted as a justification for restricting that freedom. Although the standards have varied, the Court has always required an unusually important governmental interest before upholding an infringement on political speech.[21] In the immigration cases, in contrast, the Court has relied on the plenary power doctrine to avoid performing *any* balancing of the relevant countervailing interests.[22]

The one partial exception to the absolute character of Congress's power over immigration concerns procedural due process. Despite a leading early decision to the contrary,[23] it is now accepted that aliens undergoing deportation proceedings are entitled to procedural due process.[24] The same principle seems to extend to those exclusion proceedings in which the aliens are returning residents, although again the cases are in conflict.[25] But when aliens are ex-

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[21] To justify a deprivation of free political expression, the Supreme Court has required a "clear and present danger" of a sufficiently important evil, Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919); an actual incitement to violence, as distinguished from mere advocacy of an abstract doctrine, Yates v. United States, 354 U.S. 298 (1957); necessity to a compelling governmental interest, LaMont v. Postmaster General, 381 U.S. 301, 308 (1965); N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963); an intent to incite lawless action and a likelihood of doing so, Brandenburg v. Ohio, 395 U.S. 444 (1969); imminent danger of lawlessness, Hess v. Indiana, 414 U.S. 105 (1973). *Cf.* Shelton v. Tucker, 364 U.S. 479 (1960) (strict scrutiny of means used to achieve asserted governmental interest). For the history of the "clear and present danger" test, see KONVITZ, FIRST AMENDMENT FREEDOMS (1963); KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY 280–341 (1957). See also EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Fuchs, *Further Steps toward a General Theory of Freedom of Expression*, 18 WM. & MARY L. REV. 347 (1976).

[22] See, *e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769, 770 (1972); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 294 (1904). Although the standard of review in the immigration cases has not matched that in other First Amendment cases, no view is expressed here as to the correctness of the ultimate results. But see Note, *First Amendment and the Alien Exclusion Power—What Standard of Review?* 4 CARDOZO L. REV. 457 (1983).

[23] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[24] Wong Yang Sun v. McGrath, 339 U.S. 33 (1950); Yamataya v. Fisher, 189 U.S. 86, 100 (1903) (dictum); *cf.* Ng Fung Ho v. White, 259 U.S. 276 (1922) (deportation of citizenship claimants). For subsequent qualifications of *Ng Fung Ho*, see Kessler v. Strecker, 307 U.S. 22, 34–35 (1939) (dictum); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923). For the statutory response, see 8 U.S.C. §§ 1252(b) (general deportation procedure), 1105a(a)(5) (citizenship claimants).

[25] See Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (interpreting regulation as affording procedural protection to returning residents, so as to avoid constitutional doubts); *cf.* Kwock Jan Fat v. White, 253 U.S. 454 (1920) (returning resident who claims citizenship is

cluded as an initial matter, the law still appears to be as it was stated in *United States ex rel. Knauff v. Shaughnessy:* "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[26]

I. THE THEORY

As the preceding discussion illustrates, immigration is an area in which the normal rules of constitutional law simply do not apply. What rationales might be invoked to support these judicial departures from established constitutional norms?

The theories criticized in this section are policy based. Apart from the weaknesses that they contain, the principle of special judicial abstinence in immigration cases cannot be justified even as a matter of precedent. A full historical treatment of the plenary power doctrine, from its origins to its current state, is beyond the scope of the present article. I do attempt such an analysis, however, in a separate paper now in progress. The argument will be that the Court's abdication of its ordinary constitutional functions evolved partly through an inadvertent fusion of federalism with individual rights. However, for present purposes, the Court's interpretations of its prior immigration decisions are assumed to be correct.

It will sometimes be necessary again to distinguish exclusion from deportation and procedure from substance. Surprisingly, most of the theories offered to support the plenary power doctrine and most of my criticisms of those theories will be seen to engulf both distinctions. When a particular argument is not equally applicable to all combinations, the differences will be pointed out.

With respect to procedural due process, a final qualification is necessary. As the Supreme Court observed in *Mathews v. Eldridge*,[27]

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entitled to procedural due process). However, in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), the Court rejected a procedural due process challenge by characterizing the regulation of aliens as "a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 210. It distinguished *Chew* on such narrow grounds, see *id.* at 213–14, that the latter decision appeared to retain very limited vitality. But in Landon v. Plasencia, 103 S.Ct. 321, 329 (1982), the Court cited *Chew* approvingly. Explicitly holding that a returning resident alien is entitled to procedural due process, the Supreme Court left to the lower court the task of determining what process was due. See *Recent Development, Immigration Law: Process Due Resident Aliens upon Entering the United States*, 24 HARV. INT'L L.J. 198 (1983).

[26] 338 U.S. 537, 544 (1950). Accord, Landon v. Plasencia, 103 S.Ct. 321, 329 (1982) (dictum). For the statutory procedure, see 8 U.S.C. § 1226.

[27] 424 U.S. 319 (1976).

the scope of procedural protection afforded by the due process clause is a function of, *inter alia*, the magnitude of the individual interest at stake. One might assume that an alien seeking admission as an initial matter typically asserts a lesser individual interest than, say, a lawfully admitted permanent resident alien resisting deportation. Under that assumption, there is reason to provide less procedural protection in exclusion proceedings than in deportation proceedings. As others have shown, however, it does not follow that an excluded alien is constitutionally entitled to no procedural due process.[28] Important individual interests might well be at stake even in exclusion proceedings, and in any event it would be wrong to ignore crucial differences within the class of excluded aliens. The discussions in these writings amply address the argument that excluded aliens lack a sufficiently important personal interest to trigger procedural due process.

A. THE POLITICAL QUESTION THEORY: FOREIGN AFFAIRS[29]

Perhaps the most popular theory in support of the plenary power doctrine has been that the constitutionality of an immigration provision is a political question because foreign relations are implicated. Vague references to either foreign affairs or political questions have surfaced in some of the plenary power cases.[30] Judicial perceptions of foreign policy ingredients have prompted others to describe at least some of the plenary power cases as applications of the political question doctrine.[31] To the extent that the deference in immigration cases is based on the courts' general reluctance to interfere with the conduct of foreign relations, two assumptions are being made: that immigration decisions inherently affect foreign

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[28] *E.g.*, Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983).

[29] For general treatment of the political question doctrine, see NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW 109–20 (2d ed. 1983); TRIBE, AMERICAN CONSTITUTIONAL LAW 71–79 (1978); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

[30] *E.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 n.6. (1972); Galvan v. Press, 347 U.S. 522, 530 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 588–91 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893).

[31] *E.g.*, KONVITZ, CIVIL RIGHTS IN IMMIGRATION 44 (1953); Scharpf, note 29 *supra*, at 579–81.

policy; and that decisions affecting foreign policy are political questions. Both assumptions require examination.

The connection between immigration and foreign policy derives ultimately from the fact that an immigration decision operates on the subject of a foreign state. Because a foreign state may intervene diplomatically on behalf of its nationals,[32] an adverse decision carries the potential for international tension. Moreover, even a decision favorable to the immigrant could undercut the bargaining power of the decision-making state in its negotiations with the state of which the immigrant is a national.[33]

For those reasons, there will certainly be times when a particular immigration provision, as applied to a particular fact situation, is so inextricably bound up with foreign policy that a court should not intrude. There might even be particular provisions that fit that description in all fact situations to which they could conceivably be applied. But it ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations.[34] In *Fiallo*, for example, the Supreme Court assumed that no foreign affairs problem was present, but dismissed that fact as irrelevant, observing that in previous cases the scope of review had not depended on "the nature of the policy choice at issue."[35] Nor did the Second Circuit Court of Appeals precipitate a world crisis when it held in *Francis v. I.N.S.* that the availability of discretionary relief could not constitutionally be conditioned on the alien having left and returned to the United States.[36]

The Court's blanket technique of mechanically labeling immigration decisions as so ensconced in foreign policy that constitutional review is improper has precluded consideration of whether foreign

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[32] See Sec. Ic *infra*.

[33] *E.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952); *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 104 (1976) (barring aliens from federal civil service permits President to bargain for reciprocal concessions).

[34] Even Congress seems to have discounted the foreign policy aspects of individual immigration decisions. It has vested principal control of immigration in the INS, which is part of the Justice Department; the State Department, whose responsibilities lie in the field of foreign affairs, has only a secondary role in administering the immigration laws. Compare 8 U.S.C. § 1103(a) with *id.* §§ 1104(a), 1201.

[35] 430 U.S. at 796.

[36] 532 F.2d 268 (2d Cir. 1976), discussed in notes 217–22 *infra* and accompanying text.

affairs were actually affected. A better approach would be to reserve the judicial deference for the special case in which the court concludes, after a realistic appraisal, that applying the normal standards of review would interfere with the conduct of foreign policy.

One might object that such an inquiry is too speculative. It might be argued that it would be worse to second-guess Congress on a matter as sensitive as immigration than it would be to sacrifice constitutional review in those cases that actually present no foreign policy problems.

Perhaps that is a valid argument for giving Congress the benefit of the doubt in close cases. But there is no need to throw out the baby with the bathwater. Several factors are available for a court to consider. Submissions by the government can be weighed. The legislative history of the particular statute can be consulted.[37] That a statutory provision deals only with immigrants of selected nationalities, and not with immigrants or aliens generally, is some evidence of a legislative focus on international relations. That evidence is not conclusive; the early plenary power cases discussed above, for example, dealt principally with statutory provisions that were limited to Asian immigrants and that can be explained far more convincingly by the domestic political forces discussed below. In other cases, however, statutory references to nationals of specified countries can be highly persuasive evidence that foreign affairs were considered. The Presidential Order and administrative regulations challenged in the Iranian cases are clear examples.[38] And statutes regulating alien enemies should certainly be assumed to reflect policy determinations that affect foreign affairs.[39]

Even when a particular immigration case is believed likely to present foreign policy considerations, it does not follow that the question is political. There has indeed been occasional judicial rhetoric suggesting that courts may never review the propriety of executive or Congressional acts in the field of foreign relations.[40] There have also, admittedly, been many cases in which the foreign

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[37] *E.g.*, Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970).

[38] See notes 203–12 *supra* and accompanying text.

[39] See, *e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Ludecke v. Watkins, 335 U.S. 160 (1948). But *cf.* Ex parte Kawato, 317 U.S. 69 (1942) (resident alien enemy has standing to sue in federal court).

[40] See, *e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918), acknowledged in Baker v. Carr, 369 U.S. 186, 211 n.31 (1962).

policy ramifications have in fact induced the courts to withhold review.[41]

At no time, however, have the courts gone to the extreme of refusing to review all decisions having possible effects on foreign policy. The courts have been adventurous in cases presenting such sensitive questions as human rights violations by foreign governments,[42] publication of the Pentagon papers,[43] certain passport issues,[44] certain military matters,[45] acquisition and loss of citizenship,[46] and even the legality of a Presidential Order seizing steel mills to avoid disruption of a war effort.[47] The constitutional text makes equally clear that the presence of foreign policy elements does not necessarily preclude review. It confers on the federal courts the jurisdiction to hear cases arising under treaties, cases affecting ambassadors, and disputes between an American state or

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[41] *E.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979); Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972). See also Baker v. Carr, 369 U.S. 186, 213–14 (1962) (summarizing cases refusing to review determinations of whether armed hostilities had ceased).

[42] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Letelier v. Republic of Chile, 488 F. Supp. 665 and 502 F. Supp. 259 (D.D.C. 1980).

[43] New York Times Co. v. United States, 403 U.S. 713 (1971).

[44] *E.g.*, Aptheker v. United States, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

[45] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); *cf.* Sterling v. Constantin, 287 U.S. 378 (1932) (state proclamation of marital law). But see Chappell v. Wallace, 103 S.Ct. 2362 (1983); Feres v. United States, 340 U.S. 135 (1950).

[46] In contrast with the uniform deference characterizing constitutional review of exclusion and deportation statutes have been the mixed results and the frequent assertiveness in the citizenship cases. On acquisition of citizenship, compare Rogers v. Bellei, 401 U.S. 815 (1971) (reasonableness test applied, though provision ultimately held reasonable); United States v. Wong Kim Ark, 169 U.S. 649 (1898) with Terrace v. Thompson, 263 U.S. 197, 220 (1923) (dictum); Elk v. Wilkins, 112 U.S. 94 (1884); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). For two extremes on the judicial role in reviewing challenges to naturalization requirements, compare In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975) (strict scrutiny) with Trujillo-Hernandez v. Farrell, 503 F.2d 954 (5th Cir. 1974) (nonjusticiable). See especially *Wong Kim Ark*, discussed in text accompanying notes 97–98 *infra*. The constitutional cases on loss of citizenship are similarly mixed. Compare Afoyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958); Perkins v. Elg, 307 U.S. 325 (1939) with Marks v. Esperdy, 377 U.S. 214 (1964); Perez v. Brownell, 356 U.S. 44 (1958), *overruled* by *Afroyim;* Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915); Luria v. United States, 231 U.S. 9 (1913); Johannessen v. United States, 225 U.S. 227 (1912).

[47] Youngstown Sheet and Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579 (1952).

its citizens and a foreign state or its citizens.[48] A federal statute provides specifically for suits against aliens, including alien diplomats.[49] Commentators, too, are in broad agreement that not all matters affecting foreign policy are beyond judicial cognizance.[50]

Thus, some questions affecting foreign policy have been reviewed and some have not. That indeed was a central message of *Baker v. Carr*, where the Supreme Court made clear that the classification of a particular decision as "political" requires a "discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[51] The plenary power doctrine, in contrast, assumes that immigration matters necessarily generate the kind of foreign policy problems that defy judicial resolution. To that extent, the cases have avoided the individualizing wisely prescribed, and have resorted to the "semantic cataloguing" soundly rejected, in *Baker*.

But if cataloging immigration cases is to be replaced by a more tailored approach, it becomes important to develop principles for determining whether an immigration case is too deeply rooted in foreign policy considerations to be subjected to normal judicial review. To formulate such principles, it is first necessary to identify those characteristics of foreign policy decisions that make judicial deference desirable. The principles can then be expressed in terms of the presence of those characteristics in the individual case.

