Fear and Loathing in Congress and the Courts: Immigration and Judicial Review

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Introduction

Immigration policy and judicial review have always had a kind of oil-and-water relationship. The most famous illustration of this uneasy mix has been the so-called plenary power doctrine, under which the Supreme Court has explicitly accorded Congress unusual deference in matters that affect the admission or expulsion of aliens. This doctrine, which has effectively insulated federal immigration statutes from constitutional review, has long fascinated academic commentators.¹

Yet the plenary power doctrine is not the only evidence, or even the only judicial evidence, of the tormented relationship between immigration and judicial review. The lower courts, for reasons that remain cryptic, have strained to interpret the Immigration and Nationality Act to encompass the doctrine of consular absolutism, which bars judicial review of consular officers’ decisions denying applications for visas.²

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² See infra subpart II(B).
But the most ferocious assault on judicial review of immigration
decisions was launched recently from Capitol Hill. In 1996, Congress
enacted a pair of statutes that, among other things, curtailed judicial review
in numerous ways. 3

As will be seen, each of these individual phenomena—the plenary
power doctrine, consular absolutism, and court-stripping legislation—has
been the subject of much scholarly commentary. Quite surprisingly, there
has been no explicit attempt to link these three major developments. Yet
they each reflect, and possibly reinforce, a clear though qualified pattern
of genuine discomfort—on the parts of both Congress and the judiciary—
with the notion of a significant judicial role in immigration matters. One
qualification to this pattern is the periodic judicial enthusiasm, outside the
context of visa denials, for interpreting statutory language favorably to
immigrants. 4 The other is the general judicial inclination to strike down
state legislation that classifies on the basis of alienage. 5

Part I of this Article summarizes these developments and, in the case
of the two judicial contexts, critiques the stated doctrinal explanations.
Part II explores why immigration regulation has bred such particularized
antagonism to judicial review. It considers some of the external factors
that operate on judges, the general unpopularity and political powerlessness
of immigrants, and some of the generic costs of judicial review. Part III
explains why, despite those costs, judicial review is at least as critical in
immigration cases as it is in any other legislative or administrative process.

I. Judicial Review and Immigration Exceptionalism

A. The Principle of Plenary Congressional Power

Within the realm of immigration law scholarship, probably no doctrine
has received more attention than the so-called “plenary power doctrine.” 6
Its precise contours remain vague, but the general notion is that Congress’s
power to regulate immigration is “plenary.” Consequently, when someone
challenges the constitutionality of an immigration statute, the courts accord
Congress unusually great deference, at or approaching nonreviewability. 7

The doctrine can be visualized in either of two ways: (1) the statute
is upheld on the merits because the substantive power of Congress is so
great that the statute is assumed to be constitutional; or (2) the courts have

3. See infra subpart II(C).
5. See infra text accompanying notes 15-17.
7. See Legomsky, SUP. CT. REV., supra note 1, at 255 (“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.”).
unusually limited power to review the constitutionality of immigration statutes (or none at all). 8 Under either theory, the practical result is that Congress has a virtual 9 blank check to formulate the immigration policies it thinks best.

Over the past century, Congress has cashed this check many times. It has passed, and the Court has upheld, a series of statutes that have explicitly singled out aliens of Asian ancestry for disfavored immigration treatment. 10 As for admission procedure, the Court has said: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." 11 The Court has held that the government does not violate the First Amendment by excluding alien scholars who advocate Communism at even the most theoretical level. 12 It has casually upheld immigration legislation that simultaneously discriminated on the bases of such usually disfavored criteria as gender and legitimacy. 13

There are some exceptions and qualifications to the principle of plenary congressional power over immigration. The courts have recognized the applicability of procedural due process to deportation proceedings. 14 Moreover, because the power to regulate immigration is

8. See id. at 261-69 (examining the applicability of the political question theory to the judicial role in immigration cases); id. at 269-78 (critiquing various theories that appear to rest on the substantive breadth of Congress' power).

9. The lone Supreme Court exception is INS v. Chadha, 462 U.S. 919 (1983), where the Court struck down a statutory provision that had authorized either House of Congress to veto an administrative officer's grant of suspension of deportation. See id. at 959; Legomsky, SUP. CT. REV., supra note 1, at 299-303 (examining the effect of Chadha on the plenary power doctrine).

10. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 351 (1889).


12. See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (reaffirming that the First Amendment does not abridge the government's absolute discretion to exclude alien scholars on the basis of ideology); see also John A. Scanlan, Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act, 66 TEXAS L. REV. 1481, 1509-10 (1988) (describing Harisiades v. Shaughnessy, 342 U.S. 580 (1952), which held that the First Amendment does not protect alien Communist Party members from deportation); Steven R. Shapiro, Ideological Exclusions: Closing the Border to Political Dissidents, 100 HARV. L. REV. 930, 936 (1987) (questioning whether Mandel confines judicial review of visa denials to the search for any "minimally rational explanation").


