ABSTRACT

THE ROLE OF THE COURTS IN IMMIGRATION LAW:
THE UNITED KINGDOM AND THE UNITED STATES

S. H. Legomsky
St. John's College
University of Oxford
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This thesis analyses the role of the Judiciary in cases arising under the immigration laws of the United Kingdom and the United States. Judicial review of immigration decisions is contrasted with that of other governmental decisions, and several unusual patterns characterising the courts' approaches to immigration cases are explored.

Chapter I studies by example the results, the techniques, and the rhetoric of the British immigration cases. Chapter II performs a similar function with respect to the American immigration decisions, except that cases presenting constitutional issues are reserved for separate treatment in chapter III.

Chapter IV provides a descriptive analysis of the patterns emerging from the immigration cases in both countries. Building on the material contained in chapters I, II, and III, this chapter will identify more specific differences between the immigration cases and other public law cases. It will then offer possible explanations for these differences, with principal emphasis on the courts' perceptions of their own roles. Next, the differences between judicial review in the British immigration cases and that in the American immigration cases will be noted, and again possible explanations advanced. The chapter concludes by considering how judicial review has varied, within the context of immigration law and within each of the two countries studied, from one sub-category of immigration case to another.

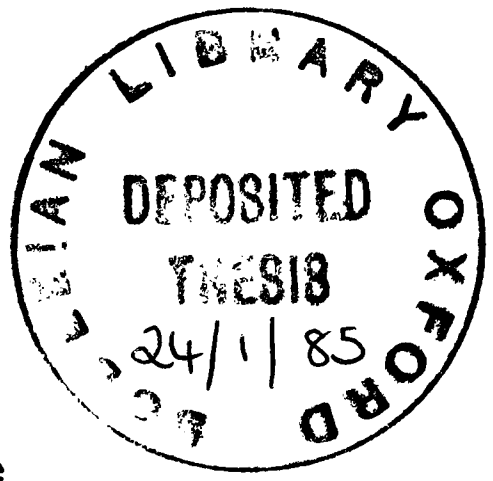
Chapter V serves a prescriptive function. After exploring the general arguments for and against judicial review of governmental action, it analyses possible reasons for modifying those arguments in immigration cases. It concludes that those reasons do not justify the departures, in immigration cases, from the usual principles of judicial review.

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S.H. Legomsky
St. John's College
University of Oxford

To Lorraine, Katie, and Annie

TABLE OF CONTENTS

	Page
Table of Statutes	vi
Table of Cases	xiv
Bibliography	lxvi
Selected Abbreviations	xc
INTRODUCTION	1
CHAPTER I--JUDICIAL REVIEW OF IMMIGRATION DECISIONS IN THE UNITED KINGDOM	10
A. Judicial Review: General Principles	11
1. Appeal and Review	11
2. Classifying Administrative Decisions	12
3. Grounds for Relief	14
4. Remedies	17
5. Application for Judicial Review . . .	22
B. Review of Findings of Fact	23
C. Natural Justice and Fairness	28
1. The Theory of Procedural Review . .	29
2. When Courts Will Require Observance of Procedural Safeguards	35
3. Duty to Act Fairly	45
4. The Immigration Cases	53
5. Conclusions	68
D. Administrative Rules and Regulations . .	75
1. The Legal Status of the Immigration Rules	76
2. Interpretation of Content of Rules and Regulations	103

	Page
E. Statutory Interpretation	110
F. Review of the Exercise of Discretion . .	123
1. Failure to Exercise Discretion . .	124
2. Abuse of Discretion	133
a. The Royal Prerogative and the Early Immigration Cases	134
b. The 'Public Good' Cases	147
c. Alien Enemies and the Royal Prerogative	159
d. Modern Invocation of the Prerogative in Immigration Cases . .	160
e. Conclusions	163
G. Presumptions of Regularity and Constitutionality	166
H. Selected Decisions of the Immigration Appeal Tribunal	174
1. Returning Residents	174
2. Entry of Children	181
3. Miscellaneous	187
I. Immigration Decisions of the Court of Justice of the European Communities	195
1. General Principles	196
2. The European Court of Justice and Immigration Law	199
3. Patterns and Explanations	215
CHAPTER II--JUDICIAL REVIEW OF IMMIGRATION DECISIONS IN THE UNITED STATES	223
A. Reviewability of Immigration Decisions . .	224
B. Scope of Review of Findings of Fact . . .	236
C. Interpretation of Administrative Regulations	240

	Page
D. Statutory Interpretation	242
1. The Meaning of 'Entry' and the Fleuti Doctrine	246
2. The 212(c) Cases	258
E. Review of the Exercise of Discretion . . .	266
CHAPTER III--IMMIGRATION LAW AND THE AMERICAN CONSTITUTION	276
A. Stage I: The Early State Regulation Cases	280
B. Stage II: A Constitutionally Enumerated Federal Power to Exclude Aliens	283
C. Stage III: Federal Exclusion Power Inherent in Sovereignty	286
D. Stage IV: Birth of the Plenary Power Doctrine--The Absence of Affirmative Limitations	298
E. Stage V: The Snowball Effect	303
F. The Beginnings of a Sixth Stage?	330
G. The Plenary Power Doctrine and Its Inadvertent Development	338
H. Comparisons Between the Plenary Power Doctrine and Related Issues	342
CHAPTER IV--PATTERNS AND CONCLUSIONS: A DESCRIPTIVE ANALYSIS	348
A. Factors Underlying the Courts' Decisions in the Immigration Cases	348
1. Social Backgrounds and Attitudes . .	353
a. Backgrounds and Attitudes of British Judges	353
b. Backgrounds and Attitudes of United States Federal Judges	357
c. Effect of Background and Attitudinal Variables on Immigration Cases	362

	Page
2. Role Perceptions	366
3. Contemporary Social and Political Forces	377
a. The British Cases	379
b. The American Cases	384
4. Conclusions	394
B. General Similarities and Differences Between the British Immigration Cases and the American Immigration Cases	396
1. Differences in the Systems of Government and Public Law	403
2. Differences in the Immigration Statutes	408
C. Specific Factors Influencing the Scope of Judicial Review Within the Sphere of Immigration Law	410
1. Factors Relating to the Importance of the Individual Interest	413
2. Factors Relating to the Importance of the Governmental Interest	420
3. Factors Relating to the Nature of the Decision Itself	421
4. Factors Relating to the Nature of the Decision Itself	425
CHAPTER V--THE ROLE OF THE COURTS IN IMMIGRATION CASES: A PRESCRIPTIVE ANALYSIS	427
A. General Arguments For and Against Judicial Review of Administrative Action	429
1. Judicial Review and Democracy	430
2. Other Arguments For and Against Judicial Review of Administrative Action	436
B. Courts and Administrative Tribunals	441