Three such characteristics, all common features of political question cases, were cited in *Baker:* resolution of foreign policy issues often hinges on "standards that defy judicial application"; or requires exercise of a discretionary power demonstrably committed to a coordinate branch; or "uniquely demand[s] single-voiced statement[s] of the Government's views."[52] Standards defying judi-

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[48] U.S. Const. art III, § 2.

[49] 28 U.S.C. § 1251.

[50] See generally HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); see also Scharpf, note 29 *supra*, at 585, 587.

[51] 369 U.S. 186, 217 (1962).

[52] *Id.* at 211. These three features are included in the Court's more general description of the patterns distilled from previous political question cases. *Id.* at 217. The first general group of political question cases listed by the Court consists of those reflecting a "textually demonstrable constitutional commitment of the issue to a coordinate political department." That approach is consistent even with the classical theory of constitutional review, under which the Court reviews congressional and executive acts because the Constitution requires the Court to do so. Even under so broad a conception of constitutional role, the Court will be excused from its duty if the Constitution exceptionally commits the particular question to one of the other two branches of government. See, *e.g.*, TRIBE, note 29 *supra*, at 71 n.1.;

cial application might, in a given case, hinder the court's capacity to understand the reasons behind Congressional distinctions among aliens from various countries. Aliens have challenged the constitutionality of one statutory provision granting special immigration benefits to aliens from contiguous countries and one granting special benefits to Eastern Hemisphere aliens.[53] When reviewing the constitutionality of those types of provisions, which reflect conscious Congressional decisions to single out aliens from one particular country or group of countries, courts should consider whether there are foreign policy concerns that they lack the standards, as well as the information and expertise,[54] to evaluate. Similarly, if the facts of a particular immigration case raise an issue demonstrably committed to Congress, then the particular issue, though even then not necessarily the entire case, should be held nonjusticiable.

The last factor that *Baker* associates with foreign policy is a spe-

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Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7–9 (1957); Scharpf, note 29 *supra*, at 517–18. See also Luther v. Borden, 48 U.S. (7 How.) 1 (1849). The other prongs enumerated in Baker assume discretionary judicial powers to withhold constitutional review even when the Constitution does not commit the decision to a coordinate branch. Since proponents of the classical theory reject the notion that courts have such powers, see, *e.g.*, Wechsler, *supra;* Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970); *cf.* Gunther, *The Subtle Vices of the "Passive Virtues"—a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964), they might stop at this point. For those theorists, the special deference in the immigration cases could not be justified by the remaining Baker factors because the courts lack the power to invoke those discretionary factors at all, and therefore to immigration cases in particular. Others, however, reject the classical theory. See, *e.g.*, BICKEL, THE LEAST DANGEROUS BRANCH (1962); Scharpf, note 29 *supra* (arguing that functional concerns explain the bulk of the political question cases). The Supreme Court's willingness in *Baker* to recognize political questions not predicated on constitutional compulsion implies a similar rejection. Consequently, the other two common features of foreign affairs cases cited in *Baker*—standards defying judicial application and the need for a single-voiced statement—require consideration. Finally, those categories that *Baker* includes in its general political question description but not in its foreign affairs discussion do not aid the analysis of the immigration cases. The reference to an initial policy determination requiring nonjudicial discretion begs the question of when the type of discretion a particular policy determination requires is nonjudicial. To the extent this strand focuses on the presence of a policy element, it would seem subsumed within the previous strand, since a wide policy component would make it more difficult for a court to resolve the question on the basis of principled standards. The prong resting on disrespect for a coordinate branch does add a new element. See, *e.g.*, *Baker*, 369 U.S. at 214, *citing* Field v. Clark, 143 U.S. 649, 672 (1892) (courts reluctant to scrutinize statute for compliance with formal prerequisites to enactment). That new element, however, suggests no apparent special applicability to immigration. Certainly the mere fact that a decision of a coordinate branch is being invalidated does not bring that prong into operation; otherwise constitutional review would never be appropriate. The last two prongs—an unusual need for adherence to an existing decision and the possibility of embarrassment from conflicting pronouncements—are considered in the text.

[53] See Alvarez v. District Director, 539 F.2d 1220 (9th Cir. 1976); Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974).

[54] See Narenji v. Civiletti, 617 F.2d 745, 747–48 (D.C. Cir. 1980).

cial need for a single-voiced statement. Here it is necessary to distinguish between two ways in which governmental pronouncements can differ. One situation is that in which two or more equally authoritative bodies render conflicting decisions applicable during the same time period. That situation would arise, for example, if individual states were permitted to set their own immigration policies. As a result, relying on the need for uniformity, the early Supreme Court decisions held that the power to regulate immigration is exclusively[55] federal.[56]

A split of authority among courts of equal rank can also create the problem of conflicting decisions simultaneously in effect. Under the Immigration and Nationality Act, that problem can occur either at the district court level or at the court of appeals level.[57] The problem is no more likely to arise in immigration cases than in any other area of federal law,[58] however, and when it does, the most logical remedy is a conclusive decision from the Supreme Court. Nor does judicial reversal of either an executive decision or a Congressional decision create conflict. Once a decision is invalidated by a court, the ominous specter of "multifarious pronouncements" raised in *Baker*[59] does not come about.[60]

The second way in which official pronouncements can differ is that, although only one authoritative pronouncement is outstanding at a given point in time, the pronouncement is one that can change over the course of time. That problem is not one of conflict; it is one of finality and certainty. It results from the possibility that a given administrative or legislative decision will be overturned. The problem exists in the case of any reviewable decision, but it assumes special importance in matters affecting foreign affairs, where final decisions might be needed promptly.[61] Thus, if a par-

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[55] Chy Lung v. Freeman, 92 U.S. (2 Otto.) 275 (1875); Henderson v. Wickham, 92 U.S. (2 Otto.) 259 (1875); The Passenger Cases, Smith v. Turner, *consolidated with* Norris v. City of Boston, 48 U.S. (7 How.) 283 (1849).

[56] Chinese Exclusion Case, 130 U.S. 581 (1889); The Head Money Cases, Edye v. Robertson, 112 U.S. 580 (1884).

[57] See 8 U.S.C. § 1105a(a, b).

[58] That point has been made by others. See, *e.g.*, Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 SAN DIEGO L. REV. 25, 26–27 (1980); Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 63 (1980).

[59] 369 U.S. at 217.

[60] See I.N.S. v. Chadha, 103 S.Ct. 2764, 2780 (1983).

[61] *E.g.*, Goldwater v. Carter, 444 U.S. 996 (1979).

ticular immigration case raises an issue that for some special reason requires a prompt final resolution, the Court should consider holding the issue nonjusticiable.

One last observation is that even a decision having a great impact on foreign affairs might be justiciable. In most of the cases cited earlier for the proposition that courts will review even those decisions containing strong foreign policy ingredients, violations of important individual rights were alleged.[62] In such cases, the courts should first isolate any policies that underlie the principle of deference in foreign policy matters and that apply to the particular cases. It should then balance those policies against the individual rights claimed to have been infringed. When performing the balancing, and in particular when evaluating the strength of the individual right, it would seem reasonable to consider not only the importance of the right the immigrant is asserting—in the present context a right of constitutional magnitude—but also the severity of the sanction resulting from the alleged deprivation of that right. Relevant to the latter would be the immigration status of the particular individual. Status might include whether the person was lawfully admitted and, if so, whether as a permanent resident or a temporary visitor.

In summary, the political question doctrine, whether or not invoked by name, accounts for some of the judicial restraint in the American immigration cases. Foreign relations concerns have been voiced, but as a justification for blanket deference in immigration cases they require two assumptions: that immigration inherently implicates foreign policy, and that foreign policy considerations call for judicial restraint.

Only in a few special instances do immigration cases realistically affect foreign policy. Accordingly, the court should ask, in each individual case, whether judicial review would interfere with foreign policy. To make that determination, a court might consider any submissions by the Government, the legislative history, and whether the provision in question distinguishes between immigrants of selected nationalities.

Even when foreign affairs will be affected, courts often review when the claimed violation of an individual right is important

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[62] See notes 42–50 *supra* and accompanying text. See esp. Henkin, note 50 *supra*, ch. 10; Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 973–74 (1982).

enough. In immigration cases, even when review might realistically be expected to affect foreign policy, the court should therefore balance the likely impact of its interference against the importance of the individual right allegedly violated. To gauge the impact on foreign affairs, the court should consider the factors that call for deference in cases involving foreign affairs: the lack of manageable standards, a demonstrable commitment to another branch, and any special need for the nation to speak with a single voice. To apply the last factor, the court should consider both uniformity and finality. In measuring the importance of the claimed deprivation, the court should take into account both the importance of the right and the severity of the resulting sanction.

B. THE GUEST THEORY

In many of the most deferential judicial opinions in the area of immigration, one common theme has been the depiction of the alien as a guest, to whom hospitality may be terminated at the pleasure of the host. The view seems to be that the alien aggrieved by governmental action has little cause for complaint because his or her very presence in the country is strictly a bonus.

That philosophy has emerged in various forms. Several cases have spoken of the aliens having "come at the Nation's invitation,"[63] or of the country's "hospitality" to aliens,[64] or of aliens' status as "guests."[65] In a leading British decision,[66] Lord Justice Widgery (as he then was) analogized immigration law to property law. He maintained that, just as a landlord need not explain a refusal to extend a lease, the Home Secretary need not explain a decision refusing to extend an alien's leave to remain in the United Kingdom.[67] Under that analogy, the nation's immigration laws represent the exercise by the "owners" of the national property of their collective right to use the property as they please.[68] Finally, the

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[63] Carlson v. Landon, 342 U.S. 524, 534 (1952).

[64] Landon v. Plasencia, 103 S.Ct. 321, 325 (1982); Foley v. Connelie, 435 U.S. 291, 294 (1978); Fiallo v. Bell, 430 U.S. 787, 796 (1977); Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).

[65] Mathews v. Diaz, 426 U.S. 67, 80 (1976).

[66] Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149 (C.A.).

[67] *Id.* at 173.

[68] Peter Schuck argues that the emergence of restrictive American immigration laws reflected in part the philosophy of individual autonomy to which the American legal system

Court has relied at least twice on the premise that the admission of an alien is not a "right"; it is a "privilege,"[69] "a matter of permission and tolerance."[70] The classification of an interest as a privilege is still another form of the guest theory.

The general, admittedly qualified,[71] demise of the right/privilege distinction has been chronicled elsewhere.[72] These sources contain powerful arguments against making the distinction conclusive as to whether procedural review is available. Repetition of those arguments would not be useful: it suffices here to note that, like the other forms of the guest theory, the right/privilege distinction in immigration law confuses the nation as a whole with its constituent parts. It can be granted *arguendo*[73] that a nation has unlimited power in international law to exclude and to expel aliens. It does not follow that the courts should refrain from determining whether the manner in which the national legislature exercises that power comports with the constitutional restrictions that the nation as a whole has elected to establish.

C. THE UNFAIR ADVANTAGE THEORY

One theory, advanced in *Harisiades v. Shaughnessy*, was that permanent resident aliens derive advantages from two sources of law:

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was then committed. Under that philosophy, obligation was based principally on consent. Schuck draws an effective analogy between the landowner's right to exclude trespassers and the nation's right to exclude aliens. See Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6–7 (1984). Note, however, that he offers his argument as a historical explanation for the adoption of a restrictive immigration policy. Widgery, L.J., in contrast, offered his analogy as a justification for judicial restraint.

[69] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[70] Harisiades v. Shaughnessy, 342 U.S. 580, 586–87 (1952). Accord, Landon v. Plasencia, 103 S.Ct. 321, 329 (1982) (dictum); *cf.* Jay v. Boyd, 351 U.S. 345, 354 (1956) (statutory interpretation affected by the fact that discretionary relief from deportation is matter of "grace," rather than "right"). See also GARIS, IMMIGRATION RESTRICTION 30 (1927) (right-privilege distinction invoked in Congressional debates over the Naturalization Act of 1798).

[71] See Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

[72] See, *e.g.*, GORDON & ROSENFIELD, note 3 *supra*, § 15.3; French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[73] This assumption is questioned in GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES (1978); Nafziger, *A Commentary on American Legal Scholarship concerning the Admission of Migrants*, 17 U. MICH. J.L. REFORM 165 (1984); see also GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (1984); R. PLENDER, INTERNATIONAL MIGRATION LAW (1972).

international law and the domestic law of the host country.[74] It noted that, in international law, aliens may request their nations to intervene diplomatically and may not be forced to participate in wars against their own nations.[75] The implication was that aliens should not expect to enjoy the same domestic rights as citizens, because aliens would then have two sets of rights and therefore be at an unfair advantage.

There are several answers. First, a court would not have to afford the alien the same domestic rights as a citizen in order to review for compliance with the particular constitutional provision the alien was invoking. There might indeed be a price that the Constitution expects the alien to pay for access to limited rights in international law, but it is not axiomatic that that price includes forfeiture of constitutional review.

Moreover, the same reasoning has not been applied to the question of legal disabilities attaching to alienage. The presence of those legal disabilities has not been thought to preclude imposing on aliens the additional disabilities borne by citizens.[76]

The practical significance of the alien's international law right to request diplomatic intervention might also be questioned. The alien's nation must be persuaded that there is a valid case and must be willing to raise the matter with the host country. The host nation must then be willing to accede to that request. Whether such a procedure adequately substitutes for constitutional protection seems dubious at best.

Finally, even if the alien's international law rights were of as much practical import as protection by the domestic law of the host

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[74] 342 U.S. 580, 585–87 (1952); *cf.* R. v. Secretary of State for the Home Dept., ex parte Ayub [1983] 3 C.M.L.R. 140, 149 (Div. Ct.) (U.K. citizen might be barred from exercising EEC rights against the United Kingdom because doing so would create simultaneous EEC and international law rights) (dictum).