14. See Yamataya v. Fisher, 189 U.S. 86, 100 (1903) ("[T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' . . . ."); cf. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (holding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (holding that courts have no power to interfere in a deportation proceeding unless there was not a fair hearing).
exclusively federal,\textsuperscript{15} state statutes that discriminate against aliens typically have been struck down either as attempts to regulate immigration\textsuperscript{16} or as violations of equal protection.\textsuperscript{17}

Elsewhere I have considered three kinds of explanations for the Supreme Court's unusual restraint in this field. One explanation is historical accident. In detailing the history of the plenary power doctrine I have argued that the Court, by wrongly relying on cases presenting only federalism issues, has reached erroneous conclusions about the judicial role in protecting individual constitutional rights.\textsuperscript{18}

A second set of explanations, also doctrinal, consists of those that the Court itself has either stated or implied. The most important of these has been the political question doctrine.\textsuperscript{19} But there have been numerous other theories, both express and implied. These include the characterization of the alien as a mere guest rather than a full-fledged member of society,\textsuperscript{20} the notion that domestic constitutional protection of aliens would be unfair to citizens because aliens already have access to certain international law remedies,\textsuperscript{21} the interrelationship of allegiance to a state and

\textsuperscript{15} See, e.g., Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Henderson v. Mayor of N.Y., 92 U.S. 259, 274-75 (1875).

\textsuperscript{16} In some instances, the problem has been federal constitutional exclusivity. See, e.g., Chy Lung, 92 U.S. at 280; Henderson, 92 U.S. at 274-75. In other instances, the problem was congressional preemption. See, e.g., Toll v. Moreno, 458 U.S. 1, 12-17 (1982) (finding that federal law preempted Maryland from imposing additional burdens on a class of aliens); League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) ("The states have no power to effectuate a scheme parallel to that specified in the [Personal Responsibility and Work Opportunity Act of 1996 (PRA)] even if the parallel scheme does not conflict with the PRA.").

\textsuperscript{17} See, e.g., Bernal v. Fainter, 467 U.S. 216, 227-28 (1984) (invalidating a Texas law prohibiting aliens from becoming notaries public); Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking down state statutes denying welfare benefits on the basis of alienage). By way of exception, the Court has deferred to the state in matters that the Court considers within the state's "political function." See, e.g., Ambach v. Norwich, 441 U.S. 68, 73-74 (1979) (recognizing the "general principle that some state functions are so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government"); Foley v. Connellie, 435 U.S. 291, 297 (1978) ("[T]he right to govern is reserved to citizens.").

\textsuperscript{18} See LEMOSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 177-222.

\textsuperscript{19} See supra note 8 and accompanying text.

\textsuperscript{20} See Landon v. Plascencia, 459 U.S. 21, 25 (1982) (describing deportation and exclusion as denying aliens the "hospitality" of the United States); Foley, 435 U.S. at 294 (noting that "[a]s a Nation we exhibit extraordinary hospitality to those who come to our country"); Fiallo v. Bell, 430 U.S. 787, 796 (1977) (characterizing Congress's power over immigration as the "right to terminate hospitality to aliens" (quoting Harisiades v. Shaughnessy, 342 U.S. 80, 96-97 (1952) (Frankfurter, J., concurring))); Mathews v. Diaz, 426 U.S. 67, 80 (1976) (describing aliens as "guests"); Harisiades, 342 U.S. at 586-87 (arguing that protraction of an alien's "ambiguous status within the country is not his right but is a matter of permission and tolerance"); Carlson v. Landon, 342 U.S. 1234, 354 (1952) (explaining that the basis for deportation of presently undesirable, though legally admitted, aliens is that they "have come at the Nation's invitation").

\textsuperscript{21} See Harisiades, 342 U.S. at 585-86 (noting that aliens may request for their nations to intervene diplomatically, providing sufficient relief).
protection by that state,\textsuperscript{22} the rooting of the immigration power in state sovereignty,\textsuperscript{23} and the extraterritorial nature of that subcategory of immigration law that deals with the admission and exclusion of aliens.\textsuperscript{24} I have argued that none of these rationales withstands scrutiny.\textsuperscript{25}

A third (nondoctrinal) explanation is that a series of externalities has also contributed to immigration exceptionalism. These include judges' own social and economic backgrounds and attitudes, their conceptions of their own roles, and contemporary social and political forces.\textsuperscript{26}