Page

1. Attributes of Tribunals and Courts 443

2. Judicial Review of Tribunal Decisions 456

C. Additional Observations Concerning American Constitutional Review 469

D. The American Political Question Doctrine and Its British Analogues 474

E. Other Theories of Judicial Deference in Immigration Cases 496

1. The Guest Theory 497

2. The Unfair Advantage Theory 499

3. The Allegiance Theory 501

4. The Inherent Power Theory 504

5. The Extraterritorial Theory 506

CONCLUSION 507

TABLE OF STATUTES

		Page
UNITED KINGDOM		
	Statutes	
1215	Magna Carta	120,121,140
1876	Appellate Jurisdiction Act	
	s.6	430
1905	Aliens Act	381
	ss. 1, 1(1)(a,c), 3	147
1914	Aliens Restriction Act	381
1919	Aliens Restriction (Amendment) Act	381
	ss. 1(1), 16(2)	147
1925	Supreme Court of Judicature (Consolidation) Act	
	s. 12	430
1946	Statutory Instruments Act	167
	s. 1(1)	90
	s. 5(1)	89
1947	Crown Proceedings Act	
	s. 21	20
	s. 21(1,2)	19
1949	Representation of the People Act	
	s. 1(1)(b)	472
1962	Commonwealth Immigrants Act	383
	ss. 2, 4(1), 4A(1,2)	115
1968	Commonwealth Immigrants Act	383
1971	Immigration Act	1,26,383
	s. 1(2)	115,175,176
	s. 1(4)	88
	s. 1(5)	87
	s. 3(2)	75,79,86,88
	s. 3(3)	85
	s. 3(5)	409
	s. 3(5)(b)	131,147
	s. 3(6)	409
	s. 3(7)	88

		Page
	s. 4(1)	85
	s. 4(3,4)	88
	s. 5(1)	128,409
	s. 6	409
	s. 9(7)	88
	s. 10(3)	88,89
	s. 12-21	64,410
	s. 12-23	3
	s. 13	97
	s. 13-17	77
	s. 13(2)	117,226,231
	s. 13(3)	442
	s. 13(5)	414,442
	s. 14(1)	110,111
	s. 14(3)	442
	s. 15(3)	67,414,442
	s. 15(4,5)	442
	s. 16(1)(a)	26
	s. 16(2)	26,85,442
	s. 18(1)	75
	s. 18(3)	75,88
	s. 19	83
	s. 19(1)	455
	s. 19(1)(a)(i)	75,87
	s. 19(1)(a)(ii)	83,114
	s. 19(2)	79,83,84,455
	s. 19(3)	187,188
	s. 19(4)	75
	s. 20	11
	s. 20(1)	77,114,189,455
	s. 22(1)	75
	s. 22(1)(b)	88
	s. 22(7)	75,88
	s. 24-28	4
	s. 28	98
	s. 33(1)	26,84,117,226,231
	s. 33(5)	160
	Sch. 2, para. 1(3)	87,89
	Sch. 2, paras. 8-11	26
	Sch. 2, para. 10	84
1971	Town and Country Planning Act	
	s. 29(1)	158
1971	Tribunals and Inquiries Act	
	s. 12(1)(a)	16
	s. 12(2,5)	16
	s. 13(1)	11,12
	s. 14(1)	23
	s. 14(3)	123
	Sch. 1, para. 8	12,16

		Page
1972	European Communities Act	3,198
	s. 2(1)	198
1972	Local Government Act	
	s. 79(1)	472
1973	Administration of Justice Act	
	s. 12	430
1975	Sex Discrimination Act	118,119
	s. 29(1)	119
1981	British Nationality Act	1,4,383
	ss. 6,18	502
	ss. 26,44(2)	123
	s. 49	502
	Sch. 1	502
1981	Supreme Court Act	
	s. 29(1)	17
	s. 31	22
	s. 31(5)	18

Subordinate Legislation and Other Rules and Regulations

1919	Aliens Order, No. 1077	147
	ss. 1(3), 1(3)(h), 12(1)	147
1920	Aliens Order, No. 448	147
1939	Defence (General) Regs.	
	s. 51	90
1953	Aliens Order, No. 1671	147
	ss. 1(1), 4, 20(2)(b)	147
1970	Instructions to Immigration Officers, Cmnd. 4298	
	s. 27	191
	s. 38	181,182
	s. 40	183
	s. 43(a)	178,179
	s. 48	174,175
1972	Immigration Appeals (Notices) Regs., No. 1683 (as amended by S.I. 1982, No. 1027)	65
1972	Immigration Appeals (Procedure) Rules, No. 1684 (as amended by S.I. 1982, No. 1026)	65

		Page
1973	Statement of Changes in Immigration Rules H.C. 79-82	75
	H.C. 79	
	s. 38	118
	s. 44	183
	s. 59	189
	H.C. 81	
	ss. 10,38	184
	H.C. 82	
	s. 42	67
1977	Rules of the Supreme Court (Amendment No. 3), No. 1955 r. 5 (substituting new version of R.S.C. Order 53)	18
	R.S.C., Order 53	18,22,23
	r. 1(1,2)	22
	r. 7(1)	23
	r. 9(4)	12,18
1980	Statement of Changes in the Immigration Rules, H.C. 394	75,409
1982	British Nationality (General) Regs., No. 986	4
1983	Statement of Changes in the Immigration Rules, H.C. 169	75,409
	ss. 35,38,39,41,45,47	21
	s. 85	147
	ss. 94,95,97	85
	s. 150	56,67
	ss. 166,167	128
	[See also breakdown of Immigration Rules paragraphs into groups, on pp. 95-96.]	

UNITED STATES

Statutes

1798	Alien Act, 25 June 1798, 1 Stat. 570	293,294
1882	Act of 3 Aug. 1882, 22 Stat. 214	385
1892	Act of 5 May 1892, ch. 60, 27 Stat. 25	
	ss. 2,3,6	304

		Page
1924	Act of 26 May 1924, 43 Stat. 153 s. 13(c)	385
1952	Immigration and Nationality Act, Act of 27 June 1952, Pub. L. 82-414, 66 Stat. 163 s. 212(c)	388 258-66, 485
1966	Pub. L. 89-554, 80 Stat. 631 s. 8(a)	224
1980	Refugee Act of 1980, Pub. L. 96-212 s. 203(e)	271

Citations to United States Code

5 U.S.C.	
ss. 701-706	223
s. 701(a)	223,232
s. 701(a)(2)	269
s. 701(b)(1)	228
s. 702	228
s. 704	223,228
s. 706	223,237,240,422
s. 706(2)(A)	223,224,270
s. 706(2)(B,C,D)	223,240
s. 706(2)(E)	223,236
s. 706(2)(F)	223
8 U.S.C.	
s. 1101(a)(13)	248
s. 1101(b)(1)(B,C,D,E,F)	320
s. 1103(a)	240,450,485
s. 1104(a)	233,240,485
s. 1105a	357
s. 1105a(a)	224,458,492
s. 1105a(a)(2)	224
s. 1105a(a)(4)	237,397
s. 1105a(a)(5)	240,314,411
s. 1105a(a)(9)	225
s. 1105a(b)	224,492
s. 1151(a)	241,320
s. 1151(b)	320
s. 1152(a)	230,241
s. 1153	241
s. 1181(a)	225
s. 1182(a)	241,414
s. 1182(a)(4)	248
s. 1182(a)(14)	320
s. 1182(a)(20)	225