[75] 342 U.S. at 585–86. Accord, Foley v. Connelie, 419 F. Supp. 889, 897–98 (S.D.N.Y. 1976), *aff'd*, 435 U.S. 291 (1978). See also HARPER, IMMIGRATION LAWS OF THE UNITED STATES, pt. 7, § 1a, at 567 (3d ed. 1975); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23, reproduced in 36 Stat. 2277, 2302. See also LAWSON & BENTLEY, KIER & LAWSON'S CASES IN CONSTITUTIONAL LAW 69–74 (6th ed. 1979); STREET & BRAZIER, DE SMITH'S CONSTITUTIONAL AND ADMINISTRATIVE LAW 155 (4th ed. 1981).

[76] Even apart from vulnerability to exclusion or deportation, aliens are subject to a wide range of disabilities beyond those borne by citizens. See generally CARLINER, note 3 *supra*; 1 GORDON & ROSENFIELD, note 3 *supra*, §§ 1.30–1.46; MUTHARIKA, note 3 *supra;* Roh & Upham, *The Status of Aliens under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972); Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092 (1977).

country, no basis is perceived for requiring the alien to make an election.[77] That the alien would have the opportunity to ask his or her country to ask the host nation to provide favorable treatment when international law has allegedly been violated does not show that the alien should not be able to invoke judicial protection when asserting a violation of domestic law.

D. THE ALLEGIANCE THEORY

Among the rationales offered by the Supreme Court in *Harisiades* to support its limited reading of an alien's constitutional protection was its statement that "[s]o long as the alien elects to continue the ambiguity of his allegiance, his domicile here is held by a precarious tenure."[78] As an argument for judicial deference, that position contains two components: that aliens lack clear allegiance to their resident countries, and that those who lack clear allegiance are not entitled to constitutional safeguards.

With respect to the first component, the Court's reference to aliens electing to continue their status implies that a decision not to become naturalized evidences a lack of allegiance. If the Court meant allegiance in the sense of loyalty, a number of observations should be made. In many cases aliens are statutorily ineligible for naturalization because of the duration of residence or the inability to meet some other prerequisite.[79] In those cases the continuation of alien status evidences nothing about the character of a person's loyalty. Even when an alien who is statutorily eligible elects not to apply for naturalization, a reluctance to renounce one's native citizenship does not necessarily reflect apathy toward the country of residence. Unless there is reason to expect that the interests of the two countries will directly clash, that decision cannot be taken as evidence of a lack of loyalty.[80] That the federal government drafts resident aliens into the military[81] illustrates beyond doubt its faith in their loyalty.

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[77] *E.g.*, it has not been suggested that the two sets of rights possessed by dual citizens should result in forfeiture of their domestic rights.

[78] Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).

[79] See 8 U.S.C. §§ 1421 *et seq.*

[80] See also Hesse, note 9 *supra*, 69 YALE L.J. at 277–78; Trop v. Dulles, 356 U.S. 86 (1958) (even desertion during wartime was held not to signify a dilution of allegiance for purposes of divestment of citizenship).

[81] See generally MUTHARIKA, note 3 *supra*, ch. 7; Roh & Upham, note 76 *supra*.

If the Court was referring to allegiance in its legal sense, a different analysis is necessary. Allegiance and protection have indeed been traditionally described as interdependent.[82] As has long been recognized, however, at least friendly aliens are deemed to bear at least temporary allegiance to the countries in which they reside.[83]

The second component is equally problematic. Even if it were true that a permanent resident alien lacked allegiance to the country of residence, it is questionable whether that factor should reduce the scope of judicial protection. Sensible policy-making might dictate that a person devoid of national allegiance not be given the responsibility for a task requiring loyalty. But it does not follow that a court should refuse to apply the normal standards of review when such a person is aggrieved by governmental action.

E. THE SOVEREIGNTY THEORY

One theory advanced in some of the plenary power cases,[84] with varying degrees of explicitness, is that the power either to exclude or to deport aliens is inherent in sovereignty, and that Congress's exercise of that power is therefore immune from substantive constitutional constraints. The argument thus relies both on the existence of an inherent, nonenumerated, Congressional power and on the idea that the plenary power doctrine follows from it.

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[82] See STREET & BRAZIER, note 75 *supra*, at 155, 431–34; Cane, *Prerogative Acts, Acts of State and Justiciability*, 29 INT'L & COMP. L.Q. 680, 690–92 (1980); see generally Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens*, 9 CAMB. L.J. 330 (1947); Williams, *The Correlation of Allegiance and Protection*, 10 CAMB. L.J. 54 (1948). A variant of this argument is put forward by David Martin, who maintains that the level of procedural protection the country owes a particular class of aliens should depend in part on the strength of that class's commitment to the national community. See Martin, note 28 *supra*. But see Aleinikoff, note 28 *supra* (level of procedural protection should be based on strength of alien's ties to community).

[83] BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 11 (1915). However their obligation is decribed as allegiance only in the limited sense that they have a duty to obey the nation's laws. *Id.* See also Fong Yue Ting v. United States, 149 U.S. 698, 735–37 (1893) (Brewer, J., dissenting), citing further sources. In addition, see Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 778–79 (1971). Admittedly it is not clear to what extent that relationship continues when aliens are physically outside the country. See Cane, note 82 *supra*, at 690–92; STREET & BRAZIER, note 75 *supra*, at 155; Williams, note 82 *supra*.

[84] *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Carlson v. Landon, 342 U.S. 524, 534 (1952); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). Accord, Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982).

The first element of that argument raises questions as to the source of the Congressional power over immigration. Several enumerated powers have been suggested.[85] They include the commerce power,[86] the naturalization power,[87] and the war power.[88] They include also a lesser known provision that denies Congress the power to prohibit, before 1808, the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit";[89] this provision might be read as implying that Congress has the power to exclude such persons after 1808.[90]

But in the *Chinese Exclusion Case*, the Supreme Court sustained an immigration statute by locating a Congressional exclusion power within the concept of "sovereignty."[91] It was therefore unnecessary to tie the statute to one of the constitutionally enumerated powers. Other cases followed suit.[92]

Recognition of a sovereign nonenumerated Congressional power raises a battery of problems.[93] Nonetheless, it will be assumed *arguendo* that the Court has been right to view the Congressional exclusion power as an inherent incident of sovereignty. The point here is that, in any event, preclusion of judicial review for compliance with those constitutional limitations protecting individual rights is a non sequitur.[94] In *United States v. Curtiss-Wright Exporting Corp.*,[95] for example, the power to regulate foreign affairs was held to be inherent in sovereignty. Yet that holding did not prevent the

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[85] See Toll v. Moreno, 458 U.S. 1, 10 (1983); The Passenger Cases, Smith v. Turner, *consolidated with* Norris v. City of Boston, 48 U.S. (7 How.) 283 (1849). For a good summary, see ALEINIKOFF & MARTIN, THE AMERICAN IMMIGRATION PROCESS, ch. 1 (to be published in 1985).

[86] U.S. Const. art. I, § 8, cl. 3.

[87] *Id.* art. I, § 8, cl. 4.

[88] *Id.* art. I, § 8, cl. 11.

[89] *Id.* art I., § 9, cl. 1.

[90] ALEINIKOFF & MARTIN, note 85 *supra*, ch. 1; Garis, note 70 *supra*, at 59–68; Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968).

[91] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

[92] See note 84 *supra; cf.* United States v. Curtiss-Wright Exporting Corp., 299 U.S. 304 (1936) (foreign affairs power inherent in sovereignty).

[93] See ALEINIKOFF & MARTIN, note 85 *supra;* HENKIN, note 50 *supra*, at 15–28; Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26–33 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

[94] This point has been made by others. See HENKIN, note 50 *supra*, at 25; *Constitutional Limits*, note 62 *supra*, at 970–71.

[95] 299 U.S. 304 (1936).

Court in several subsequent cases from invalidating, as violative of individual rights limitations, federal action affecting foreign affairs.[96] And in *United States v. Wong Kim Ark*,[97] where the Court acknowledged the inherent power of every sovereign nation to decide who its citizens are,[98] it was nonetheless held that persons born in the United States to alien parents could not be denied citizenship. Indeed, if even the expressly enumerated powers are subject to constitutional limitations,[99] the case for limiting a merely implied power would seem to be even stronger.[100]

F. THE EXTRATERRITORIALITY THEORY

There is one important theory that applies only to the exclusion cases. The argument is that an alien cannot invoke the American Constitution in exclusion proceedings because the Constitution lacks extraterritorial effect.[101] At first glance, the response to this theory seems obvious. Since federal power derives from the Constitution, it is contradictory to uphold a statute having extraterritorial effect but to deny that its application is subject to constitutional limitations. If the Constitution is read to empower federal officials to act outside American territory, then it is not apparent why it should be interpreted as inapplicable for the purpose of limiting such action. In fact, the Supreme Court has on several occasions applied the Constitution to acts of American government officials outside United States territory.[102]

To meet this objection, one might observe, at least in the Supreme Court cases applying constitutional protections to governmental acts outside United States territory, that the aggrieved par-

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[96] See notes 42–50 *supra* and accompanying text.

[97] 169 U.S. 649 (1898).

[98] *Id.* at 668.

[99] Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893).

[100] On this point, see Fong Yue Ting v. United States, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting). *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 599 (1952) (Douglas, J., dissenting) (implied power should be subject to express limitation).

[101] See, *e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 282 (1922) (dictum); Lem Moon Sing v. United States, 158 U.S. 538, 547–48 (1895); Fong Yue Tue v. United States, 149 U.S. 698,738 (Brewer, J., dissenting). See also Schuck, note 68 *supra*, at 18–21 (classical view that aliens who are excluded lack constitutional protection), 62–65 (signs of change); see also *Constitutional Limitations*, note 62 *supra*, at 980–82.

[102] See, *e.g.*, the military court-martial cases cited in HENKIN, note 50 *supra*, at 327 n.42; see also United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979).

ties were American citizens. Surely, the argument would run, the Constitution was never meant to confer rights on all people everywhere.

That argument has formidable intuitive appeal. But as a justification for the plenary power doctrine, it has its limits. Certainly the fact that a person is an alien does not, standing alone, render the Constitution inapplicable.[103] Similarly, the fact that a person is outside the United States does not eliminate constitutional protections, as illustrated by the extraterritorial cases discussed above. Even the combination of a person's being an alien and his being outside the country does not necessarily make the Constitution inapplicable. As mentioned earlier, returning resident aliens have been held entitled to procedural due process.[104] Finally, the Court has never suggested that residence in the United States is a prerequisite to constitutional protection. Although the issue does not appear to have arisen, it scarcely seems conceivable, for example, that a nonresident alien convicted of a crime in the United States would be held ineligible to complain of cruel and unusual punishment.

The analysis cannot, of course, stop at this point. If it did, it would be subject to the fair criticism that those three features—alienage, nonresidence, and absence from the United States—should not be viewed in isolation. While none of them taken individually precludes constitutional challenge, the combination of all three might be thought to have that effect.[105] That position is plau-

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[103] The leading case is Yick Wo v. Hopkins, 118 U.S. 356 (1886). See also the cases holding state alienage classifications suspect, note 6 *supra*, and deportation cases presenting procedural due process challenges, notes 23–24 *supra* and accompanying text.

[104] See note 25 *supra* and accompanying text.

[105] There are cases consistent with that conclusion, but they reflect special considerations preventing their transfer to the exclusion context. In what have been termed the Insular Cases, for example, the Court held that certain constitutional provisions need not be observed by the governments of unincorporated American territories. See, *e.g.*, Balzac v. People of Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); *cf.* Downes v. Bidwell, 182 U.S. 244 (1901) (constitutional provision requiring uniform duties held inapplicable to unincorporated territories). In Reid v. Covert, 354 U.S. 1, 12–14 (1957), the Court limited the Insular Cases by observing that they involved recently acquired territories with "entirely different cultures and customs from those of this country," *id.* at 13, so that imposing American customs on them would be unwise. Other cases that might initially be thought to preclude suits by nonresident aliens abroad in fact reflect special principles limited to alien enemies in wartime. See, *e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); In re Yamashita, 327 U.S. 1 (1946); see also United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952).

sible, since a nonresident alien who is physically outside the United States might ordinarily be assumed to lack any connection with the United States, and therefore lack any standing to complain that our Constitution has been violated.

That last point can be conceded as a general proposition but challenged as a justification for the plenary power doctrine. Its defect is that it fails to explain some of the most significant Supreme Court decisions invoking the principle of plenary Congressional power to exlude aliens—most notably those in which the excluded alien had sought admission on the very basis of a close family relationship to an American citizen. In those cases, it is simply not true that the complainant lacked an American connection. There is something surreal about saying, for example, that the wife[106] or child[107] of an American citizen lacks significant ties to the United States.

G. THE POETIC JUSTICE THEORY

One final theory of limited application requires brief discussion. In *Harisiades v. Shaughnessy*,[108] the question was whether Congress could constitutionally deport permanent resident aliens on the basis of their past membership in the Communist party. The Court said that if American citizens can be sent to foreign countries "to stem the tide of Communism,"[109] it would be incongruous to spare alien Communists from the hardships of "Communist aggression."[110]

The Court did not distinguish Communist aggression from mere membership in the Communist party. If it had, it would have been forced to acknowledge that American citizens are perfectly free to join the Communist party. The incongruity thus does not exist. Nor did the Court point out that permanent resident aliens, being liable to conscription,[111] can also be sent to foreign countries "to stem the tide of Communism." Although the Court's theory related only to those deportations based on one particular ground, the language evidences a political attitude that might well have in-

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[106] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[107] Fiallo v. Bell, 430 U.S. 787 (1977).

[108] 342 U.S. 580 (1952).

[109] *Id.* at 591.

[110] *Id.*

[111] See note 81 *supra*.

fluenced several of the Supreme Court decisions concerning alien Communists.[112]

II. THE EXTERNALITIES[113]

There can be little doubt today that a judge frequently has a practical choice between two or more dispositions of a particular case.[114] But that freedom, though broad, is not limitless. The flexibility inherent in the judicial process is constrained by the now familiar "steadying factors" that Karl Llewellyn assembled as a response to what he perceived as the excesses of legal realism.[115] Probably the most significant of those constraints is the professional office occupied by the judge.[116]

One who seeks to explain the courts' refusals to interfere with Congress in the immigration sphere must consider both judicial freedom and its limitations. The plenary power decisions were accompanied by reasoned opinions. The most immediate explanation for any individual decision, therefore, is the specific legal doctrine articulated in the opinion. If the recognition of Karl Llewellyn's steadying factors is not to be a mere platitude, this explanation must be taken seriously.