B. Consular Absolutism

Even if one were to accept the doctrinal rationales for the plenary power doctrine—and as noted above, all are weak—those rationales in any event would not explain the separate doctrine of consular absolutism. As the following discussion will explain, the lower courts\textsuperscript{27} have consistently interpreted the Immigration and Nationality Act as barring judicial review of the decisions by United States consular officers denying visas. It is one thing to hesitate, as the plenary power doctrine induces judges to do, before striking down\emph{ congressional} acts on constitutional grounds. The principle of consular absolutism goes further. It immunizes the decisions

\begin{footnotesize}
\textsuperscript{22} See id. at 587 ("So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure."); see also Terrace v. Thompson, 263 U.S. 197, 220-21 (1923) (noting that discrimination is permissible because an alien lacks allegiance).

\textsuperscript{23} See Fiallo, 430 U.S. at 792 (explaining that Supreme Court cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments" (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953)); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (affirming the Government's contention that the "power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers'" (quoting Brief for Appellants at 20)); Harisiades, 342 U.S. at 587-88 (arguing that the power of deportation is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state"); Carlson, 342 U.S. at 534 ("So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders."); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("Admission of aliens to the United States is a privilege granted by the sovereign United States Government.").

\textsuperscript{24} The extraterritoriality question is thoughtfully explored in Gerald L. Neuman,\textit{ Whose Constitution?}, 100 YALE L.J. 909 (1991) (examining the geographic scope of the Constitution).

\textsuperscript{25} See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 301-24; Legomsky, SUP. CT. REV., supra note 1, at 269-78

\textsuperscript{26} See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 223-53 (comparing external influences on American and British judges); Legomsky, SUP. CT. REV., supra note 1, at 278-95 (considering external influences on American federal judges); I concede that one of these influences—judges' conceptions of their own roles—could easily be classified as doctrinal rather than external.

\textsuperscript{27} The Supreme Court has never decided this issue. But cf. Kleindienst, 408 U.S. 753 (seemingly reviewing on the merits the Attorney General's decision not to waive the grounds for exclusion on which a visa denial was predicated).
\end{footnotesize}
of individual administrative officers from judicial oversight, even when the legality of their decisions has been questioned on nonconstitutional grounds, such as lack of evidence or incorrect interpretations of the statute or regulations.

Consular absolutism seems especially odd when contrasted with more general patterns. As I argued in the 1980s, the United States courts have often blunted the effects of the plenary power doctrine by invoking creative statutory interpretations in order to reach results favorable to aliens and unfavorable to the government.28 For this and other reasons, consular absolutism has been particularly striking and (not surprisingly) the object of persistent scholarly derision.29

The principle of consular absolutism originated with two lower court decisions from the 1920s. In United States ex rel. London v. Phelps,30 the court simply stated, without elaboration, that it lacked “jurisdiction” to review a visa denial.31 Two years later, in United States ex rel. Ulrich v. Kellogg,32 a different court reached a similar result. It cited statutory language that mandated denial of the visa “if it appears to the consular officer” that the person is inadmissible.33 Again there was no elaboration; perhaps the court thought that the breadth of the discretionary power made judicial review inappropriate. The court also reasoned, however, that no provision of the immigration statute specifically authorized judicial review of visa denials.34

None of these cursory rationales is defensible. The reference in London to “jurisdiction” is not explained, but a subsequent court, perhaps following this lead, withheld review on the ground that a visa denial takes place outside the United States.35 Yet, several courts have reviewed decisions made by United States government officials overseas, in some cases even when the complainants were nonresident aliens.36 Nor are the

28. See Legomsky, Immigration and the Judiciary, supra note 1, at 155-70.
30. 22 F.2d 288 (2d Cir. 1927).
31. Id. at 290.
32. 30 F.2d 984 (D.C. Cir. 1929).
33. Id. at 986.
34. Id.
36. See, e.g., Russian Volunteer Fleet v. United States, 282 U.S. 481, 487, 489 (1931) (giving a nonresident corporation, organized under the laws of Russia, a Fifth Amendment right to just
review provisions of the Administrative Procedure Act limited by geography. The statute authorizes review of “agency action,” with “agency” defined as “each authority of the Government of the United States.”

There are no geographic exceptions.