	Page
s. 1182(a)(22)	251
s. 1182(b,c,d)	241
s. 1182(d)(5)	266
s. 1182(g)	241
s. 1182(h,i)	241,266
s. 1201	485
s. 1201(a)	232, 266
s. 1201(g)	230
s. 1226(a)	3, 241
s. 1251(a)	241,409,414
s. 1251(a)(1)	246,248
s. 1251(a)(3,4,8,13,15)	246
s. 1251(b,f)	241
s. 1252(b)	3,224,241
s. 1253(h)	266,271
s. 1254	241
s. 1254(a)	266,269,333
s. 1254(a)(1)	255,270
s. 1254(c)	333
s. 1254(e)	266, 269
s. 1255	241,260
s. 1259	241
ss. 1306, 1321-30	4
s. 1329	229
ss. 1421 and passim	502
28 U.S.C.	
ss. 44, 133-34	432
s. 1251	488
ss. 2241 and passim	224
ss. 2341 and passim	224
s. 2344	224
Rules and Regulations	
8 C.F.R.	
s. 1.1(1)	3
s. 2.1	240,326
Part 3	3
s. 3.1(b)(1,2)	410
s. 3.1(d)(1)	455
s. 3.1(h)	450
s. 3.2	270
s. 3.8	270
ss. 100.3(d), 100.4(e)	449
s. 103.5	270
s. 242.1(a)	409
s. 242.22	270
20 C.F.R.	
ss. 655, 656	240

	Page
22 C.F.R.	
Parts 41, 42	240
s. 42.90	230
s. 42.130(a)	231
Part 46	240
Executive Order of President Carter (1979) 15 Weekly Compilation of Presidential Documents 2107	326
Constitution	
Art. I	
ss. 1,7	333
s. 8	295,297
s. 8, cl. 3	284
s. 8, cl. 4	284,334
s. 8, cl. 11	284
s. 8, cl. 18	276
s. 9	276
s. 9, cl. 2	225
s. 9, cl. 3	325
s. 10	276
Art. II	
s. 1, cl. 2	406
s. 2, cl. 2	432
Art. III	
s. 1	430
s. 2	488
Art. VI	345
cl. 2	277
Amends. I, V	276
Amend. XIV	
s. 1	277
EUROPEAN ECONOMIC COMMUNITY	
Treaty of Rome	
art. 7	199, 205
art. 12	200,201,202
arts. 48-66	197,199
art. 48	203,214
art. 48(2)	200
art. 48(3)	204,209
art. 48(4)	214

	Page
art. 51	205
art. 52	200,202
art. 65	200
art. 169-189	197
art. 177	197,201,213
art. 189	197,203
Council Directive 64/221	
art. 3(1)	204
arts. 8, 9(1)	212
Council Regulation 1612/68	
Preamble	220
MISCELLANEOUS	
Convention Respecting the Laws and Customs of War on Land, 18 Oct. 1907	
art. 23	499
European Convention for the Protection of Human Rights 1950	78,121
art. 8(1)	122

TABLE OF CASES

UNITED KINGDOM

	Pages
Acton B.C. v. Morris [1953] 1 W.L.R. 1228 (C.A.)	90
Adegbenro v. Akintola [1963] A.C. 614 (P.C.)	124
Alam Bi v. I.A.T. [1979-80] Imm. A.R. 146 (C.A.)	25
Alexander v. I.A.T. [1982] 2 All E.R. 766 (H.L.)	77,103,106,109
Ali (D.M.) v. I.A.T. [1973] Imm. A.R. 33 (C.A.)	164,484
Amin v. E.C.O., Bombay [1983] 2 All E.R. 864 (H.L.)	12,80,117,119,121,122, 123,162,163,415,442, 482
Anisminic Ltd. v. Foreign Comp. Comm'n [1969] A.C. 147 (H.L.)	15,460
Annamunthodo v. Oilfields Workers' Trade Union [1961] A.C. 945 (P.C.)	31
Anns v. London Borough of Merton [1978] A.C. 728 (H.L.)	481
Arshad v. I.O. [1977] Imm. A.R. 19 (I.A.T.)	184, 193
Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223 (C.A.)	133,134,159,274
Attorney-General v. DeKeyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.)	135,136,143,161,489
Attorney-General v. Fulham Corp. [1921] 1 Ch. 440 (Div. Ct.)	167
Attorney-General v. Nissan [1970] A.C. 179 (H.L.)	143,144,145,417,489
Attorney-General v. Ryan [1980] A.C. 718 (P.C.)	58,73,173,411,416

	Pages
Attorney-General v. Smethwick Corp. [1932] 1 Ch. 562 (C.A.)	167
Attorney-General v. Wilts United Dairies Ltd. (1921-22) 38 T.L.R. 781 (H.L.)	171
Attorney-General ex rel. Tilley v. Wandsworth London B.C. [1981] 1 W.L.R. 854 (C.A.)	126
Attorney-General ex rel. McWhirter v. I.B.A. [1973] 1 All E.R. 689 (C.A.)	143
Attorney-General for Canada v. Cain [1906] A.C. 542 (P.C.)	139,140,141,142,146, 148,149,150,165,173
Attorney-General for Canada v. Hallet & Carey Ltd. [1952] A.C. 427 (P.C.)	169,170
Attorney-General of Hong Kong v. Shiu [1983] 2 All E.R. 346 (P.C.)	67
Bashir v. I.O., Dover [1976] Imm. A.R. 96 (I.A.T.)	174
Bashir v. Sec. of State for the Home Dept. [1978] Imm. A.R. 150 (I.A.T.)	155
Bates v. Lord Hailsham [1972] 1 W.L.R. 1373 (Ch.)	47,50
Belfast Corp. v. O.D. Cars Ltd. [1960] 1 All E.R. 65 (H.L.)	170
Birdi v. Sec. of State for Home Affairs (1975) 119 Sol. J. 322 (C.A.)	85
Blackburn v. A.-G. [1971] 1 W.L.R. 1037 (C.A.)	141,142,198
Blackpool Corp. v. Locker [1948] 1 K.B. 349 (C.A.)	90
Board of Education v. Rice [1911] A.C. 179 (H.L.)	46
Board of Trustees of the Maradana Mosque v. Mahmud [1967] 1 A.C. 13 (P.C.)	38,157