But legal doctrine is not the only influence on judicial decision making. One can apply to the immigration cases the increasingly well accepted view that various factors not typically acknowledged

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[112] See notes 181–89 *infra* and accompanying text.

[113] Commentary on the external factors affecting American judges has become more abundant in recent years, particularly with respect to such variables as personal backgrounds and attitudes. But most of the writing on external factors in general, and especially that on the specific factors of judicial role perception and contemporary political forces, has focused on British judges. It will therefore be necessary to refer frequently to the latter studies, which will be cited only for propositions that can reasonably be extrapolated to the American judiciary.

[114] See, *e.g.*, BLOM-COOPER & DREWRY, FINAL APPEAL 152 (1972); HART, THE CONCEPT OF LAW 12–13 (1961); PATERSON, THE LAW LORDS 194–95 (1982) (Law Lords regard themselves as having choices); Palley, *Decision Making in the Area of Public Order by English Courts*, OPEN UNIVERSITY, D203, block 2, pt. 3, at 41, 79–87 (1976). One writer distinguishes between "trouble" cases, where courts have choices, and "clear" cases, where they do not. Seidman, *The Judicial Process Reconsidered in the Light of Role Theory*, 32 MOD. L. REV. 516, 521 (1969). For elaboration of the specific mechanisms affording this freedom of choice, see Palley, *supra*, at 75–83; see also GRIFFITH, THE POLITICS OF THE JUDICIARY 1–2, 185 (1977).

[115] LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 19–61 (1960). See also Palley, note 114 *supra*, at 87–88; *cf.* JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 44 (1969) (rational standards can be available even for policy choices).

[116] LLEWELLYN, note 115 *supra*, at 45–46.

in courts' opinions contribute heavily to the results. Those factors will be described here as "external."[117] Among them are several that deserve consideration in the immigration context: the personal backgrounds and political attitudes of the judges; the judges' own perceptions of their roles in the legal system; and the political forces—"political" here being used in its broadest sense to encompass social and economic forces as well—prevailing in society at the time cases are decided.[118]

A. SOCIAL BACKGROUNDS AND ATTITUDES

Two kinds of variables will be considered together in this subsection. There are the background variables of the individual judge. These include social class, family, religion, ethnicity, previous experience, education, professional training, ethos and traditions, vulnerability to professional opinion, involvement in party politics, age, sex, and level of legal distinction attained.[119] Second, there are the attitudinal variables, a term used here to encompass the judge's values, general ideological orientation, and views on specific policy questions.[120]

The hypothesis that the backgrounds and attitudes of the federal[121] judges have contributed to the plenary power doctrine rests on three suppositions: that a judge's background and attitudes influence his or her decisions; that in the federal judiciary conservative backgrounds and conservative political views predominate; and

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[117] The term "external" is one of convenience. At least one of the listed variables, role perception, is often explicitly included in the court's opinion and thus not neatly severable from doctrine, as discussed below. Although rarer, even the other major influences discussed in this section—attitudinal variables and prevailing political forces—can be revealed by the opinion. See notes 175–80 *infra* and accompanying text.

[118] These factors have been culled from a more comprehensive list of variables compiled by Claire Palley, note 114 *supra*, § 4. Palley groups these variables into two categories. Those internal to the judge include personal background, attitudes concerning specified values and policies, interaction with others, and perception of judicial role. Those external to the judge include the way in which the cases are set in motion and the relationship between courts and several other bodies—*e.g.*, the legislature, the executive, the press, the general public, pressure groups, and judges of other courts.

[119] All but the last two are taken from Palley, note 114 *supra*, § 4.1. Pre-judicial experience, however, has been expanded to include all previous experience, including judicial experience on a lower court, see *e.g.*, MARVELL, APPELLATE COURTS AND LAWYERING 180 (1978) (effect of previous trial court experience), and judicial experience accumulated by a judge on the same court.

[120] See generally Palley, note 114 *supra*, § 4.2.

[121] Immigration cases are litigated in federal court. See 8 U.S.C. §§ 1105a, 1329.

that politically conservative views tend generally to translate into relatively narrow definitions of immigrants' rights.

At first glance, all the pieces of this hypothesis might seem plausible. As to the first piece, numerous recent studies now show empirically[122] what many writers had sensed intuitively[123]—that a judge's background and attitudes often profoundly affect his or her decisions. Many judges freely acknowledge such influences.[124]

The second piece might also be thought present. Judges are "conditioned by the conservative impact of legal training and professional legal attitudes and associations."[125] The vast majority of federal judges have amassed considerable financial net worth by the time they are appointed.[126] Ethnic minorities are extremely underrepresented in relation to the general population.[127] Prosecutorial experience and corporate connections are very common among federal judges.[128] These and other background similarities[129] coalesce to produce a certain degree of homogeneity on the federal bench.

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[122] For an extensive bibliography, listing primarily American empirical studies, see Tate, *Paths to the Bench in Britain: A Quasi-experimental Study of the Recruitment of a Judicial Elite*, 28 WESTERN POL. Q. 108, 109 n.2 (1975). See esp. Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 307 & n.3 (1982); Nagel, *Multiple Correlation of Judicial Backgrounds and Decisions*, 2 FLA. ST. U.L. Rev. 258, 266–67 (table 1), 268–69 n.37 (bibliography) (1974). But *cf.* Cann, *Social Backgrounds and Dissenting Behavior on the North Dakota Supreme Court 1965–71*, 50 N. DAK. L. REV. 773 (1974) (results inconclusive).

[123] *E.g.*, ABEL-SMITH & STEVENS, IN SEARCH OF JUSTICE 171 (1968); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167–79 (1921); DWORKIN, TAKING RIGHTS SERIOUSLY 4, 6 (1977); Palley, note 114 *supra*, §§ 4.1, 4.2; LORD RADCLIFFE, NOT IN FEATHER BEDS 212–16 (1968); *cf.* FARMER, TRIBUNALS AND GOVERNMENT 170 (1974); MACDONALD, IMMIGRATION LAW AND PRACTICE 4 (1983). But see Lord Devlin, *Judges, Government, and Politics*, 41 MOD. L. REV. 501, 506 (1978) (acknowledging homogeneity of judicial attitudes but questioning whether such attitudes influence judicial decision making).

[124] MARVELL, note 119 *supra*, at 180–81.

[125] SCHMIDHAUSER, JUDGES AND JUSTICES—THE FEDERAL APPELLATE MACHINERY 99 (1979). Many have made analogous observations about the British judiciary. The leading work is GRIFFITH, note 114 *supra*. See also Lord Evershed, M.R., *The Judicial Process in Twentieth Century England*, 61 COL. L. REV. 761, 773–74 (1961); Lord Devlin, note 123 *supra*, at 505 (1978); Lord Devlin, *Judges and Lawmakers*, 39 MOD. L. REV. 1, 8 (1976).

[126] See the statistics compiled by Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 346 (1983) (as of March 1983); see also Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981).

[127] SCHMIDHAUSER, note 125 *supra*, at 59–61; Glick, *Federal Judges in the United States: Party, Ideology, and Merit Nomination*, 12 LOYOLA L.A. L. REV. 767, 800–801, 805, 806 (1979); see also JACKSON, JUDGES 254 (1974).

[128] JACKSON, note 127 *supra*, at 252–55.

[129] All but a handful of federal judges are male. Glick, note 127 *supra*, at 801, 805, 806; JACKSON, note 127 *supra*, at 248, 253; Martin, note 122 *supra*, at 307 (1982); SCHMIDHAUSER,

Finally, although one whose views are generally regarded as politically conservative will not necessarily be less predisposed to take a pro-immigrant position on substantive immigration policy than one who is generally regarded as politically liberal,[130] there has historically been at least a positive correlation between general political liberalism and sympathy toward immigrants.[131] Such a correlation is not surprising. Substantive immigration policy questions frequently implicate values to which political conservatives and political liberals attach differing weights. These values include stability,[132] the interests of the State in preference to certain interests of the individual, effective law enforcement,[133] property rights,[134] views on race relations,[135] nationalism,[136] the balance between national security and civil rights,[137] and the distribution of

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note 125 *supra*, at 59. Supreme Court Justices, and to a lesser extent lower federal judges, tend generally to come from families enjoying a relatively high social status. Glick, note 127 *supra*, at 800; JACKSON, note 127 *supra*, at 252–53, 328; SCHMIDHAUSER, note 125 *supra*, at 52, 96 (Supreme Court Justices), 55, 97 (circuit judges).

[130] Even apart from the frequent difficulty of labeling a particular viewpoint as "liberal" or "conservative," it is of course possible for a person to hold clearly liberal views on some issues and clearly conservative views on others. Moreover, self-interest can conflict with a person's usual ideological propensities; for example, an immigrant with generally conservative views, or an employer with those same views, might favor a liberal immigration policy. Finally, even a person with consistently liberal views might favor a restrictive immigration policy out of a belief that its net effect would be to further liberal values. For example, a political liberal might believe that restricting immigration would improve racial harmony, although that particular argument is ordinarily invoked by conservatives. See, *e.g.*, the discussions provided by GRANT & MARTIN, IMMIGRATION LAW AND PRACTICE 356 (1982); MACDONALD, note 123 *supra*, at 16–17; MOORE & WALLACE, SLAMMING THE DOOR—THE ADMINISTRATION OF IMMIGRATION CONTROL 2–4 (1975). Alternatively, a political liberal might favor restrictions in the hope of improving the wages or working conditions of poorly paid domestic workers. See, *e.g.*, DeCanas v. Bica, 424 U.S. 351 (1976), where a legal services organization represented migrant farmworkers in their action challenging the hiring of illegal aliens.

[131] See, *e.g.*, the problems discussed by GARRARD, THE ENGLISH AND IMMIGRATION, 1880–1910, at 10, 132–33, 203–09 (1971).

[132] Several of the patterns identified by GAINER, THE ALIEN INVASION 212 (1972), can be seen to rest ultimately on the public perception of a threat to either cultural or economic stability. See also Sec. IIc *infra*; MOORE & WALLACE, note 130 *supra*, at 26.

[133] One who places a high value on effective law enforcement would be especially likely to take a conservative view on issues involving illegal entrants, immigrants who overstay their leave, and immigrants who commit non-immigration-related crimes.

[134] See the discussion of the guest theory, analogizing immigration law and landlord-tenant law, Sec. Ib *supra*.

[135] See note 132 *supra*.

[136] *E.g.*, the deportation of Iranian nationals during the American hostage crisis. See notes 203–12 *infra* and accompanying text.

[137] *E.g.*, El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982). See also R. v. Secretary of State for Home Affairs, ex parte Hosenball [1977] 1 W.L.R. 700 (C.A.).

wealth.[138] Occasionally, even people's feelings about the ideological creeds of the immigrants themselves can influence attitudes toward immigration.[139]

Yet, taken as a whole, the hypothesis that a conservative set of judicial attitudes has contributed to the plenary power doctrine does not seem convincing. Its greatest weakness is that it does not account for the selective nature of the judicial decisions. As I have argued, constitutional liberties that have been meticulously protected in other areas have received no protection in the immigration cases.

Perhaps the difficulty stems from placing undue weight on the homogeneously conservative influences I have identified. Those influences certainly exist, but they are tempered by factors that tend to promote ideological diversity. The American judicial appointment process has been described by leading writers as one that emphasizes political affiliation over legal distinction, at least as compared with the British process for appointing judges.[140] The American emphasis on political considerations, whatever its deficiencies, does favor ideological diversity. Some of that diversity results from the direct consideration of political ideology in the selection process,[141] particularly at the Supreme Court level.[142]

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[138] See, *e.g.*, Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 76 (1977); Hofstetter, *Economic Underdevelopment and the Population Explosion: Implications for the U.S. Immigration Policy*, 45 LAW & CONTEMP. PROB. (No. 2) 55 (1983); Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker*, 13 SAN DIEGO L. REV. 42, 45 (1975); SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 37 (1981) (hereinafter SCIRP); Hon. W. Smith, *Introduction* [to symposium], 45 LAW & CONTEMP. PROB. (No. 2) 3, 3–4 (1983).

[139] Some of the early colonial leaders, for example, feared a large influx of immigrants holding monarchist views. See DAVIE, WORLD IMMIGRATION 38–39 (1936); GARIS, note 70 *supra*, at 25–26; JONES, AMERICAN IMMIGRATION 80 (1960); PROPER, COLONIAL IMMIGRATION LAWS 90–91 (1967). See also notes 181–89 *infra* and accompanying text (alien Communist decisions of early 1950s).

[140] See JAFFE, note 115 *supra*, at 62–63, 67; TRIBE, note 29 *supra*, at 49–50. For general descriptions of the politics of federal judicial appointments, see CHASE, FEDERAL JUDGES—THE APPOINTING PROCESS (1972); Glick, note 127 *supra*, at 772–92; JACKSON, note 127 *supra*, at 247–76. At the district and circuit judge levels, senatorial politics can be more important than Presidential politics. *Id.* at 249, 310.

[141] Lord Devlin, note 125 *supra*, 39 MOD. L. REV. at 6; Glick, note 127 *supra*, at 772; Goldman, note 126 *supra*, 66 JUDICATURE at 337 n.2; JACKSON, note 127 *supra*, at 270–73; JAFFE, note 115 *supra*, at 61; SCHMIDHAUSER, note 125 *supra*, at 66, 86, 90.

[142] Glick note 127 *supra*, at 773. Ideology is less important in choosing district and circuit judges. *Id.* at 779.

Ideological diversity can also result indirectly. The overwhelming majority of federal judges belong to the political party of the President who appointed them,[143] and positive correlations have been observed between membership in one of the two major political parties and ideological views on several subject areas likely to come before the courts.[144] Thus a change in the Presidency—especially when the new President is of a different political party—can be followed by an infusion of new ideologies and values into the federal courts.