If the London court’s cryptic reference to “jurisdiction” was meant to refer to subject matter jurisdiction rather than to extraterritoriality, then the court failed to consider section 279 of the Immigration and Nationality Act. At the time, this provision established district court jurisdiction over “all causes, civil and criminal, arising under any of the provisions of this subchapter,” including the visa-issuing provisions. The court’s decision is therefore hard to fathom. Since London, section 279 has been amended; now it creates specific federal district court jurisdiction only in those immigration-related actions in which the United States is a plaintiff. Conversely, however, general federal question jurisdiction under 28 U.S.C. section 1331 has now been broadened to confer district court jurisdiction over “all civil actions arising under the Constitution, laws or treaties of the United States” (without the prior requirement of a certain minimum amount in controversy). Thus, the jurisdiction that the Hermina Sague court should have found to have been created by section 279 now exists under 28 U.S.C. section 1331. And, lest one wonder whether Congress’s 1996 amendment of section 279 was meant to preclude the use of general federal question jurisdiction, the short answer can be found in the conference committee’s explanation of the amendment. It says: “This [amendment] has no effect on other statutory or constitutional grounds for private suits against the Government.”

The court in Ulrich also relied on the broad discretion of consular officers to deny visas. Although again the court did not elaborate, it possibly believed that, to use modern Administrative Procedure Act (APA) terminology, Congress meant to “commit” the decision to agency discretion. If that was the court’s intention, its premise is unsupported.

compensation for the requisitioning of its contracts, and the taking of the naval vessels that were constructed thereunder, for use by the United States); United States v. Tiede, 86 F.R.D. 227, 260, 256-60 (U.S. Ct. for Berlin 1979) (holding that “if the United States convenes a United States court in Berlin . . . and charges civilians with non-military offenses, the United States must provide the defendants with the same constitutional safeguards that it must provide to civilian defendants in any other United States court,” including the right to a jury trial).

39. Id.
42. See id. § 1331 (1976) (amended 1980).
43. 142 CONG. REC. H10901 (1996).
44. Under the Administrative Procedure Act, 5 U.S.C. § 701(a) (1994), the final decisions of federal administrative agencies are generally subject to judicial review “except to the extent that— (1)
The State Department’s own regulations make clear that consular officers have no general discretion to deny visas to eligible applicants. Under the regulations, a consular officer who refuses a visa application “shall inform the applicant of the provision of law or implementing regulation on which the refusal is based.”

Admittedly, some specific grounds of statutory ineligibility require the exercise of discretion, at least to the extent that the term is used to encompass practical judgment. One provision, for example, renders ineligible for a visa “[a]ny alien who, in the opinion of the consular officer . . . is likely at any time to become a public charge.” But the fact that some exclusion grounds require the exercise of discretion is no reason to insulate all visa denials from judicial review. More importantly, that a decision is discretionary does not render it “committed to agency discretion” and therefore unreviewable. Otherwise, the APA provision that specifies an “abuse of discretion” standard for the review of discretionary decisions would be meaningless.

Nor do any other statutory provisions preclude judicial review of visa denials. In Loza-Bedoya v. INS, the court acknowledged that the consular officer’s decision to deny a visa was legally erroneous but held itself helpless to intervene. It cited the older decisions and one statutory provision, 8 U.S.C. section 1201(a). All the latter says, however, is that in specified cases consular officers may issue visas. It says nothing about review of a decision not to issue a visa. Similarly, in Licea-Gomez v. Pilliod, the court cited another statutory provision, 8 U.S.C. section 1104(a). But this provision merely authorizes the Secretary of State to administer all the immigration and nationality laws that relate to consular officers except those that relate to visa issuance and denial. It says nothing about judicial review.

Apart from their reliance on the language of either the original court decisions or the statute itself, courts have also invoked legislative history in mysterious ways to attempt to justify consular absolutism. In both Loza-Bedoya and Hermina Sague, the courts cited a passage from the

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statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” See generally 5 U.S.C. § 704 (1994); Harvey Saferstein, Nonreviewability: A Functional Analysis of “Committed to Agency Discretion,” 82 HARV. L. REV. 367 (1968).
45. See 22 C.F.R. § 42.81(b) (1999) (emphasis added).
47. See, e.g., Saferstein, supra note 44, at 371.
49. 410 F.2d 343 (9th Cir. 1969).
50. See id. at 346-47.
54. See Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969).
House committee report prepared for the Immigration and Nationality Act. The cited passage explained that the committee had decided not to make visa denials reviewable by either the Secretary of State or a proposed administrative body. Nothing in the cited passage spoke to the question of judicial review.56

Whether or not some defensible rationale exists, more than seventy years of judicial adamancy have lent respectability to consular absolutism. In some other context, one might even argue that at this juncture Congress can be regarded as having acquiesced in this interpretation. But this is no ordinary question of statutory construction. The Supreme Court has made clear that departures from the judicial review provisions of the APA will not be “lightly presumed.”57 In the visa denial cases, the courts have been unable to point to any evidence, light or otherwise, to support an exemption from the usual rules that govern judicial review of administrative decisions.