	Pages
Bradbury v. London Borough of Enfield [1967] 3 All E.R. 434 (C.A.)	167
Breen v. Amalgamated Engineering Union [1971] 1 All E.R. 1148 (C.A.)	42,43,47,51,52,64
Bristol Dist. Council v. Clark [1975] 1 W.L.R. 1443 (C.A.)	100
British Oxygen Co. Ltd. v. Minister of Technology [1970] 3 All E.R. 165 (H.L.)	126
Bromley London B.C. v. Greater London Council [1982] 1 All E.R. 129 (H.L.)	126
Bulmer (H.P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401 (C.A.)	198,208
Bunbury v. Fuller (1853) 9 Ex. 111	23
Burmah Oil Co. Ltd. v. Gov'r & Co. of the Bank of England [1980] A.C. 1090 (H.L.)	45
Burmah Oil Co. Ltd. v. Lord Advocate [1965] A.C. 75 (H.L.)	143,161,489
Buron v. Denman (1848) 154 Eng. Rep. 450 (Ct. of Ex.)	144
Carltona Ltd. v. Comm'rs of Works [1943] 2 All E.R. 560 (C.A.)	128,129
Case of Proclamations (1611) 12 Co. Rep. 74	135,141
Chandler v. D.P.P. [1964] A.C. 763 (H.L.)	143,477
Chapman v. Earl [1968] 1 W.L.R. 1315 (Div. Ct.)	167
Chavda v. E.C.O., Bombay [1973] Imm. A.R. 40 (I.A.T.)	194
Cheng v. Sec. of State for the Home Dept. [1972] Imm. A.R. 5 (I.A.T.)	178
Chester v. Bateson [1920] 1 K.B. 829 (Div. Ct.)	172

	Pages
Chief Constable of the North Wales Police Force v. Evans [1982] 1 W.L.R. 1155 (H.L.)	12,19,37
China Navigation Co. Ltd. v. A.-G. [1932] 2 K.B. 197 (C.A.)	141
Chokolingo v. A.-G. [1981] 1 W.L.R. 106 (P.C.)	172
Cocks v. Thanet Dist. Council [1982] 3 All E.R. 1135 (H.L.)	23
Commissioners of Customs & Excise v. Cure & Deeley Ltd. [1962] 1 Q.B. 340 (Div. Ct.)	157,172
Congreve v. Home Office [1976] Q.B. 629 (C.A.)	157
Cook v. Spriggs [1899] A.C. 572 (P.C.)	144
Cooper v. Bd. of Works (1863) 143 Eng. Rep. 414 (Ct. of Common Pleas)	30
Co-Operative Comm. on Japanese Canadians v. A.-G. for Canada [1947] A.C. 87 (P.C.)	160
Costa v. Sec. of State for the Home Dept. [1974] Imm. A.R. 69 (I.A.T.)	179,194
Crompton v. Gen. Med. Council [1982] 1 All E.R. 35 (P.C.)	44
Csenyi v. Sec. of State for the Home Dept. [1975] Imm. A.R. 92 (I.A.T.)	150,155
Daymond v. South West Water Authority [1976] A.C. 609 (H.L.)	157
D.P.P. v. Bhagwan [1972] A.C. 60 (H.L.)	115,123,403,412,417
Durayappah v. Fernando [1967] 2 A.C. 337 (P.C.)	30,38,40,44,49,51,53
Dyson v. A.-G. [1911] 1 K.B. 410 (C.A.)	62
East Riding County Council v. Park Estate (Bridlington) Ltd. [1957] A.C. 223 (H.L.)	190

	Pages
E.C.O., Bombay v. Joshi [1975] Imm. A.R. 1 (I.A.T.)	174,177,192
E.C.O., Bombay v. Thakerar [1974] Imm. A.R. 60 (I.A.T.)	185
E.C.O. Kingston v. Holmes [1975] Imm. A.R. 20 (I.A.T.)	186
E.C.O. Kingston v. Peart [1979-80] Imm. A.R. 41 (I.A.T.)	180,193
E.C.O., Kingston v. Thompson [1981] Imm. A.R. 148 (I.A.T.)	186
E.C.O., Lahore v. Abdullah [1973] Imm. A.R. 57 (I.A.T.)	185
E.C.O., Madras v. Nadarajan [1976] Imm. A.R. 144 (I.A.T.)	182
E.C.O., Nairobi v. Seth [1979-80] Imm. A.R. 63 (I.A.T.)	179
Edinburgh & Dalkeith Ry. v. Wauchope (1842) 8 E.R. 279 (H.L.)	405
Eleko v. Officer Administering the Gov't of Nigeria [1931] A.C. 662 (P.C.)	27
Ellis v. Dubowski [1921] 3 K.B. 621 (Div. Ct.)	132
Esso Petroleum Co. Ltd. v. Min. of Labour [1969] 1 Q.B. 98 (C.A.)	463,478
Francis v. Sec. of State for the Home Dept. [1972] Imm. A.R. 162 (I.A.T.)	178,193
Furnell v. Whangarei High Schools Bd. [1973] 1 All E.R. 400 (P.C.)	30
Giovanni v. Sec. of State for the Home Dept. [1977] Imm. A.R. 85 (I.A.T.)	206
Glynn v. Keele Univ. [1971] 1 W.L.R. 487 (Ch.)	31,74
Goodison v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 122 (I.A.T.)	178

	Pages
Gouriet v. A.-G. [1978] A.C. 435 (H.L.)	141,142,143,481
Grant v. Borg [1982] 1 W.L.R. 638 (H.L.)	113,123
Grewal v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 119 (I.A.T.)	207
Grunwick Processing Laboratories Ltd. v. ACAS [1978] A.C. 655 (H.L.)	94
Halil v. Davidson [1979-80] Imm. A.R. 164 (H.L.)	113
Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 All E.R. 1 (C.A.)	159
Hanratty v. Lord Butler of Saffron Walden (1971) 115 Sol. J. 386 (C.A.)	141
Hashim v. E.C.O., Dacca [1974] Imm. A.R. 75 (I.A.T.)	174
Heydon's Case (1584) 76 Eng. Rep. 637 (Ex.)	373
Hoffman-La Roche & Co. v. Sec. of State for Trade & Industry [1975] A.C. 295 (H.L.)	169
Howard v. Bodington (1877) 2 P.D. 203 (Ct. of Arches)	94
Howard v. Sec. of State for the Home Dept. [1972] Imm. A.R. 93 (I.A.T.)	186
Huda v. E.C.O., Dacca [1976] Imm. A.R. 109 (I.A.T.)	185
Ibrahim v. Visa Officer, Islamabad [1978] Imm. A.R. 18 (I.A.T.)	182
In re Bhatti (C.A., unrep'd, 7 Sept. 1981)	162,163,173,482
In re Ferdinand [1921] 1 Ch. 107 (C.A.)	159
In re Golden Chemicals [1976] 2 All E.R. 543 (Ch.)	130,131