For these reasons, personal attitude does not convincingly explain the peculiar deference the Court has displayed toward Congress in immigration cases. Other "external" factors show greater promise.

B. PERCEPTION OF ROLE

One study of judicial behavior defines role as "the cluster of normative expectations which exist at any given time as to the behavior and attributes required of a person who holds a particular status or position."[145] That definition usefully emphasizes both that role comprises expectations and that those expectations are normative rather than descriptive. Another formulation defines role as "functions, duties, and powers."[146] The latter definition has the advantage of providing greater specificity with respect to the objects of the normative expectations—the sorts of behavior and attributes about which the expectations are held. Here I will combine the two definitions and use the term "role of a court" to mean the normative expectations concerning the functions, duties, and powers of a court.[147]

That combined definition permits distinctions based on the holder of the expectations.[148] Several writers, through differing

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[143] From 1952 to 1979, the figure was over 90 percent. *Id.* at 801, 805, 806.

[144] See Nagel, note 122 *supra*, at 266–68. For a bibliography of empirical studies linking party membership to judicial decision making, see *id.* at 268–69 n.37.

[145] PATERSON, note 114 *supra*, at 3, 202 (1982).

[146] Palley, note 114 *supra*, at 41.

[147] See also Seidman, note 114 *supra*, at 517 (1969) (role is complex of obligations that make up a social position).

[148] PATERSON, note 114 *supra*, at 3, 202–03, uses the term "reference groups" to describe the holders of the expectations.

methodologies, have argued convincingly that a judge's own perception of role is one of the central factors influencing judicial decision making,[149] a view I accept.

Although role perception is treated here as merely one of several discrete determinants of judicial behavior, it cannot be divorced entirely from the other two major contributors examined in this section. The previous discussion was framed as a consideration of the effect that background and attitudinal variables have on judicial decision making. It can as easily be viewed, however, as reinforcement for the position that John Griffith articulates in role language: that judges perceive their role as the protection of the public interest in a stable society,[150] and that that role perception is in fact what is important.[151] Further, the more broadly judges perceive their roles, the more important the social and political attitudes of the judges become.

Similarly, the following discussion will consider the effect of contemporary political forces on judicial decision making. That discussion could be characterized equally well as a vindication of Justice Cardozo's prescriptive view that, when making law, a judge's role is to be guided by the values prevailing in society, rather than by his or her own values.[152]

What is the relationship between judicial role perception and the plenary power doctrine? American judges are not ordinarily thought of as passive observers, at least in comparison with their British counterparts.[153] More deeply influenced by the legal realists, American judges have been more prone to acknowledge the choice element present in many judicial decisions.[154] Judicial activ-

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[149] See GRIFFITH, note 114 *supra*, at 189–90; Palley, note 114 *supra*, § 4.4; see also PATERSON, note 114 *supra*; Seidman, note 114 *supra*. The further question which groups are most influential in causing judges to perceive their roles the way they do is examined in an empirical study of the Appellate Committee of the House of Lords. See PATERSON, esp. at 33–34, 119–21 (most important reference group for most Law Lords is their fellow Law Lords).

[150] GRIFFITH, note 114 *supra*, at 212–13.

[151] *Id.* at 189–90.

[152] CARDOZO, note 123 *supra*, at 105–07 (but ascribing relatively little practical significance to that distinction, *id.* at 105–06, 108–11).

[153] See, *e.g.*, JAFFE, note 115 *supra*, at 2–5; Palley, note 114 *supra*, at 55.

[154] See 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.17, 2.18 (2d ed. 1978); JAFFE, note 115 *supra*, at 2; ZANDER, THE LAW-MAKING PROCESS 230 (1980).

ism[155] in the United States is typically regarded as being especially evident in constitutional matters.[156]

Yet, in the immigration arena, the plenary power doctrine reflects precisely the opposite bent. The question presented is why such a deferential view of judicial role has been adopted in the plenary power cases. I suggest two answers.

The first can be found in the previous section. Role perception is ordinarily thought of as an "external" factor. But an explicit statement of the court's perception of its role can appear in a judicial opinion. When it does, it becomes part of the legal doctrine. In the constitutional cases concerned with immigration legislation, the fusion of doctrine and role perception is especially visible. The prominent doctrinal issue in those cases is the appropriate standard of review. The Court views its role narrowly, and it says so. Accordingly, the doctrinal justifications offered in the opinions and discussed in Section I simultaneously explain the results of the cases and the Court's perception of its role. In particular, as discussed above in Section IA, the Court perceives the judicial role as especially narrow when, as the Court assumes to be the case with immigration, foreign affairs are affected.

Second, part of the judicial role is observance of *stare decisis*. The more support the plenary power doctrine accumulated, the more entrenched it became. In *Galvan v. Press*, Justice Frankfurter provided an explanation on which subsequent plenary power cases[157] would rely:[158]

> [M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .

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[155] The term "activism" has been used to convey several distinct meanings. It can refer to decision making that is wider than necessary to decide the case, decision making that extends the scope of existing rules, or decision making that reflects the "social, political and economic consequences." Palley, note 114 *supra*, at 55 n.1. Those meanings focus, respectively, on the scope of the holding in relation to the facts, the degree to which the holding changes existing law, and the factors it is permissible for a court to consider in reaching a decision. Palley points out that the term "activism" logically could be, but ordinarily is not, used to denote a restrictive application of law. Other definitions could also be used.

[156] JAFFE, note 115 *supra*, at 2–5.

[157] *E.g.*, Fiallo v. Bell, 430 U.S. 787, 792 n.4 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766–67 (1972).

[158] 347 U.S. 522, 530–31 (1954).

> But the slate is not clean. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Even an activist judge with liberal political views might hesitate before voting to dislodge a line of authority so long and so unyielding.

C. CONTEMPORARY SOCIAL AND POLITICAL FORCES[159]

A court's decision can also be affected by the contemporary political forces operating in society.[160] To the extent that this influence exists because a judge personally shares the prevailing public opinion, this factor is simply a specific application of the attitudinal variables discussed earlier. One of the background variables shaping the attitudes is the current tide of public opinion, to which the judge, being human, is susceptible. But to the extent that political forces affect the decision because the judge is hesitant to defy public opinion, regardless of whether he or she personally shares that opinion, these influences are distinct from the attitudinal variables and require separate treatment.

Some general observations about public attitudes toward immigrants are thus in order. First, immigrants have perennially been unpopular. Whether for cultural, economic, political, or environmental reasons, various immigrant waves have typically received at least mixed, and more commonly hostile, public reactions.[161]

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[159] For a thoughtful description of the philosophical forces historically affecting the totality of immigration law (not just the case law), see Schuck, note 68 *supra*.

[160] See generally GRIFFITH, note 114 *supra*, at 55–171 (author provides numerous examples of judicial decisions influenced by, *inter alia*, prevailing social and political forces); see also Palley, note 114 *supra*, at 57 (courts aware judgments might be scrutinized by press, general public, and pressure groups), 58 (judges might retreat from sensitive issues if particular decision would be unacceptable or would create stress in society); *cf.* CARDOZO, note 123 *supra*, at 106–11 (judicial lawmaking should reflect moral notions prevailing in society); Lord Devlin, note 125 *supra*, 39 MOD. L. REV. at 2–6 (arguing that British judges should not make law without a consensus); Prosser, *Politics and Judicial Review: The Atkinson Case and Its Aftermath*, 1979 PUBL. L. 59, 83.

[161] That was true even in colonial days. DAVIE, note 139 *supra*, at 35–56 (1936); GARIS, note 70 *supra*, at x, 17–18; see also Gleason, *The Melting Pot: Symbol of Fusion or Confusion?* 16 AMER. Q. 20 (1964). The pages that follow discuss public reactions to specific immigrant waves. See also the accounts given in Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 580, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969); Sei Fujii v. State, 38 Cal. 2d 718, 740–52, 242 P.2d 617, 632–39 (1952) (Carter, J., concurring); *cf.* Faruki v. Rogers, 349 F. Supp. 723, 729 (D.D.C. 1972) (noting frequent oppression of immigrants). The common reasons for this

Equally important for present purposes, a sharp increase in the volume of immigration has historically been followed by an increase in the level of anti-immigrant sentiment.[162]

That latter phenomenon is significant here. Not surprisingly, periods in which the courts are deciding large numbers of immigration cases are typically those of high-volume immigration, as the discussion below will show.[163] This is true in part because a higher level of immigration would naturally be expected to result in greater absolute numbers of disputes and therefore more litigation. It is true also because high-volume immigration has tended to culminate in restrictive legislation,[164] which in turn produces higher numbers of excluded or deported immigrants.[165]

Thus, unhappily for immigrants, the periods in which their large numbers make their presence all the more unpopular tend to be the very periods in which they are most frequently before the courts.

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general antipathy are summarized in BENTLEY, AMERICAN IMMIGRATION TODAY 14–16 (1981); GAINER, note 132 *supra*, at 212; GARRARD, note 131 *supra*, at 3–5; see generally CURRAN, XENOPHOBIA AND IMMIGRATION, 1820–1930 (1975); Rostow, *The Japanese American Cases—a Disaster*, 54 YALE L.J. 489 (1945); TRIBE, note 29 *supra*, at 1053–54.

[162] See notes 166–202 *infra* and accompanying text. This phenomenon is not peculiarly American. For example, English public reaction to Irish immigrants in the nineteenth century has been tied to the public perception of increased volume. GAINER, note 132 *supra*, at 212; see generally Gilley, *English Attitudes to the Irish in England, 1780–1900*, in HOLMES (ed.), IMMIGRANTS AND MINORITIES IN BRITISH SOCIETY 81 *et seq.* (1978); see also May, *The Chinese in Britain, 1860–1914*, *id.* at 111 *et seq.* Similar animosity toward Jewish immigrants arriving in England around the turn of the century is recounted in FOOT, IMMIGRATION AND RACE IN BRITISH POLITICS 103–06 (1965); GARRARD, note 131 *supra*, at 23–47, 56–65; Holmes, *J. A. Hobson and the Jews*, in HOLMES, *supra*, at 148–52; JONES, IMMIGRATION AND SOCIAL POLICY IN BRITAIN 72–88 (1977); Thornberry, *Law, Opinion, and the Immigrant*, 25 MOD. L. REV. 654, 656–57 (1962). Various complaints were lodged against the new immigrants. See GAINER, *supra*, at 15–35 (depressing wages and working conditions), 36–59 (aggravating housing shortage), 99–107 (involved in anarchist movement), 107–28 (threat to racial purity); GARTNER, THE JEWISH IMMIGRANT IN ENGLAND, 1870–1914, at 276 (1960) ("sweating" practice in industry), 278 (racial objections); Kiernan, *Britons Old and New*, in HOLMES, *supra*, at 53 (lowering wages and taking up needed housing). Some of the animosity was undoubtedly tempered either by genuine sympathy, GARTNER, *supra*, at 274, or by embarrassment at being perceived as racially prejudiced or as uncharitable to people fleeing violent persecution, GARRARD, note 131 *supra*, at 5–10, 203–09; JONES, *supra*, at 72. Finally, as to the effect of large-scale black and Asian immigration to Britain, see EVANS, IMMIGRATION LAW 2 (2d ed. 1983); FOOT, *supra*, at 25–79; GAINER, *supra*, at 212; MOORE & WALLACE, note 130 *supra*, at 2–4, 26; Wood, in GRIFFITH (ed.), COLOURED IMMIGRANTS IN BRITAIN, at 3, 219–25 (1960).

[163] The correlation is not perfect, since political factors other than high volume can spur litigation. See, *e.g.*, the McCarthy era cases, notes 181–89 *infra* and accompanying text, and the Iranian cases, notes 203–12 *infra* and accompanying text.

[164] See notes 166–73 *infra* and accompanying text.

[165] See, *e.g.*, VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 19 (1932).

Further, the precedents established in those cases constrain the courts even during future periods of relative quiet.

These factors may help to explain both the creation and the preservation of the plenary power doctrine. Chinese immigrants began arriving in California in earnest around 1850, when labor was in short supply. By 1869, however, the labor market had become glutted and the presence of the Chinese unwelcome.[166] The migration continued, and anti-Chinese prejudice intensified.[167] In 1882, responding to nativist sentiment, Congress passed the Chinese Exclusion Act, the first statute restricting entry on racial grounds.[168]

During the 1880s, a new wave of immigrants started coming to California from Japan.[169] The Japanese immigrants became the main target of anti-Asian prejudice,[170] and were sometimes lumped together with the Chinese in propaganda that warned of the "Yellow Peril."[171] Much of that hostility found expression in the anti-Japanese resolutions of several state legislatures, the debates on which contained some of the most vicious anti-Japanese rhetoric of the period.[172] In 1924, Congress reacted by prohibiting the entry of all Japanese immigrants.[173]

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[166] See CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 3–4 (1976). The completion of the transcontinental railroad in 1869 enabled more American workers to come to California at a time when the post–Civil War depression had already reduced the need for labor. *Id.*

[167] *Id.* at 4, 7–9; CURRAN, note 161 *supra*, at 78–90; Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 62–63 (1947); HANDLIN, IMMIGRATION AS A FACTOR IN AMERICAN HISTORY 167 (1959); 1 KONVITZ, note 3 *supra*, at 11–12; Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, 45 LAW & CONTEMP. PROB. (No. 2) 137, 153 (1982); TUNG, THE CHINESE IN AMERICA 1820–1973, at 1–2, 8 *et seq.* (1974). For a contemporary account of the anti-Chinese feeling, see COOLIDGE, CHINESE IMMIGRATION (1909).

[168] Act of Aug. 3, 1882, 22 Stat. 214. See CHUMAN, note 166 *supra*, at 7–8; Abrams, *American Immigration Policy: How Strait the Gate?* 45 LAW & CONTEMP. PROB. (No. 2) 107, 108 (1983).

[169] CHUMAN, note 166 *supra*, at 11.