C. The 1996 Court-Stripping Provisions

Before the emergence of positive statutory law on the subject, the courts assumed that deportation orders, as they were then called, were reviewable in court. The mechanism typically invoked was habeas corpus.58 Shortly after enactment of the Immigration and Nationality Act in 1952, declaratory and injunctive relief replaced habeas corpus as the principal vehicle for obtaining judicial review of a deportation decision.59 In 1961, Congress made petitions for review in the courts of appeals the “sole and exclusive” procedure for obtaining judicial review of administratively final deportation orders, except that habeas corpus was still permitted for aliens in custody.60 Concerned by tales of long delays in


Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon the consular officers by the instant bill should be made subject to review by the Secretary of State.

Id.

57. See Marcello v. Bonds, 349 U.S. 302, 310 (1955) (“Exemptions from the ... Administrative Procedure Act are not lightly to be presumed.”), quoted in Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956).
59. See Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1954) (holding that the 1952 Immigration and Nationality Act did not “deprive deportees of all right of judicial review except by habeas corpus”).
executing deportation orders, Congress thought that the combination of district court review of the agency action and court of appeals review of the district court decision was slower and more cumbersome than a one-stop review process in the court of appeals.61

That is essentially how things stood until 1996. In that year, Congress passed two comprehensive statutes relevant here—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)62 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).63 These statutes left the petition for review intact as the sole vehicle for obtaining judicial review of what are now called "removal" orders (again subject to some exceptions to the exclusivity component),64 but there are now several crucial classes of removal cases in which judicial review is either restricted or eliminated.

One key provision purports to eliminate jurisdiction to review almost all removal orders that are predicated upon criminal convictions.65 Another provision states that "no court shall have jurisdiction to review" decisions denying a wide assortment of discretionary remedies in compassionate circumstances.66 Yet another provision bars jurisdiction when the removal order was entered pursuant to a special "expedited removal" process.67 Still other provisions limit the forms, methods, and timing of actions brought to challenge various types of removal-related decisions.68 Not surprisingly, recent litigation and commentary have been prolific.69

II. The Roots of Discontent

What accounts for this targeted, specific antagonism toward judicial review in the immigration context? I suggest three sets of factors—the external influences on judicial decisionmaking in the immigration context;

61. See H.R. REP. NO. 87-1086, at 23-24, 22-33 (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2968, 2966-77 ("[N]o alien who has once had his day in court, with full rights of appeal to the higher courts, should be permitted to block his removal and cause unnecessary expense to the Government by further judicial appeals, the only purpose of which is delay.").


65. See id. § 1252(a)(2)(C).

66. Id. § 1252(a)(2)(B).


68. See id. § 1252(b)-(g).

the (qualified) political advantages to elected representatives in taking a "tough" line on immigration; and legitimate, but sometimes overstated, concerns about the fiscal and institutional costs of judicial review.

A. External Influences on Judges

There is a vast literature on the sociology of judging; rather than attempt to add to it, here I simply summarize conclusions that I reached in a previous writing. The premise of most such scholarship is that judges, although motivated by pride and craftsmanship to find doctrinally respectable routes to the results they reach, cannot help but be influenced also by a range of external factors. These include their own social and economic backgrounds and attitudes, their own conceptions of the role of a court, and the social and political forces of the relevant period.

One might think that American judges, coming disproportionately from a relatively high social and economic stratum, and further conditioned by the cautious conservatism of the law school and professional bar environments, are by nature inclined to favor the government over the immigrant in close cases. Given the underrepresentation of ethnic minorities and women on the bench, the high proportion of judges selected from the ranks of prosecutors and corporate lawyers, and the other conservative influences noted above, this viewpoint would be understandable.

Yet it does not convincingly explain the results in the immigration cases. As the plenary power doctrine and consular absolutism cases illustrate, courts have frequently strayed from otherwise liberal generic doctrine to reach results in immigration cases that are at odds with more general legal principles. Thus, simple invocation of the conservative influences on judges does not explain why immigrants, as distinguished from other minorities, have fared so poorly in court. It also fails to explain why, as I have previously suggested, courts if anything have tended to arrive at results more favorable to immigrants in many other statutory interpretation contexts.