	Pages
In re H.K. [1967] 2 Q.B. 617 (Div. Ct.)	38,46,49,50,52,53,58-62,73,74,425
In re Manan [1971] 1 W.L.R. 859 (C.A.)	111
In re Mohamed Arif [1968] 1 Ch. 643 (C.A.)	61,74
In re Pergamon Press Ltd. [1971] 1 Ch. 388 (C.A.)	44,47
In re Racal Communications Ltd. [1980] 3 W.L.R. 181 (H.L.)	15
Ingle v. Farrand [1927] A.C. 417 (H.L.)	116
Inland Revenue Comm'rs v. Rossminster [1980] A.C. 952 (H.L.)	172
Jackson Stansfield & Sons v. Butterworth [1948] 2 All E.R. 558 (C.A.)	90,132
Jeffs v. New Zealand Dairy Production & Marketing Bd. [1967] 1 A.C. 551 (P.C.)	38
John v. Rees [1970] Ch. 345 (Ch.)	32
Johnstone v. Pedlar [1921] 2 A.C. 262 (H.L.)	139,144,417
Kabaka's Gov't v. A.-G. of Uganda [1966] 1 A.C. 1 (P.C.)	172
Kassam v. I.A.T. [1980] 2 All E.R. 330 (C.A.)	119,173
Kember [See R. v. Gov'r of Pentonville Prison, ex p. Budlong & Kember]	
Khan (Shahbaz) v. Sec. of State for the Home Dept. [1972] Imm. A.R. 172 (I.A.T.)	174
Khan (Tosir) v. E.C.O., Dacca [1974] Imm. A.R. 55 (I.A.T.)	174,175
Khawaja & Khera v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.)	27,110,155,156,384,417

	Pages
Laker Airways Ltd. v. Dept. of Trade [1977] 2 W.L.R. 234 (C.A.)	135,143,157,161,489
Lavender & Son Ltd. v. Min. of Housing & Local Development [1970] 1 W.L.R. 1231 (Div. Ct.)	132
Liversidge v. Anderson [1942] A.C. 206 (H.L.)	45,172
Liyanage v. R. [1966] 1 All E.R. 650 (P.C.)	172
Macarthys Ltd. v. Smith [1981] 1 All E.R. 111 (C.A.)	198
Maharaj v. A.-G. of Trinidad & Tobago (No. 2) [1979] A.C. 385 (P.C.)	172
Malloch v. Aberdeen Corp. [1971] 1 W.L.R. 1578 (H.L.)	31,37,40,71
McEldowney v. Forde [1969] 2 All E.R. 1039 (H.L.)	167,171
McInnes v. Onslow Fane [1978] 3 All E.R. 211 (Ch.)	39,42,43,44,45,47,51, 64,72
Metropolitan Borough and Town Clerk of Lewisham v. Roberts [1949] 2 K.B. 608 (C.A.)	129
Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 (C.A.)	33
Mukhopadhyay v. E.C.O., Calcutta [1975] Imm. A.R. 42 (I.A.T.)	179
Munnich v. Godstone Rural Dist. Council [1966] 1 W.L.R. 427 (C.A.)	190
Musgrove v. Chun Teeong Toy [1891] A.C. 272 (P.C.)	136-43,145,146,147, 148,164
Nagle v. Feilden [1966] 1 All E.R. 689 (C.A.)	39
Nakkuda Ali v. Jayaratne [1951] A.C. 66 (P.C.)	35,36,37,39,40

	Pages
Nessa v. I.O., TH/2196/75 (524) (I.A.T., unrep'd, 10 Oct. 1975)	185
Netz v. Ede [1946] Ch. 224 (Ch.)	144,163
Newcastle Breweries Ltd. v. R. [1920] 1 K.B. 854 (Div. Ct.)	172
Niarchos (London) Ltd. v. Sec. of State for the Environment (1978) 35 P. & C.R. 259 (Div. Ct.)	99
Nijssen v. I.O., London (Heathrow) Airport [1978] Imm. A.R. 226 (I.A.T.)	206
Ningkan v. Gov't of Malaysia [1970] A.C. 379 (P.C.)	170
Nisa v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 20 (I.A.T.)	77,179
Norwest Holst Ltd. v. Sec. of State for Trade [1978] 1 Ch. 201 (C.A.)	52
Oberoi v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 175 (I.A.T.)	67
O'Connor v. Sec. of State for the Home Dept. [1972] Imm. A.R. 5 (I.A.T.)	180,193
Olivier v. Buttigieg [1966] 2 All E.R. 459 (P.C.)	172
O'Reilly v. Mackman [1982] 3 All E.R. 1124 (H.L.)	23,29,30,49,51
Osama v. I.O. [1978] Imm. A.R. 8 (I.A.T.)	155
Padfield v. Min. of Agriculture Fisheries & Food [1968] A.C. 997 (H.L.)	157
Paet v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 185 (I.A.T.)	127
Patel v. C.I.O., Heathrow [1977] Imm. A.R. 116 (C.A.)	80,81,83,85,92
Patel v. Sec. of State for the Home Dept. [1972] Imm. A.R. 59 (I.A.T.)	183

	Pages
Pearlberg v. Varty [1972] 1 W.L.R. 534 (H.L.)	30,47
Pearlman v. Keepers & Gov'rs of Harrow School [1979] 1 Q.B. 56 (C.A.)	15,81,82,100
Pearson v. I.A.T. [1978] Imm. A.R. 212 (C.A.)	77,127,132,133
Pereira v. Sec. of State for the Home Dept. [1972] Imm. A.R. 224 (I.A.T.)	183
Pickwell v. Camden London B.C. [1983] 1 All E.R. 602 (Div. Ct.)	134
Pinnock v. E.C.O., Kingston [1974] Imm. A.R. 22 (I.A.T.)	181,182,193
Poll v. Lord Advocate [1899] 1 F. 823 (Ct. of Sess.)	138,139,140,141,142 143,145,146,148,164
Porter v. Freudenberg [1915] 1 K.B. 857 (C.A.)	159
Prescott v. Birmingham Corp. [1955] Ch. 210 (Ch.)	157
Princess Thurn & Taxis v. Moffitt [1915] 1 Ch. 58 (Ch.)	159
Punton v. Ministry of Pensions and National Insurance [1963] 1 W.L.R. 186 (C.A.) [Punton I]	20
Punton v. Ministry of Pensions and National Insurance [1964] 1 W.L.R. 226 (C.A.) [Punton II]	20,21,492
Purewal v. E.C.O. [1977] Imm. A.R. 93 (I.A.T.)	85
Pyx Granite Co. Ltd. v. Min. of Housing & Local Gov't [1958] 1 All E.R. 625 (C.A.)	158
R. v. Aston Univ. Senate, ex p. Roffey [1969] 2 Q.B. 538 (Div. Ct.)	52,74
R. v. Atkinson [1978] 1 W.L.R. 425 (C.A.)	33