[170] *Id.* at 11, 15–19; CURRAN, note 161 *supra*, at 91–92; Ferguson, note 167 *supra*, at 63–73; HANDLIN, note 167 *supra*, at 167; HERMAN, THE JAPANESE IN AMERICA 1843–1973, at 6 *et seq.* (1974); Huizinga, *Alien Land Laws: Constitutional Limitations on State Power to Regulate*, 32 HASTINGS L.J. 251, 252–53 (1980); KONVITZ, note 3 *supra*, at 22, 157–58; McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 13–14 (1947).

[171] CHUMAN, note 166 *supra*, at 73–77.

[172] *Id.* at 19, 42.

[173] The Act of May 26, 1924, 43 Stat. 153, § 13(c), excluded all aliens "ineligible to citizenship." The Supreme Court had held in Ozawa v. United States, 260 U.S. 178 (1922), that the Japanese were ineligible for citizenship.

It was during this era of public hostility to Asians that the Supreme Court adopted and solidified the plenary power doctrine.[174] In many cases, the Asian ancestry of the particular aliens prompted judicial tirades about their negative influences. Justice Field, a presidential hopeful who had been instrumental in persuading Congress to restrict Chinese immigration,[175] was one of the central figures in this drama. In *Chew Heong v. United States*,[176] he dissented from a statutory interpretation that he considered too liberal. In an opinion that can fully be appreciated only when read in its entirety, Justice Field launched a vitriolic attack on the Chinese as a race and delivered an explicit appeal to the will of the people. Five years later, it was Justice Field who authored the majority opinion in the *Chinese Exclusion Case*, where the Court first recognized an inherent, nonenumerated, Congressional power to exclude aliens.[177]

But Justice Field was not alone in his denunciations of the Chinese. Justice Bradley wrote in 1884 that "Chinese of the lower classes have little respect for the solemnity of an oath."[178] Even Justice Brewer, who dissented when the Supreme Court extended the plenary power doctrine from exclusion to deportation, conceded that the challenged statute had been "directed only at the obnoxious Chinese," who were a "distasteful class."[179] His fear was that the precedent would affect other ethnic groups in the future.[180]

The Supreme Court decisions of the early 1950s breathed new vigor into the plenary power doctrine. This was the period in which the national preoccupation with Communism was at its peak.[181] The aliens in most of those cases had been charged with

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[174] The principal building blocks were Chae Chan Ping v. United States [The Chinese Exclusion Case], 130 U.S. 581 (1889); Ekiu v. United States, 142 U.S. 651 (1892); and Fong Yue Ting v. United States, 149 U.S. 698 (1893). See also Lee Lung v. Patterson, 186 U.S. 168 (1902); Chin Ying v. United States, 186 U.S. 202 (1902); Chin Bak Kan v. United States, 186 U.S. 193 (1902); Li Sing v. United States, 180 U.S. 486 (1901); Fok Yong Yo v. United States, 185 U.S. 296 (1902); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

[175] KONVITZ, note 3 *supra*, at 10–11 n.29.

[176] 112 U.S. 536, 560–78 (1884).

[177] 130 U.S. 581 (1889). See notes 91–92 *supra* and accompanying text.

[178] Chew Heong v. United States, 112 U.S. 536, 579 (1884) (Bradley, J., dissenting).

[179] Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893). In fairness to Justice Field, it should be noted that he, too, balked at extending the plenary power doctrine from exclusion to deportation. *Id.* at 744–61.

[180] *Id.* at 743.

[181] See generally KONVITZ, EXPANDING LIBERTIES 120–21 (1966). For a summary of the anti-Communist legislation enacted during that period, see *id.* at 134–42. Konvitz also

possessing various ties to the Communist party, and the results, not surprisingly, were extreme.[182]

Apart from the anti-Communist political forces relevant to those cases specifically involving alien Communists, there prevailed during that period a more general public hostility toward aliens.[183] This hostility became apparent after the Second World War,[184] and might simply have been part of the traditional anti-alien backlash accompanying a major war.[185] The hostility might have flowed also from a publicly perceived association of aliens with subversive causes, and from the traditional public refusal to tolerate in aliens the same degree of political radicalism tolerated in the native born.[186] And some part of the anti-alien atmosphere might have been due to racial fears, as evidenced by the statements offered to support the national origins quota system embodied in the Immigration and Nationality Act of 1952.[187]

The combined effect of these anti-Communist and anti-alien forces was to create an atmosphere conducive to the retention of strict Congressional and Presidential control over aliens, and thus the preservation of the plenary power doctrine. The anti-Communist instincts expressed in *Harisiades* have already been quoted.[188] It was probably to be expected that in *Galvan v. Press*,[189] decided in 1954, the Court would at the very least decline to overrule a principle as deeply entrenched as the plenary power doctrine by then had become, even if the Court had otherwise been inclined to intervene.

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argues, *id.* at 122, that political forces affected the Supreme Court's decision in Dennis v. United States, 341 U.S. 494 (1951).

[182] *E.g.*, Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); *cf.* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (alien excluded as security risk, plenary power doctrine bars review); Jay v Boyd, 351 U.S. 345 (1956) (deportation of alien Communist, but plenary power doctrine not at issue).

[183] KONVITZ, note 31 *supra*, at 123–26 (1953).

[184] *Id.* at 123.

[185] See HIGHAM, STRANGERS IN THE LAND 194–233 (2d ed. 1963); Seller, note 167 *supra*, at 150–51.

[186] KONVITZ, note 31 *supra*, at 122; see also Reimers, *Recent Immigration Policy: An Analysis*, in CHISWICK (ed.), THE GATEWAY: U.S. IMMIGRATION ISSUES AND POLICIES 28 (1982).

[187] Act of June 27, 1952, Pub. L. 82–414, 66 Stat. 163. See Reimers, note 186 *supra*, at 25–27.

[188] See notes 108–12 *supra* and accompanying text.

[189] 347 U.S. 522 (1954). See notes 157–58 *supra* and accompanying text.

From the 1960s on, the Supreme Court has only infrequently addressed constitutional challenges to immigration legislation, probably because the plenary power doctrine has left little room in which to litigate such issues. But on those few occasions when the Supreme Court did discuss the previous plenary power doctrine cases, the Court consistently reaffirmed it.[190] This judicial conservatism in this subarea of immigration law cannot be attributed to a general conservatism in society. During much of that period—specifically the early to mid-1960s—political liberalism flourished on many important issues. There evolved a new appreciation both for civil rights in general and for equal economic opportunities in particular. The Civil Rights Act became law in 1964.[191] The contrast invites an inquiry into why the plenary power doctrine has been allowed to survive.

Part of the explanation lies undoubtedly in the enormous force, illustrated by *Galvan v. Press*, of almost a century of precedent. As discussed earlier, the Court's perception of its role includes great emphasis on the desirability of following such well established precedent. As also noted earlier, the Court has perceived a general connection between immigration and foreign policy, and that has narrowed its role perception further. In addition, for those judges whose substantive attitudes toward immigration are conservative already, attitude reinforces role perception in this context. Finally, in at least two of the modern cases, special considerations might have influenced the outcome.[192] One possible explanation, therefore, is simply that these factors have prevailed over the general liberalism dominating some of this time period.

It is submitted, however, that other important forces have interacted with those factors. Chief among them is that, as the previous discussion has shown, immigrants have been consistently unpopular, at least during this century. That is not to say that the

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[190] *E.g.*, Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); Boutilier v. INS, 387 U.S. 118 (1967). But *cf.* I.N.S. v. Chadha, 103 S. Ct. 2764 (1983), discussed in notes 226–43 *infra* and accompanying text.

[191] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

[192] In Boutilier v. INS, 387 U.S. 118 (1967), the charge against the alien was homosexual conduct, which, despite the liberalism of the 1960s, had still not attained public acceptance. In Kleindienst v. Mandel, 408 U.S. 753 (1972), the exclusion order was based on the alien's radical political views; the case might be, in part, an example of society's unwillingness to accept in aliens the same level of political unorthodoxy it will accept in citizens. See note 186 *supra* and accompanying text.

general public has always favored restricting the prevailing immigration policy, for there have certainly been periods in which immigration has been encouraged as economically beneficial.[193] But the immigrants themselves, although tolerated during such periods, have never been popular as a group, as the history of prejudice toward one wave of immigrants after another, discussed earlier, reveals.[194] The liberalism of the 1960s had its limits. When challenges to Congressional or Presidential control over immigration arose, it was inevitable that those limits would be tested.

During this time period, the general unpopularity of immigrants has been exacerbated by public reaction to Mexican immigrants in particular. As early as the 1930s, although the numbers of Mexican immigrants to the United States remained low,[195] prejudice and discrimination were common.[196] Today, now that Mexico is by far the single largest source of annual immigration,[197] prejudice toward both Mexican aliens and even American citizens of Mexican ancestry has become rampant.[198]

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[193] *E.g.*, the American colonists encouraged immigration. BENTLEY, note 161 *supra*, at 14; CHUMAN, note 166 *supra*, at 53; CURRAN, note 161 *supra*, at 11; KONVITZ, note 3 *supra*, at 1; PROPER, note 139 *supra*, ch. 2; VAN VLECK, note 165 *supra*, at 3; Seller, note 167 *supra*, at 140–41; Hoyt, *Naturalization under the American Colonies: Signs of a New Community*, 67 POL. SCI. Q. 248, 262 (1952); Risch, *Encouragement of Immigration as Revealed in Colonial Legislation*, 45 VA. MAGAZINE 1, 9 (1937); see also The Passenger Cases, 48 U.S. (7 How.) 283, 401 (1849) (McLean, J.). In the 1850s, Chinese immigrants were needed in California to work in the orchards, on farms, in mines, in transportation, and in manufacturing. CHUMAN, note 166 *supra*, at 3–4. During the Second World War, Mexican braceros were imported to build railroads and to work in the fields. BENTLEY, note 161 *supra*, at 37.

[194] The 1965 amendments that finally abolished the national origins quota systems were consistent with the public desire to eliminate racial discrimination. Even at that time, however, the public opinion polls showed that the majority did not want more immigrants. See Reimers, note 186 *supra*, at 33.

[195] MORRIS & MAYIO, CURBING ILLEGAL IMMIGRATION 6 (1982).

[196] See CORTES (ed.), THE MEXICAN AMERICAN AND THE LAW (1974). For a detailed account of one major governmental effort to apprehend and deport illegal aliens from Mexico, see GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980), esp. at 143–44 (public associated "wetbacks" with crime, poverty, and disease).

[197] See BENTLEY, note 161 *supra*, at 38.

[198] *Id.* at 40–42 (in Southwest); Bronfenbrenner, *Hyphenated Americans—Economic Aspects*, 45 LAW & CONTEMP. PROB. (No. 2) 9, 25 (1983); Martin & Houstoun, *European and American Immigration Policies*, 45 LAW & CONTEMP. PROB. (No. 2) 29, 44 (1983); Nafziger, *An Immigration Policy of Helping Bring People to the Resources*, 8 DENVER J. INT'L L. & POLICY 607 (1979); SAMORA, LOS MOJADOS: THE WETBACK STORY 98–105 (1971) (exploitation of illegal Mexican entrants); Smith, note 138 *supra*, at 3; see also Study, *Consular Discretion in the Immigrant Visa-issuing Process*, 16 SAN DIEGO L. REV. 87, 142 & n.366 (1978).

Further tarnishing the public image of aliens is the dramatic scale of illegal immigration. Accurate estimates of the illegal alien population have not yet been obtained, but there is no doubt that the figure is in the millions.[199] About two-thirds of the illegal entrants are believed to be Mexicans.[200] For various reasons, illegal alien workers can be and often are employed at substandard pay and under substandard conditions.[201] This phenomenon breeds resentment in American workers, who perceive, rightly or wrongly, that illegal aliens are thereby aggravating the unemployment rate and depressing the wages and working conditions of American laborers.[202] Moreover, even apart from economic concerns, these mass violations of federal law evoke law enforcement values the breach of which further damages the public image of aliens.

Although the recent batch of plenary power doctrine cases decided by the Supreme Court has not involved Mexican litigants, there are ways in which the public reaction to Mexican immigration might have contributed indirectly to those results. First, a large influx of aliens from any one country can create a general climate unfavorable to immigrants, as can be seen from the earlier discussion. This climate can induce judicial conservatism either because a judge's personal attitude might itself be shaped by public opinion or because a judge might perceive his or her role as requiring the consultation of public opinion before making law. Moreover, to the extent that either attitude or contemporary political forces are considered, the emphasis at the Supreme Court level on precedential

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[199] Abrams, note 168 *supra*, at 112–13; Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34, 34–35 (1975); Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States 1970–1981*, 45 LAW & CONTEMP. PROB. (No. 2) 223 (1983); Fogel, note 138 *supra*, at 72; HALSELL, THE ILLEGALS 4 (1978); Manulkin & Maghame, note 138 *supra*, at 43–45; MORRIS & MAYIO, note 195 *supra*, at 1; Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUSTON L. REV. 863, 866 (1976); Schuck, note 68 *supra*, at 41–42; SCIRP, note 138 *supra*, at 37; Smith, note 138 *supra*, at 3. Studies of the total numbers of illegal aliens and the numbers of Mexican illegal aliens have been criticized as sloppy. Bustamante, *Immigrant from Mexico: The Silent Invasion Issue*, in BRYCE-LAPORTE (ed.), SOURCEBOOK ON THE NEW IMMIGRATION 139–44 (1980).

[200] MORRIS & MAYIO, note 195 *supra*, at 4.

[201] See, *e.g.*, BENTLEY, note 161 *supra*, at 152–55; Fogel, note 138 *supra*, at 66; SAMORA, note 198 *supra*, at 98–105.

[202] *Bentley*, note 161 *supra*, at 152–55; Salinas & Torres, note 199 *supra*, at 864; see also Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 ORE. L. REV. 63, 69–72 (1977) (arguing that undocumented Mexican aliens cause only minimal displacement of American workers).

effect vis-à-vis consequences to the individual parties would be expected to render insignificant the nationality of the particular alien litigant.