My view is that role conception is a more persuasive explanation than conservatism. I have criticized the reflexive classification of all issues that concern the constitutionality of immigration provisions as political questions. But those judges who incline even slightly toward trepidation

70. See Legomsky, SUP. CT. REV., supra note 1, at 278-95.
71. See id. at 279-83.
72. See supra note 28 and accompanying text.
73. See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 155-70.
74. See id. at 301-14; Legomsky, SUP. CT. REV., supra note 1, at 261-69.
might regard immigration, with its potential foreign affairs implications, as an especially treacherous arena to enter.\textsuperscript{75} 

In addition, the powerful stare decisis effect of several decades of unbroken Supreme Court use of the plenary power doctrine would reinforce judicial caution. The paradigmatic case is \textit{Galvan v. Press},\textsuperscript{76} where Justice Frankfurter, after acknowledging the merits of constitutional review in immigration cases, nonetheless proclaimed: "But the slate is not clean. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."\textsuperscript{77} Even an activist and ideologically liberal judge otherwise inclined to fight back might find this powerful statement unnerving. For judges who begin with narrower conceptions of their roles and less incentive to expand them, overruling or even restricting these precedents would be especially daunting. Not surprisingly, the post-\textit{Galvan} Supreme Court has cited this language approvingly, even using it as an independent reason to withhold constitutional review of immigration statutes.\textsuperscript{78}

Finally, judges are flesh-and-blood human beings. Consciously or unconsciously, they sometimes cannot put aside what they perceive as the values and desires of the community. This happens partly because judges’ views, like anyone else’s, can be formed and influenced by the ongoing public debate. In addition, it is generally believed that even judges who disagree with the particular public opinion might hesitate to defy it.\textsuperscript{79}

Most immigration cases are decided during periods of high-level immigration, partly because this is when most immigration cases are likely to arise, and partly because high levels of immigration are more likely to trigger restrictive legislation that in turn creates higher absolute numbers of aggrieved immigrants.\textsuperscript{80} This is an unlucky circumstance for immigrants. Historically, there has been a positive, though concededly imperfect, correlation between periods of high-volume immigration and public hostility toward immigrants.\textsuperscript{81} Thus, the periods in which major immigration precedents are most likely to be set are those very periods in which public antipathy toward immigrants is at its peak.\textsuperscript{82}

\textsuperscript{75} See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 307-08 (explaining why special judicial deference in immigration cases can be tempting).

\textsuperscript{76} 347 U.S. 522 (1954).

\textsuperscript{77} \textit{Id.} at 531.


\textsuperscript{79} See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, supra note 1, at 242.

\textsuperscript{80} See id. at 243.

\textsuperscript{81} See \textit{id.} at 242 (noting that sharp increases in immigration have been "historically followed by a rapid increase in the level of anti-immigration sentiment").

\textsuperscript{82} See \textit{id.} at 242-43 (discussing how precedents set during times of anti-immigrant sentiment constrain the courts in later decisions).
For that reason, it is not coincidental that some of the most extreme plenary power precedents were laid down either during the period of substantial Chinese immigration in the late nineteenth century or during the post-World War II influx of Eastern Europeans. The latter line of cases, of course, reflected also the prevailing preoccupation with Communism and general national security. As time went on, even a thaw in the political climate was not enough to dislodge what by then had become rock-hard precedent.

B. Political Influences on Congress

Some of the same political influences that operate on judges undoubtedly operate even more strongly on Congress. Again, in this short article I do not attempt a serious analysis of the complex political forces that prompt different elected officials from different regions to vote in particular ways on matters involving immigration. Suffice it to say that, in a climate of strong anti-immigrant sentiment, the desire to appear “tough on immigration” can run deep.

I have argued elsewhere that nativist impulses have multiple roots. While thoughtful people of good will can oppose large-scale immigration for legitimate reasons, often nativism sprouts from the roots of irrational economic insecurity, outright racism, concerns about balkanization, fear of crime, fear of high numbers of immigrants, anger about illegal immigration and what is often perceived as the government’s tepid responses, and ignorance about both the contributions of immigrants and the stringency of the legal criteria for lawful permanent residence. In the case of noncitizens, who cannot vote in federal or state elections, the usual counterweight that might discourage politicians from pandering to nativism is absent.

Still, one must acknowledge political substitutes for voting power. Some groups of immigrants have interests that fortuitously coincide with those of more empowered groups, such as employers. Moreover, some candidates and elected officials who are otherwise prone to support anti-

83. See id. at 195-205 (detailing many of the immigration cases decided during this time frame).
84. See id. at 202-05 (discussing a number of deportation cases resting on membership in the Communist Party).
85. See id. at 288-95.
87. See id. at 107-11 (discussing each of these issues in turn).
immigrant legislation must factor into the political calculus the likely reactions from ethnic voting constituencies and other allies. 89