	Pages
R. v. Barnsley Met. B.C., ex p. Hook [1976] 1 W.L.R. 1052 (C.A.)	40,48,49
R. v. Birmingham City Justice, ex p. Chris Foreign Foods [1970] 1 W.L.R. 1428 (Div. Ct.)	50
R. v. Bottrill, ex p. Kuechenmeister [1947] 1 K.B. 41 (C.A.)	160,163,236,487,493
R. v. Bow St. Magistrates, ex p. Mackeson (1982) 75 Crim. App. R. 24 (Div. Ct.)	150
R. Boycott, ex p. Keasley [1939] 2 K.B. 651 (Div. Ct.)	23
R. v. C.I.O., ex p. Shaikh, Times L. Rep., 21 July 1976 (C.A.)	185
R. v. C.I.O., Gatwick Airport, ex p. Kharrazi [1980] 3 All E.R. 373 (C.A.)	19,78,80,81,82, 83,85,99,100,107, 109
R. v. C.I.O., Heathrow Airport, ex p. Bibi [1976] 1 W.L.R. 979 (C.A.)	78,79,80,83,84,86,122
R. v. C.I.O., Lympne Airport, ex p. Singh (Amrik) [1969] 1 Q.B. 333 (Div. Ct.)	119,164
R. v. Crim. Inj. Comp. Bd., ex p. Ince [1973] 1 W.L.R. 1334 (C.A.)	91
R. v. Crim. Inj. Comp. Bd., ex p. Lain [1967] 2 Q.B. 864 (Div. Ct.)	91,135,143
R. v. Crim. Inj. Comp. Bd., ex p. Lawton [1972] 1 W.L.R. 1589 (Div. Ct.)	91
R. v. Crim. Inj. Comp. Bd., ex p. Schofield [1971] 1 W.L.R. 926 (Div. Ct.)	91,102
R. v. Crim. Inj. Comp. Bd., ex p. Tong [1976] 1 W.L.R. 1237 (C.A.)	91
R. v. Crown Court at Knightsbridge, ex p. Int'l Sporting Club (London) Ltd. [1981] 3 All E.R. 417 (Div. Ct.)	16

	Pages
R. v. Dacorum Gaming Licensing Comm., ex p. EMI Cinemas and Leisure Ltd. [1971] 3 All E.R. 666 (Div. Ct.)	93,101
R. v. Electricity Comm'rs [1924] 1 K.B. 171 (C.A.)	11,17
R. v. Flintshire County Council County Licensing (Stage Plays) Comm., ex p. Barrett [1957] 1 Q.B. 350 (C.A.)	126
R. v. Gaming Bd., ex p. Benaim & Khaida [1970] 2 Q.B. 417 (C.A.)	39,44,45,47,51
R. v. Gov'r of Brixton Prison, ex p. Ahsan [1969] 2 Q.B. 222 (Div. Ct.)	27
R. v. Gov'r of Brixton Prison, ex p. Bloom [1920] All E.R. 153 (Div. Ct.)	53,150,164,382
R. v. Gov'r of Brixton Prison, ex p. Sarno [1916] 2 K.B. 742 (Div. Ct.)	148,149,173,382,482
R. v. Gov'r of Brixton Prison, ex p. Sliwa [1952] 1 K.B. 169 (C.A.)	149
R. v. Gov'r of Brixton Prison, ex p. Soblen [1963] 2 Q.B. 243 (C.A.)	55,57,59,60,62,73, 148,150,153,154,161, 165,482,484
R. v. Gov'r of Pentonville Prison, ex p. Azam [1973] 2 All E.R. 741 (H.L.)	27,116,122,415,417, 419
R. v. Gov'r of Pentonville Prison, ex p. Budlong [& Kember] [1980] 1 All E.R. 701 (Div. Ct.)	208
R. v. Greenwich Justices, ex p. Aikens, Times L. Rpt., 3 July 1982	22
R. v. Guildford Magistrates Ct., ex p. Healy [1983] 1 W.L.R. 108 (Div. Ct.)	150
R. v. Halliday [1917] A.C. 260 (H.L.)	45,172
R. v. Home Sec., ex p. Bressler [1924] All E.R. 668 (C.A.)	150,151

	Pages
R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1978] 2 All E.R. 198 (Div. Ct.)	45
R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701 (C.A.)	31,42,44,49,51,101
R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 3 All E.R. 545 (Div. Ct.)	30,44,51
R. v. I.A.T., ex p. Ahluwalia [1979-80] Imm. A.R. 1 (Div. Ct.)	119
R. v. I.A.T., ex p. Ali (Aisha Khatoon) [1979-80] Imm. A.R. 195 (Div. Ct.)	178
R. v. I.A.T., ex p. Armstrong [1977] Imm. A.R. 80 (Div. Ct.)	104
R. v. I.A.T., ex p. Bastiampillai [1983] 2 All E.R. 844 (Div. Ct.)	114,164
R. v. I.A.T., ex p. Cheema, The Times (C.A.), 14 Jan. 1983)	155
R. v. I.A.T., ex p. Coomasaru [1983] 1 All E.R. 208 (C.A.)	111
R. v. I.A.T., ex p. Jeyaveerasingam [1976] Imm. A.R. 137 (Div. Ct.)	25,113,173
R. v. I.A.T., ex p. Joseph [1977] Imm. A.R. 70 (Div. Ct.)	193
R. v. I.A.T., ex p. Joyles [1972] 1 W.L.R. 1390 (Div. Ct.)	105,109
R. v. I.A.T., ex p. Khan (Div. Ct., unrep'd, 18 May 1983)	156
R. v. I.A.T., ex p. Khan (Mahmud) [1983] 2 All E.R. 420 (C.A.)	155
R. v. I.A.T., ex p. Kotake (Div. Ct., unrep'd, 17 Feb. 1983)	77,106,109
R. v. I.A.T., ex p. Kotecha [1983] 2 All E.R. 289 (C.A.)	114

	Pages
R. v. I.A.T., ex p. Malik (C.A., unrep'd, 14 Feb. 1983)	127
R. v. I.A.T., ex p. Manek [1978] 3 All E.R. 641 (C.A.)	105,109
R. v. I.A.T., ex p. Manilal (Div. Ct., unrep'd, 10 March 1983)	106,127
R. v. I.A.T., ex p. Martin [1972] Imm. A.R. 275 (Div. Ct.)	104,109
R. v. I.A.T., ex p. Mehmet [1977] 2 All E.R. 602 (Div. Ct.)	113,173
R. v. I.A.T., ex p. Mehta (R.P.) [1976] Imm. A.R. 38 (C.A.)	104,164
R. v. I.A.T., ex p. Mehta (V.M.) [1976] Imm. A.R. 174 (C.A.)	104,164
R. v. I.A.T., ex p. Nathwani [1979-80] Imm. A.R. 9 (Div. Ct.)	80,164
R. v. I.A.T., ex p. Palacio [1979] Imm. A.R. 178 (Div. Ct.)	155,164
R. v. I.A.T., ex p. Peikazadi [1979-80] Imm. A.R. 191 (Div. Ct.)	193
R. v. I.A.T., ex p. Samaraweera [1974] 2 All E.R. 171 (Div. Ct.)	104,109
R. v. I.A.T., ex p. Shaikh [1981] 3 All E.R. 29 (Div. Ct.)	77,107,109
R. v. I.A.T., ex p. Singh (Ajaib) [1978] Imm. A.R. 59 (Div. Ct.)	155
R. v. I.A.T., ex p. Singh (Jaspal) (1977) 121 Sol. J. 544 (Div. Ct.)	104
R. v. I.A.T., ex p. Sohal [1981] Imm. A.R. 20 (Div. Ct.)	106,482
R. v. I.A.T., ex p. Subramaniam [1976] 3 W.L.R. 630 (C.A.)	110,111,112,113,123, 466
R. v. I.A.T., ex p. Suleman [1976] Imm. A.R. 147 (Div. Ct.)	104