In some cases, however, the nationality of the particular alien has legal relevance. The most striking examples are the lower court decisions involving Iranian students. Those decisions reflect a strong and unwavering progovernment tilt.[203] Especially instructive is *Yassini v. Crosland*.[204] During the Iranian hostage crisis, President Carter ordered the Attorney General to summon all Iranian students to INS offices for inspection, and to identify and deport any Iranian students who were violating the immigration laws.[205] The INS,[206] purporting to implément the Presidential Order, issued a directive revoking the permission previously granted to all Iranian nationals to remain in the United States until a specified date.[207] One of the alien's arguments in *Yassini* was based on *Hampton v. Mow Sun Wong*, where the Supreme Court had laid down an important principle:[208]

> When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, . . . [or] if the rule were *expressly mandated* by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.

Since the INS and the Justice Department have no direct responsibility for making foreign policy, the question would seem to be

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[203] In addition to the cases cited in notes 204, 211 *infra*, see Shoaee v. I.N.S., 704 F.2d 1079 (9th Cir. 1983); Torabpour v. I.N.S., 694 F.2d 1119 (8th Cir. 1982); Ghorbani v. I.N.S., 686 F.2d 784 (9th Cir. 1982); Shoja v. I.N.S., 679 F.2d 447 (5th Cir. 1982); Akhbari v. U.S.I.N.S., 678 F.2d 575 (5th Cir. 1982); Ghajar v. I.N.S., 652 F.2d 1347 (9th Cir. 1981). But *cf.* Mashi v. I.N.S., 585 F.2d 1309 (5th Cir. 1978) (before seizure of hostages).

[204] 618 F.2d 1356 (9th Cir. 1980).

[205] 15 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 2107 (1979).

[206] The Attorney General's powers to implement the immigration laws, including the power to issue regulations, have been delegated to the Commissioner of the INS. See 8 C.F.R. § 2.1 (1984).

[207] See *Yassini*, 618 F.2d at 1359.

[208] 426 U.S. 88, 103 (1976). See Comment, *Federal Civil Service Employment: Resident Aliens Need Not Apply*, 15 SAN DIEGO L. REV. 171 (1977).

whether the INS directive was expressly mandated by either the Immigration and Nationality Act or the Presidential Order. Rather than address that question, the Court in *Yassini* disposed of the due process argument by concluding that the INS directive was "within the scope" of the Presidential Order.[209] But there is a vast difference between an agency action that is "expressly mandated" by Presidential order and one that is merely "within the scope" of it. If a rational agency action is expressly mandated by the President, then, as *Mow Sun Wong* concedes, the action is valid.[210] To uphold a directive assertedly justified only by an interest that the agency has no responsibility for fostering, however, runs precisely counter to the philosophy and the result of *Mow Sun Wong*. Nothing in the Presidential Order expressly, or for that matter even implicitly, mandated the termination of permission previously granted Iranian nationals to remain in the United States. The directive simply reflected the judgment of the INS that this sanction would help to resolve the Iranian crisis. Thus the practical effect of the Court's holding is to expand the plenary power doctrine, extreme already when used to insulate Congressional action from meaningful constitutional review, to cover INS action in particular. Other circuits have had similarly little difficulty in sustaining the constitutionality of INS regulations selectively disadvantaging Iranian nationals in ways not mandated by Congress or the President.[211]

When it is considered that contrary dispositions were available in those cases, that in *Yassini* a contrary conclusion on the constitutional issue seemed dictated by *Mow Sun Wong*, and that the panel in *Yassini* was composed of three judges ordinarily regarded as quite liberal,[212] the results might seem surprising. The surprise disappears when the depth of the public outcry against Iran following the seizure and continued detention of the American hostages is recalled. The courts might well have believed it unthinkable to flout so intense a public mood by striking down a retaliatory action of the executive branch.

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[209] 618 F.2d at 1362.

[210] That was the case in Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1980), where the INS had simply executed a foreign policy decision of the President.

[211] *E.g.*, Nademi v. I.N.S., 679 F.2d 811, 814 (10th Cir. 1982); Malek-Marzban v. I.N.S., 653 F.2d 113, 116 (4th Cir. 1981).

[212] The panel in *Yassini* consisted of Judges Tuttle, Tang, and Hug.

III. THE PRACTICE

The lower court opinions frequently reflect a tone consistent with that of the Supreme Court's plenary power decisions. Even apart from the Iranian cases discussed earlier,[213] numerous lower courts have virtually declined to review Congressional immigration Acts for compliance with substantive constitutional constraints.[214]

At the same time, however, a number of courts are beginning to show signs of extreme disquiet. Faced with constitutional challenges to harsh legislation, courts uneasy over the concept of plenary Congressional power have begun doing what courts typically do when hemmed in by unacceptable doctrine. They strain to find means of escape. When the only exits seem blocked by logical barriers, the movement can be slowed. But eventually, if the doctrine is intolerable, even artificial detours prevail over the alternative of submission.

On the question of plenary Congressional power over immigration, the beginnings of that process are now visible. At first, the phenomenon was largely confined to rhetoric. Some courts assumed the power to invalidate federal immigration statutes that draw irrational distinctions, only to find the particular legislation rational.[215] But recently the results have begun to match the rhetoric. Two district court decisions have held deportation provisions unconstitutional as applied to the particular facts, though both were ultimately reversed on appeal.[216] Other decisions, discussed below, still stand. They reveal at least three distinct devices by which courts anxious to palliate the rigors of the plenary power doctrine have occasionally succeeded.

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[213] See notes 203–12 *supra* and accompanying text.

[214] *E.g.*, Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982); Pierre v. INS, 547 F.2d 1281, 1289–90 (5th Cir. 1977); Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y.), *aff'd*, 449 F.2d 1305 (2d Cir. 1971); *cf.* Knoetze v. United States, 634 F.2d 207, 211–12 (5th Cir. 1981) (alien has no due process rights when visa revoked, even if after entry). For an especially extreme decision, see Jean v. Nelson, 727 F.2d 957, 963 (11th Cir. 1984) (*en banc*) (Attorney General may discriminate on basis of national origin when detaining excluded aliens), *cert. granted*, 105 S.Ct. 563.

[215] *E.g.*, United States v. Barajas-Guillen, 632 F.2d 749, 752–54 (9th Cir. 1980); Menezes v. INS, 601 F.2d 1028, 1034 (9th Cir. 1979); Castillo-Felix v. INS, 601 F.2d 459, 467 (9th Cir. 1979); Alvarez v. District Director, 539 F.2d 1220, 1224 (9th Cir. 1976); Noel v. Chapman, 508 F.2d 1023, 1028–29 (2d Cir. 1975).

[216] Acosta v. Gaffney, 413 F. Supp. 827 (D.N.J. 1976), *rev'd* 558 F.2d 1153 (3d Cir. 1977); Lieggi v. USINS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd in unrep'd decision*, see 529 F.2d 530 (7th Cir. 1976). The Third Circuit decision in *Acosta* accords with Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972).

One technique has been to draw distinctions between distinctions. A classic illustration is provided by the Second Circuit decision in *Francis v. I.N.S.*[217] A deportable alien applied for discretionary relief. The applicable provision had been interpreted to require, *inter alia*, that the alien has departed from and returned to the United States.[218] The alien, who had remained in the United States, argued that it would be irrational, and thus violative of equal protection, to treat him less favorably than an alien who had left and returned but who was otherwise similarly situated.

The court acknowledged the Congressional power "to create different standards of admission and deportation *for different groups* of aliens."[219] It then said: "However, once those choices are made, individuals *within a particular group* may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest."[220] Finding no rational basis for the challenged distinction, the court held the provision unconstitutional as applied. Variants of this reasoning have been employed in other modern opinions.[221]

The technique adopted in *Francis* has one fatal flaw: it proves too much. Any classification contained in an immigration statute could be characterized either as a distinction between groups or as a

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[217] 532 F.2d 268 (2d Cir. 1976).

[218] Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c). The alien became deportable upon being convicted of possession of marijuana. *Id.* § 241(a)(11), 8 U.S.C. § 1251 (a)(11).

[219] 532 F.2d at 273 (emphasis added). It added a footnote conceding that "the validity of distinctions drawn by Congress with respect to deportability is not a proper subject for judicial concern." *Id.* at 273 n.8, quoting Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975); Bronsztejn v. INS, 526 F.2d 1290, 1291 (2d Cir. 1975).

[220] 532 F.2d at 273 (emphasis added).

[221] In Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981), the Ninth Circuit followed *Francis*. Explaining its selection of the standard of review, the court said: "Like the Second Circuit, this court applies the rational basis test to federal immigration statutes distinguishing *among groups of aliens*." *Id.* at 225 (emphasis added). The court's emphasis on distinctions among groups was precisely the opposite of the *Francis* court's emphasis on distinctions between individuals within a group. In Alvarez v. District Director, 539 F.2d 1220 (9th Cir. 1976), the court distinguished between governmental action treating aliens "as a class" and governmental action drawing classifications "among aliens." *Id.* at 1224 n.3. It suggested in dictum that the former triggered strict scrutiny; in support, the court erroneously cited cases applying strict scrutiny to state statutes discriminating against aliens. *Id.* For classifications among aliens, the court assumed that the rational basis test applied. The court did not consider the applicability of the plenary power doctrine to either type of classification. *Cf.* Menezes v. INS, 601 F.2d 1028, 1034 (9th Cir. 1979) ("discrimination *within* the class of aliens—allowing benefits to some aliens but not to others" requires rational basis), quoting partly from Mathews v. Diaz, 426 U.S. 67, 80, 81–83 (1976).

distinction within a group, as the court sees fit. Everything turns on how the particular group is defined. In *Francis*, for example, the court implicitly treated those aliens who satisfied all the statutory criteria other than the leave-and-return requirement as a single group. It was therefore able to read the statute as distinguishing, within that group, between the individual who has left and returned and the individual who has remained in the country. If anything, however, it would seem at least as intuitive to define the group as consisting of those people who meet all the statutory requirements, including the leave-and-return element. If the group were so defined, the statute would be one that provides different standards for different groups—discretionary relief for those who satisfy all the statutory elements and no discretionary relief for those who do not. So characterized, the statute would not be reviewable for rationality under the court's formulation.[222]

To carry this analysis one step further, the reasoning adopted in *Francis* is fundamentally inconsistent with the actual results of the Supreme Court's plenary power decisions. In *Fiallo*, for example, analogous reasoning would have enabled the Court to say that Congress validly provided special benefits to children of American citizens, but that, having chosen to do so, Congress could not then distinguish between legitimate and illegitimate children within that group unless the distinction was rationally related to a permissible Congressional objective. Similar reasoning could have been applied to any other plenary power decision upholding a statutory classification. The distinction between distinctions would either swallow the plenary power doctrine entirely or give the courts an unfettered discretion whether to invoke it. Distinctions between groups and systematic distinctions between individuals within a group are in fact one and the same.

A second device for avoiding the harshness of the plenary power doctrine is to create an exception, thus far limited to aliens facing deportation, and possibly to returning resident aliens facing exclusion, for procedural due process.[223] This technique, too, has its share of problems. As others have shown, it is an exception that the Supreme Court has displayed little consistency in recognizing.[224]

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[222] See note 219 *supra*.

[223] See notes 23–26 *supra*.

[224] See, *e.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387–96 (1953); Scharpf, note 29 *supra*, at 578–81

Apart from the problem of inconsistency, why should such fundamental constitutional liberties as the First Amendment freedoms and equal protection receive less judicial supervision than procedural due process? The logic of the opinions suggests that Congress could constitutionally enact legislation deporting all black aliens, but only if each alien is given a predeportation hearing at which there is an opportunity to prove he or she is in fact white.[225] This is not the place for an exegesis on the function of process in relation to either justice or the appearance of justice. It is enough to observe that the important individual interests that are frequently at stake in immigration cases, and that have induced the Supreme Court at least sporadically to recognize procedural due process, are present also in those cases where substantive constitutional defects are alleged. The substantive/procedural dichotomy is thus objectionable not only because of the inconsistency with which it has been applied, but also because the limitation to procedural due process leaves too wide an area unguarded.

A third technique for avoiding the principle of judicial noninterference with immigration statutes is to acknowledge the plenary nature of the Congressional power, but to proceed as if the word "plenary" were meaningless. This strategy was adopted by the Supreme Court in *I.N.S. v. Chadha*,[226] a decision that requires close examination.

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n.218. Several lower courts have been assertive in addressing procedural due process challenges, particularly in the asylum context. See generally Martin, note 28 *supra*, at 168–71; Note, *Filling the Immigration Void: Rodriguez-Fernandez v. Wilkinson—an Excludable Alien's Right to be Free from Indeterminate Detention*, 31 CATH. L. REV. 335 (1982); Note, *United States Asylum Procedures: Current Status and Proposals for Reform*, 14 CORNELL INT'L L.J. 405 (1981); Note, *The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees*, 70 GEO. L.J. 1303 (1982); see also Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984). Outside the specific context of asylum, see generally Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130 (1976); Aleinikoff, note 28 *supra*; Schuck, note 68 *supra*, at 66–68; *cf.* Gardner, *Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine*, 8 HASTINGS CONST. L.Q. 397 (1981) (advocating safeguards applicable in criminal proceedings).

[225] I do not suggest that Congress would contemplate such a statute today. Rather, this extreme example is offered to illustrate the arbitrariness of allowing review for procedural due process while denying review for compliance with substantive constitutional guarantees. It might be objected that the Supreme Court would surely find some way to strike down such a statute in the unlikely event it were ever enacted, but the older cases used the plenary power doctrine to uphold statutes explicitly discriminating on the basis of race, and the modern Supreme Court decisions continue to cite those cases approvingly. See, *e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765–66, 766 n.6 (1972). The Court might indeed fashion an escape route from the plenary power doctrine if a statute as extreme as the one hypothesized were ever enacted, but to do so would spell the end of the plenary power doctrine as we know it.

[226] 103 S.Ct. 2764 (1983).