C. The Merits: Judicial Review Has Real Costs

Advocates of serious judicial review must candidly acknowledge that judicial review inherently entails real costs. From an institutional standpoint, there is a familiar problem: unelected, relatively unaccountable federal judges make decisions that can profoundly affect the political life of the nation. The broader the impact of those decisions, the more concern there is about leaving the last word to a body or a person not subject to a political check. In the case of immigration policy, which by definition operates on nationals of foreign states, there is always at least theoretical potential for judicial disruption of sensitive foreign policy initiatives. The recent controversy over the six-year-old Cuban boy, Elian Gonzalez, illustrates the possible foreign policy repercussions of judicial decisionmaking. 90

As discussed elsewhere, 91 however, it is farfetched to assume that more than a tiny proportion of even the constitutional issues that various immigration laws have raised is so intimately enmeshed in foreign policy that judicial intervention is dangerous. Even less realistic is to regard judicial review of factfinding in individual cases, or judicial interpretation of ambiguous technical language in statutes or regulations, as posing a danger so systematic that the only safe option is total abdication. Questions such as whether a given individual would suffer extreme hardship if deported or whether a statute should be interpreted to make a stricter crime-related deportation provision retroactive are inherently unlikely to disrupt U.S. foreign policy.

Like judicial review of any other administrative decision, of course, a reversal of an adjudicative ruling of a federal administrative agency can alter the substantive policy direction of the agency on the particular issue—but only when the court finds the agency’s decision unlawful and overturns it. Even discretionary agency decisions are routinely subjected to judicial review for abuse of discretion; 92 no significant threat to democracy is evident.

89. See Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 BYU L. REV. 1139, 1145 (noting that advocacy groups have exerted political pressure on behalf of nonresident aliens).

90. The custody conflict over Elian escalated from a simple question of family law into a political tug-of-war between Cuban exiles in Miami and Fidel Castro’s communist government. See Lizette Alvarez, Hatred of Castro Feeds Outrage Among Exiles, N.Y. TIMES, Apr. 11, 2000, at A22, available in LEXIS, News File, NYT Library.

91. See Legomsky, SUP. CT. REV., supra note 1, at 261-69.

92. See supra note 47 and accompanying text.
Judicial review, however, has other costs. When a court reverses a
decision of an administrative agency, a body that lacks specialized expertise
in the particular field is superseding a body that has such expertise. In
immigration law, where technical nuances abound, the value of expertise
should not be discounted.

Even here, though, limitations on the courts’ institutional competence
should not be exaggerated. For one thing, the usual judicial role when
reviewing an agency decision is to examine the evidence in the record to
see whether it adequately supports the agency’s findings of fact, to bring
its accumulated statutory and other interpretation skills to bear in deciding
whether the agency correctly interpreted the law, and to consider whether
the agency’s exercise of discretion, if any, was arbitrary, capricious, or
otherwise an abuse of discretion. These are the kinds of skills that
lawyers acquire and develop in law school and further refine in practice
and on the bench. Moreover, the agency can provide written reasons for
its decisions and argue its position further in court. Thus, the reviewing
court has the benefits of the agency’s specialized expertise. Finally, on
questions of fact and discretion and even on questions of law, the
limited scope of the judicial role further diminishes the significance of the
gulf between the agency’s specialized expertise and the court’s lack of it.

Another casualty of judicial review, depending on the particular
administrative scheme, can be uniformity. In the case of immigration,
judicial review means that the final say on important issues rests with a
variety of courts spread throughout the nation, rather than with a single
administrative tribunal. Under those circumstances, forging a coherent
immigration strategy is more challenging. As the Supreme Court once said
when addressing a different immigration issue—whether immigration policy
should be exclusively federal—these are matters on which the nation must
speak with a single voice. Aside from the foreign policy effects, which
at any rate are present in only a tiny proportion of immigration cases,
uniformity helps ensure equal treatment of similarly situated individuals.
In addition, there is always a certain inefficiency when many different
bodies need to decide the same issues.


(1984) (according great deference to an administrator’s reasonable interpretation of the agency’s
enabling statute). See generally Colin S. Diver, Statutory Interpretation in the Administrative State,
133 U. PA. L. REV. 549 (1985) (describing the competing traditions of independence and deference
between agencies and courts); David R. Woodward & Ronald M. Levin, In Defense of Deference:
Judicial Review of Agency Action, 31 ADMIN. L. REV. 329 (1979) (advocating judicial deference to
agency decisions).

95. See Henderson v. Mayor of N.Y., 92 U.S. 259, 273 (1875) (stating that “laws which govern
the right to land passengers in the United States from other countries” should be “the subject of a
uniform system or plan”).