	Pages
R. v. I.A.T., ex p. Vashist (C.A., unrep'd, 18 Jan. 1983)	164
R. v. I.A.T., ex p. Weerasuriya [1983] 1 All E.R. 195 (Div. Ct.)	114
R. v. Immigration Adjudicator, ex p. Sandhu, Times L. Rep., 10 June 1982 (Div. Ct.)	207
R. v. Immigration Appeal Adjudicator, ex p. Bhanji [1977] Imm. A.R. 89 (C.A.)	113
R. v. Inspector of Leman St. Police Station, ex p. Venicoff [1920] 3 K.B. 72 (Div. Ct.)	35,53,54,55,56,57, 59,60,74,150,381,382, 401
R. v. Jordan [1967] Crim. L.R. 483 (Div. Ct.)	405
R. v. Kent Police Authority, ex p. Godden [1971] 2 Q.B. 662 (C.A.)	50
R. v. Leicester Gaming Licensing Comm., ex p. Shine [1971] 2 All E.R. 1329 (Div. Ct.)	93
R. v. Lewes JJ., ex p. Sec. of State for the Home Dept. [1973] A.C. 388 (H.L.)	45
R. v. Liverpool Corp., ex p. Liverpool Taxi Fleet Operators' Assn. [1972] 2 Q.B. 299 (C.A.)	50,53
R. v. London Borough of Hillingdon, ex p. Royco Homes Ltd. [1974] 2 All E.R. 643 (Div. Ct.)	11,158,159,188,189, 478
R. v. Med. App. Trib., ex p. Gilmore [1957] 1 Q.B. 574 (C.A.)	16,23
R. v. Met. Police Comm'r, ex p. Parker [1953] 1 W.L.R. 1150 (Div. Ct.)	36,40
R. v. Minister of Health [1939] 1 K.B. 232 (C.A.)	23
R. v. Nazari [1980] 1 W.L.R. 1366 (C.A.)	214

	Pages
R. v. Northumberland Comp. App. Trib., ex p. Shaw [1952] 1 All E.R. 122 (C.A.)	16,460
R. v. Peterkin, ex p. Soni [1972] Imm. A.R. 253 (Div. Ct.)	125,164,455
R. v. Port of London Authority, ex p. Kynoch Ltd. [1919] 1 K.B. 176 (C.A.)	126
R. v. Preston Supp. Bens. App. Trib., ex p. Moore [1975] 2 All E.R. 807 (C.A.)	16
R. v. Sec. of State for Foreign Affairs, ex p. Greenberg [1947] 2 All E.R. 550 (Vac. Ct.)	106
R. v. Sec. of State for Home Affairs, ex p. Duke of Chateau Thierry [1917] 1 K.B. 922 (C.A.)	148,151,382
R. v. Sec. of State for Home Affairs, ex p. Hosenball [1977] 1 W.L.R. 700 (C.A.)	67,77,78,79,80,81, 83,84,85,89,92,101, 381,425,484
R. v. Sec. of State for Home Affairs, ex p. Jackaria (1977) 121 Sol. J. 337 (Div. Ct.)	79,106
R. v. Sec. of State for Home Affairs, ex p. Santillo [1981] 2 W.L.R. 362 (C.A.) [See also E.C.J. decision]	66,213,415
R. v. Sec. of State for Home Affairs, ex p. Singh (Bhajan) [1975] 2 All E.R. 1081 (C.A.)	122
R. v. Sec. of State for the Home Dept., ex p. Akhtar [1980] 2 All E.R. 735 (C.A.)	27
R. v. Sec. of State for the Home Dept., ex p. Ali (Nasir) (C.A., unrep'd, 12 July 1978)	27,84
R. v. Sec. of State for the Home Dept., ex p. Alibhi [1972] Imm. A.R. 127 (I.A.T.)	125

	Pages
R. v. Sec. of State for the Home Dept., ex p. Ayub [1983] 3 C.M.L.R. 140 (Div. Ct.)	208,499
R. v. Sec. of State for the Home Dept., ex p. Bhurosah [1967] 3 All E.R. 831 (C.A.)	191
R. v. Sec. of State for the Home Dept., ex p. Choudhary [1978] 1 W.L.R. 1177 (C.A.)	27,84,86
R. v. Sec. of State for the Home Dept., ex p. Fernandes, Times L. Rep., 21 Nov. 1980 (C.A.)	122
R. v. Sec. of State for the Home Dept., ex p. Hassan, The Times, 22 July 1981 (C.A.)	155
R. v. Sec. of State for the Home Dept., ex p. Hussain [1978] 2 All E.R. 423 (Div. Ct.)	27
R. v. Sec. of State for the Home Dept., ex p. Jayakody [1982] 1 W.L.R. 405 (C.A.)	27
R. v. Sec. of State for the Home Dept., ex p. Khan (Ijaz) [1977] 3 All E.R. 538 (C.A.)	27
R. v. Sec. of State for the Home Dept., ex p. Khan (Mangoo) [1980] 2 All E.R. 337 (C.A.)	27
R. v. Sec. of State for the Home Dept., ex p. Marqueritte [1982] 3 All E.R. 909 (C.A.)	111
R. v. Sec. of State for the Home Dept., ex p. Mughal [1974] 1 Q.B. 313 (C.A.)	51,65,74,116,122,123, 401,419
R. v. Sec. of State for the Home Dept., ex p. Phansopkar [1975] 3 All E.R. 497 (Div. Ct. & C.A.)	19,25,119,123,173,412, 416,424
R. v. Sec. of State for the Home Dept., ex p. Ram [1979] 1 W.L.R. 148 (Div. Ct.)	27