The Immigration and Nationality Act gives the Attorney General the discretion to suspend the deportation of an otherwise deportable alien who meets several statutory prerequisites.[227] The statute further provides, however, that either house of Congress may nullify the suspension by passing a resolution to that effect.[228] An alien whose grant of suspension had been disapproved by the House of Representatives argued that the "legislative veto"[229] was unconstitutional. The Court ultimately agreed. It reasoned that the power the statute purported to confer on the House was "legislative" in character, and that, under the constitutional scheme for preserving separation of powers, a legislative power may be exercised only upon a vote of both houses of Congress, followed by either a Presidential signature or a Congressional override of a Presidential veto.[230]

But how could the Court reach the merits at all? The House action was valid unless the immigration statute that expressly purported to authorize it was unconstitutional. In the light of the "plenary" Congressional power to regulate immigration, how was it that the constitutionality of the statute could even be reviewed? The House of Representatives argued that the case presented a nonjusticiable political question because the statutory provision was an exercise of the Congressional power to "establish an uniform Rule of Naturalization."[231] The Court responded: "The plenary authority of Congress over aliens under [the naturalization clause] is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."[232] It then reviewed the various prongs of the political question doctrine collected in *Baker v. Carr*[233] and, concluding that none applied to the present case, found the constitutional question justiciable. Although the same reasoning could as easily have been invoked in the plenary power cases,[234] the Court

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[227] See Immigration & Nationality Act § 244(a), 8 U.S.C. § 1254(a).

[228] *Id.* § 244(c), 8 U.S.C. § 1254(c).

[229] See 103 S.Ct. at 2771 n.2.

[230] 103 S.Ct. at 2780–88, relying on U.S. Const. art. I, §§ 1, 7.

[231] U.S. Const. art. I, § 8, cl. 4. See 103 S.Ct. at 2778–79.

[232] 103 S.Ct. at 2779.

[233] 369 U.S. 186 (1962).

[234] See Sec. IA *supra*.

made no attempt to reconcile its decision with those cases, not one of which was cited in the opinion.

One writer cautions against reading undue significance into *Chadha*. He points out that the Court was preoccupied with the broad constitutional questions concerning legislative vetoes and, further, that in any case the Court reaffirmed the "plenary authority of Congress over aliens."[235]

As to the first point, it is undoubtedly true that the Court's overriding concern was with the validity of legislative vetoes in general, not with this particular provision of the Immigration and Nationality Act. In the past fifty years, 295 legislative veto provisions, cutting across numerous boundaries,[236] have been enacted by Congress.[237] All are potentially endangered by the decision in *Chadha*.[238] Under these circumstances, it would indeed be shortsighted to think that the Court's primary concern in *Chadha* was with immigration law.

At the same time, the Court's avoidance of the plenary power doctrine could not have been inadvertent. In one of its briefs, the House of Representatives spent twelve pages arguing that the Court should invoke the doctrine in this case.[239] During the course of that discussion, the House brief cited practically every major plenary power decision. Particular attention was focused on the distinction between inherent sovereign powers, which the brief faulted the lower court for failing to consider, and enumerated powers, such as the commerce clause and the naturalization clause, on which the lower court had assumed the statute rested.[240] The distinction is important because, as discussed earlier, the Supreme Court has frequently cited the sovereignty theory to support its limited view of the judicial role. Yet, as revealed in the excerpt quoted above, the Supreme Court disregarded the House argument

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[235] Schuck, note 68 *supra*, at 59 n.319.

[236] Objections to the broad sweep of the Court's holding are voiced in Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789.

[237] Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L. REV. 323, 324 (1977).

[238] Justice Powell would have avoided that result by limiting the holding to the case in which the decision being vetoed was "judicial" in character. See 103 S.Ct. at 2788–92.

[239] See No. 80–1832, Second Supplemental Brief of House of Representatives, at 10–22.

[240] *Id.* at 13–16.

and assumed that the statute rested solely on an enumerated power, the naturalization clause. In doing so, it omitted reference to any of the plenary power cases cited in the brief.

Consequently, it seems clear that the Court made a conscious decision not to apply the plenary power doctrine. Given the enormity of its impact across a broad spectrum of governmental activity, the decision might still be dismissed as one in which the Court simply subordinated its continued belief in the wisdom of the plenary power doctrine to its belief that legislative veto provisions are invalid. Under that scenario, the *Chadha* decision is not compelling evidence of an emerging new Supreme Court philosophy on constitutional review in immigration cases. But it does establish one more obstacle to the perpetuation of the plenary power doctrine. It will no longer be possible for the Court, without ignoring *Chadha*, to dismiss an alien's constitutional attack simply by labeling the Congressional power "plenary." It will have to distinguish *Chadha*, though, as will be seen, distinctions are possible.

As to the second point—that the Court did reaffirm the plenary nature of the Congressional authority over immigration—the response is more direct. In the same sentence in which the Court described the power as "plenary," it framed the issue as whether Congress's exercise of that power conforms with the Constitution. Further, the Court ultimately invalidated the exercise of this admittedly plenary power. In the light of the Court's actions, it is not clear what, if anything, the word "plenary" actually adds.[241]

The above discussion suggests that *Chadha* will speed the demise of the plenary power doctrine because the device by which the Court escaped the doctrine could logically be invoked in *any* case addressing the constitutionality of immigration legislation. It is further possible, though for the reasons given earlier unlikely, that *Chadha* is more than simply a precedent that will make continuation of the plenary power doctrine more difficult. It might additionally reflect the Court's independent desire to soften the principle of plenary Congressional power over immigration. Support for that possibility can be found in the patterns of the Court's previous

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[241] Even before *Chadha*, courts had frequently described particular powers as "plenary," only to hold that the exercise of those plenary powers may nonetheless be reviewed for compliance with affirmative constitutional guarantees. In addition to the cases cited in *Chadha*, 103 S.Ct. at 2779, see Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83–84 (1977); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361, 382 (1942).

rhetoric. As observed earlier, the language in which the plenary power doctrine is couched has become progressively less absolute.[242] Whatever meaning the Court in *Chadha* implicitly assigned to the word "plenary" is necessarily in keeping with that trend.

At the risk of jeopardizing the continued demise of the plenary power doctrine, I hasten to add that there will be ways of reconciling *Chadha* with the other plenary power cases if future courts are sufficiently determined to preserve the latter. One possibility is simply to distinguish *Chadha* as a procedural case. The argument would be that the Court's only constitutional objection was to the procedure Congress had provided for disapproving a grant of suspension; Congress could constitutionally disapprove such a grant only pursuant to the legislative procedure prescribed by the Constitution. Once characterized as procedural, the decision could be analogized to the procedural due process cases. As discussed above,[243] those cases arguably suggest an exception to the principle of plenary Congressional power.

Alternatively, the *Chadha* holding that a political question was not presented might in the future be limited to constitutional challenges based on separation of powers. The plenary power doctrine is itself a principle by which the Court refrains from interfering with what it perceives to be the province of Congress. Thus, *Chadha* might be rationalized as a case in which the Court could have avoided such interference only at the cost of permitting Congress to invade the territory of the Executive. If so characterized, the *Chadha* rationale would be inapplicable to constitutional attacks based on individual rights.

IV. THE FUTURE

We have entered a new phase in the life of the plenary power doctrine. This stage is characterized by a judicial willingness, so far episodic, to cut away at the notion of plenary Congressional power over immigration. The assaults have come from several directions.

At the Supreme Court level, the most noticeable change has been in rhetoric. The progression from absolute statements of noninter-

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[242] See notes 11, 12 *supra*.

[243] See notes 23–26, 223–25 *supra* and accompanying text.

ference to hazier statements of relative deference has been steady.[244] In *Chadha*, despite its concession that Congress's power to regulate immigration is "plenary," the Court struck down a provision of the Immigration and Nationality Act without acknowledging the plenary power cases cited in the briefs.

But the most impressive inroads into the concept of plenary Congressional power have been made by the lower courts. Although it is too early to describe their activities as a full-scale rebellion, it is fair to say that discontent is spreading rapidly. Several circuits have translated the plenary power doctrine into a rational basis test.[245] Two of the most influential circuits in immigration matters—the Second and the Ninth[246]—have ultimately held immigration legislation unconstitutional, as applied to the facts of the cases.[247] Fictional distinctions have been drawn between statutes that distinguish within a group and those that distinguish between groups.[248] And much judicial activism has been reflected in those immigration cases raising issues of procedural due process.[249]

It is often difficult to separate prediction from prescription. But a number of conditions do seem to favor the continued expansion of these judicial devices for addressing constitutional claims on their merits. As Peter Schuck has shown, the past few years have witnessed a more general trend of bringing immigration closer to the mainstream of public law.[250] The liberalizations in constitutional review are an important part of this renaissance. Further, as shown in the first section of this article, the doctrinal theories advanced from time to time in support of plenary Congressional power over immigration are becoming increasingly difficult to defend. Finally, those lower courts that are persuaded by the policy arguments in

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[244] See notes 11, 12 *supra* and accompanying text.

[245] See, *e.g.*, Newton v. I.N.S., 736 F.2d 336, 339–43 (6th Cir. 1984); Tapia-Acuna v. I.N.S., 640 F.2d 223, 225 (9th Cir. 1981); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1980); Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976).

[246] During the twelve-month period ending June 30, 1983, more than 60 percent of the immigration cases filed in the federal courts of appeals were filed in the Ninth Circuit. ANN. RPT. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 101 (1983). The Second Circuit was next busiest. *Id.*

[247] See the discussions of *Francis* and *Tapia-Acuna*, notes 217–22 *supra* and accompanying text.

[248] See notes 217–22 *supra* and accompanying text.

[249] See notes 223–25 *supra* and accompanying text.

[250] Schuck, note 68 *supra*.

favor of constitutional review now have a Supreme Court decision on which they can rightly rely. The *Chadha* decision, whatever might have motivated it, not only reviewed on the merits but ultimately invalidated a federal statutory provision regulating the deportation of aliens.[251]

From the cases discussed in this article, the beginnings of familiar historical patterns can now be discerned. Courts faced with doctrine they consider unworkable create exceptions, some more artificial than others. The exceptions build until they threaten to swallow the rule. When the writing is on the wall, the courts take the final step of candidly overruling the original principle. The opinions typically describe the historical evolution of the rule, identify the exceptions, expose the analytical inadequacies of the exceptions, observe the inevitable direction of the tide, and conclude that the time has come to lay the general principle to rest.[252]

When that last point is reached in the present context, the plenary power doctrine will be frankly disavowed. Constitutional review of immigration legislation will enter another, perhaps final, stage. This next stage will be marked by a return to general principles of constitutional law. It will be unnecessary for courts to distinguish immigration statutes from other federal statutes.

Even then, critical questions will remain. Immigration cases, like any others, are certainly capable of raising political questions. As suggested earlier, general political question principles will have to be applied to individual fact situations as they arise. The application of those principles can be aided by considering certain factors of particular significance in immigration law.[253] And when an immigration case does present a justiciable constitutional issue, there will arise the question precisely what standard of review the general principles actually dictate—not an easy question in this context.[254]

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[251] Judges who reject the policy arguments for constitutional review of immigration legislation have arguable means of distinguishing *Chadha*. See note 243 *supra* and accompanying text.

[252] A classic illustration of this process is the doctrine that occupiers of property owe a lesser duty to licensees than they do to invitees. The opinions in several of the cases that have abolished the licensee/invitee distinction noted the historical origins of the traditional principle, the growing body of artificial exceptions, and the clear direction of the case law. See, *e.g.*, Kermarec v. Compagnie Générale Transatlantique, 358 U.S. 625, 629–32 (1959); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[253] See notes 37–39, 52–62 *supra* and accompanying text.

[254] Aliens are a politically powerless group in several respects. They cannot vote. See Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) (all states deny aliens the vote); ELY,

But constitutional review there will finally be. A finding that the subject matter concerns immigration will no longer end the inquiry.

V. CONCLUSION

For almost a century, the Supreme Court has treated immigration law as sui generis. It has bestowed upon Congress the untrammeled authority to make decisions concerning the admission and expulsion of aliens. So great has been the power of the word "immigration" that its mere mention has been enough to propel the Court into a cataleptic trance.

In the past, one of the greatest obstacles to reexamining the plenary power doctrine has been the "clean slate" philosophy articulated by Justice Frankfurter.[255] The precedent has simply become too deeply embedded. My aim has been to clean the slate.

Today there are indications of change. The trend has been to nudge immigration closer to the central currents of American constitutional law. The courts are becoming anxious to confine the application of the plenary power doctrine within some broadly defined boundaries. To accomplish this, courts dissatisfied with the

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DEMOCRACY AND DISTRUST 161 (1980). Aliens tend generally to be unpopular. At least certain subgroups of aliens are typically poorer than the general population. See Manulkin & Maghame, note 138 *supra*, at 45; Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 32–33 (1977). And other avenues of political input are blocked by aliens' relative lack of familiarity with such important national institutions as the legal system, language, and customs. See, *e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976); Wong Yang Sun v. McGrath, 339 U.S. 33, 46 (1950); Roberts, *supra*, at 33. This peculiar vulnerability underlies the Supreme Court decisions holding alienage to be a suspect classification for purposes of state equal protection claims. See the cases cited in note 6 *supra*. These considerations could be made the starting point for an argument that federal immigration statutes should be subjected to strict scrutiny. Aliens have no more political protection against federal action than they have against state action. Perhaps they have even less. See Schuck, note 68 *supra*, at 22–23. Further , such factors as immutability of status and history of discrimination also serve as indicia of suspectness, see, *e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973); see also San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 104–05 (1973) (Marshall, J., dissenting), and they seem no less applicable to federal action than to state action. The counterargument would be that, in the light of the federal powers to exclude and deport aliens, a federal immigration provision should not initially be presumed to have been directed at impermissible ends. The burden on one arguing for strict scrutiny of federal immigration statutes would be to demonstrate that on balance there is still sufficient reason to be suspicious of the federal motives. For an excellent discussion of this problem, see Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUPREME COURT REVIEW 275.

[255] See notes 157–58 *supra* and accompanying text.

governing principles have recently crafted a variety of techniques for circumventing them.

These ameliorative devices, while presenting some imposing logical difficulties, are likely to continue to proliferate. Eventually, the plenary power doctrine will become unable to support their weight. When the inevitable breaking point is reached, the Supreme Court will candidly admit that neither precedent nor policy warrants retaining this remarkable departure from the fundamental principle of constitutional review.