96. See supra text accompanying note 91.
Yet, splits of judicial authority are not unique to immigration cases. They are an accepted feature of our system of independent circuits and judicial districts. They seem no more costly in immigration cases than in any other area in which courts review decisions of administrative agencies. And, of course, they do not materialize at all when the courts are reviewing findings of fact and exercises of discretion, which are specific to the individual case. Only on questions of law does the problem of uniformity even need to be weighed. Even then, the principle of judicial deference to agency interpretations minimizes the variance. Moreover, variance is not wholly bad. Differences of opinion among courts can generate thoughtful dialogue that ultimately assures sound policymaking. In instances in which splits of authority are intolerable or even unusually problematic, of course, the Supreme Court can choose to solve the problem by granting certiorari.

Still another concern with judicial review, at least in the immigration context, is delay. Delay is costly for several reasons. It impedes the very purpose of removal—to rid the country of those individuals whose presence Congress has found injurious to the public welfare. It also potentially creates an instrument that can be used by those with no legal basis for remaining to stall the inevitable. If the person is in detention, the delay increases the government’s expenses.

Lastly, judicial review itself costs money. Judges, INS prosecutors, and support staff all have to be paid. When the public is concerned about taxes—and it always is—spending money to afford justice to immigrants can be highly unpopular.

III. Why Judicial Review is Indispensable

Given these costs, it is fair and legitimate to ask what judicial review actually accomplishes, both generally and in immigration cases. My view is that it does several things.

First, judicial review by Article III federal judges brings to the process a degree of independence that even relatively secure administrative adjudicators cannot bring. True independence, in the sense of insulation from the political process and security of tenure, is the strongest guarantee possible that the judge will base the findings of fact on the evidence presented, and the conclusions of law on his or her honest interpretation of the applicable legal sources, rather than reach a conclusion that the agency head strongly prefers. The Attorney General created the Board of Immigration Appeals (BIA), names its members, defines its jurisdiction, has the power to dissolve it any time she wishes, and may reverse any of its decisions.97 Further, the appearance of independence helps assure not

only the American public, but also the affected immigrants themselves, that
the process is fair; for them, distinguishing between the INS and the BIA
is not always easy.

Both actual and perceived independence are particularly important, I
maintain, when the interests at stake are as great as they often are in
immigration cases. The removal of a long-term lawfully admitted per-
manent resident is a life-altering event. We could tolerate either actual or
perceived bias when the stakes are trivial, but substantial life and liberty
interests demand more meticulous care. This is especially true when, as
is the case with immigrants, the litigants lack access to the normal political
channels on which United States citizens can rely for some measure of
protection.98 Immigrants must depend on a fair and impartial judiciary
because they have no one else on whom they can rely. In addition, fair
process serves a public relations function. The immigrant who is removed
unjustly brings home a constellation of memories and stories.

Judicial review by a court of general jurisdiction also adds a generalist
perspective to a process that narrow specialists can otherwise dominate.
Judges can reason by analogy. All else equal, they have, or eventually
acquire, a broader experience than those who see only a steady diet of
specialized immigration cases. This generalist experience adds more than
simply professional expertise. It adds a relative freedom from the biases
and calluses that long-term exposure to a steady diet of the same cases can
inflict. For the same reason, judges seem less vulnerable to agency capture
than a tribunal in which the same agency is a party to every case.

I close with the factor that, for me, is the most persuasive of all.
Realistically, in only a small fraction of immigration cases will judicial
review in fact be sought. It is expensive, complicated, and a great deal of
trouble for the litigant. But the mere prospect of judicial review hopefully
encourages more thoughtful, and more rational, decisionmaking in the first
instance. The possibility of judicial review is an added incentive for even
the most conscientious administrative adjudicator to make sure he or she
has a defensible reason for a contemplated conclusion. Thus, for me,
judicial review is most valuable not in the minority of cases that actually
get to court, but in the majority that do not.

IV. Conclusion

Three substantial developments—plenary congressional power, con-
sular absolutism, and the 1996 statutory court-stripping provisions—have
had an immense combined impact on the shape of contemporary immig-
ration law. Behind each of these developments lies a common theme of

98. See supra text accompanying note 87.
legislative and judicial antagonism to judicial involvement in immigration matters. It is an anomalous pattern, for it deviates sharply from more generic settled norms in constitutional and administrative law.

It is also a disturbing pattern, for we can never be complacent about the vulnerability of immigrants to popular majorities. Trite as it may be to say it, the mark of a great society is that it treats its most vulnerable members with fairness and compassion. We should accept nothing less for immigrants.

But I would not want to end on that note, because the case for judicial review does not rest on charity. It rests on procedural justice. When the individual interests at stake are as potentially large as they are in immigration disputes, tailoring the precise contours of procedural justice to the nationality of the litigant is a troubling notion. Pinning the very availability of procedural justice on the nationality of the litigant is more troubling still. It is a notion that a society built on the rule of law and on egalitarian freedom from arbitrary government interference should forcefully disavow.