	Pages
R. v. Sec. of State for the Home Dept., ex p. Singh (Avtar) (Div. Ct., unrep'd, 25 July 1967)	63
R. v. Sec. of State for the Home Dept., ex p. Thakrar [1974] Q.B. 684 (Div. Ct. & C.A.)	25
R. v. Sec. of State for Trade, ex p. Chris Foreign Foods (Div. Ct., unrep'd, 4 March 1983)	132
R. v. Secchi [1975] 1 C.M.L.R. 383 (Magistrate)	206,211,420
R. v. Skinner [1968] 2 Q.B. 700 (C.A.)	129,130,131
R. v. Sup't of Chiswick Police Station, ex p. Sacksteder [1918] 1 K.B. 578 (C.A.)	126,149,151,381,382
R. v. Sup't of Vine St. Police Station, ex p. Liebmann [1916] 1 K.B. 268 (Div. Ct.)	159,160,163
R. v. Supp. Bens. Comm'n, ex p. Singer [1973] 2 All E.R. 931 (Div. Ct.)	16
R. v. Sussex JJ., ex p. McCarthy [1924] 1 K.B. 256 (Div. Ct.)	33
R. v. Torquay Licensing Justices, ex p. Brockman [1951] 2 K.B. 784 (Div. Ct.)	126
R. v. Trib. of App. under the Housing Act, 1919 [1920] 3 K.B. 334 (Div. Ct.)	54
Rayner v. Corp. of Stepney [1911] 2 Ch. 312 (Ch.)	167
Re Gilmore's Application [1957] 1 All E.R. 796 (C.A.) [See R. v. Med. App. Trib., ex p. Gilmore]	
Re Hassan [1976] 2 All E.R. 123 (Div. Ct.)	27
Re the Habeas Corpus Application of Virdee [1980] 1 C.M.L.R. 709 (Div. Ct.)	208
Re Tillmire Common, Heslington [1982] 2 All E.R. 615 (Ch.)	21

	Pages
Rhemtulla v. I.A.T. [1979-80] Imm. A.R. 168 (C.A.)	106
Rennie v. E.C.O., Kingston [1979-80] Imm. A.R. 117 (I.A.T.)	186,194
Ridge v. Baldwin [1964] A.C. 40 (H.L.)	29,31,36,38,40,44, 49,50,51,53,57,60
Roberts v. Hopwood [1925] A.C. 578 (H.L.)	134
Runyowa v. R. [1966] 1 All E.R. 633 (P.C.)	172
Russell v. Duke of Norfolk [1949] 1 All E.R. 109 (C.A.)	51
Salaman v. Sec. of State in Council of India [1906] 1 K.B. 613 (C.A.)	144
Schaffenius v. Goldberg [1916] 1 K.B. 284 (C.A.)	159,160
Scheele v. I.O., Harwich [1976] Imm. A.R. 1 (I.A.T.)	155
Schmidt v. Sec. of State for Home Affairs [1969] 2 Ch. 149 (C.A.)	59,61,63,64,73,74, 126,132,148,153,173, 268,403,414,415,417, 498
Secretary of State for Education & Science v. Tameside Met. B.C. [1977] A.C. 1014 (H.L.)	157
Secretary of State for Employment & Productivity v. C. Maurice & Co. Ltd. [1969] 2 A.C. 346 (H.L.)	463
Secretary of State for the Home Dept. v. Aluko [1974] Imm. A.R. 90 (I.A.T.)	178
Secretary of State for the Home Dept. v. Bashir Sheikh [1972] Imm. A.R. 143 (I.A.T.)	178
Secretary of State for the Home Dept. v. Facey, TH/32001/78 (1638) d (26 Oct. 1979)	178
Secretary of State for the Home Dept. v. Lakdawalla [1972] Imm. A.R. 26 (I.A.T.)	190,192

	Pages
Secretary of State for the Home Dept. v. Manek, TH/4790/74 (596) (I.A.T., unrep'd, 13 Jan. 1976)	185
Secretary of State for the Home Dept. v. Patel [1979-80] Imm. A.R. 106 (I.A.T.)	175,193
Secretary of State for the Home Dept. v. Thaker [1976] Imm. A.R. 114 (I.A.T.)	185
Shareef v. Comm'r for Registration of Indian and Pakistani Residents [1965] 3 W.L.R. 704 (P.C.)	57,73,411,416
Sheffield City Council v. Graingers Wines Ltd. [1978] 2 All E.R. 70 (C.A.)	94,102
Singh (Balbir) v. Sec. of State for the Home Dept. [1978] Imm. A.R. 204 (C.A.)	113
Singh (Tarsem) v. Sec. of State for the Home Dept. [1972] Imm. A.R. 265 (I.A.T.)	183
Sudhakaran v. E.C.O., Madras [1976] Imm. A.R. 3 (I.A.T.)	189,190,192
Suthendran v. I.A.T. [1976] 3 W.L.R. 725 (H.L.)	111,112,113,122
Tambimuttu v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 91 (I.A.T.)	67
South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Mfr'g Employees Union [1980] 3 W.L.R. 318 (P.C.)	15
Stafford v. Minister of Health [1946] K.B. 621 (Div. Ct.)	36
Taneja v. E.C.O., Chicago [1977] Imm. A.R. 9 (I.A.T.)	175
Uppal v. Home Office, Times L. Rep., 21 Oct. 1978 (Ch.), (1979) 123 Sol. J. 17 (C.A.) [See also E.C.J. decision, sub nom Uppal v. United Kingdom]	63,122

	Pages
Van Duyn v. Home Office [1974] 1 W.L.R. 1107 (Ch.) [See also E.C.J. decision]	20
Villone v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 23 (I.A.T.)	155
Vine v. Nat'l Dock Labour Bd. [1957] A.C. 488 (H.L.)	167
Visa Officer, Aden v. Thabet [1977] Imm. A.R. 75 (I.A.T.)	187,188,189,192,194
Walker v. Baird [1892] A.C. 491 (P.C.)	144,489
Ward v. Bradford Corp. (1971) 135 J.P.& L.G.R. 580, (1971) 70 L.G.R. 27 (C.A.)	74
Williams v. Sec. of State for the Home Dept. [1972] Imm. A.R. 207 (I.A.T.)	186
Wiseman v. Borneman [1969] 3 All E.R. 275 (H.L.)	30,51
Zamir v. Sec. of State for the Home Dept. [1980] 2 All E.R. 768 (H.L.)	27,80,415,419,420

EUROPEAN COURT OF JUSTICE

Adoui v. Belgian State [1982] 3 C.M.L.R. 631 (E.C.J.)	211,214
Baccini v. Office National de L'Emploi [1983] 3 C.M.L.R. 572 (E.C.J.)	205
Becker v. Finanzamt Münster-Innenstadt [1982] E.C.R. 53 (E.C.J.)	200
Bonsignore v. Oberstadtdirektor der Stadt Koln [1975] E.C.R. 297 (E.C.J.)	210
Brockmuellen v. Huisarts Registratie Commissie [1982] 1 C.M.L.R. 91 (E.C.J.)	207
Casagrande v. Landeshauptstadt München [1974] E.C.R. 773 (E.C.J.)	205

	Page
Commission v. Belgium (Re Benefits for Ex-Colonial Workers) [1981] 1 C.M.L.R. 418 (E.C.J.)	205
Commission v. French Republic [1974] E.C.R. 359 (E.C.J.)	202,205
Coppola v. Insurance Officer [1983] E.C.R. 43 (E.C.J.)	205
Costa v. ENEL [1964] 3 C.M.L.R. 425	198
Defrenne v. Sabena [1978] E.C.R. 1365 (E.C.J.)	205,219
DeFrenne v. Sabena [1976] E.C.R. 455 (E.C.J.)	205,219
Forcheri v. Belgian State, Case 152/82 (E.C.J., 13 July 1983)	205
Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] E.C.R. 177 (E.C.J.)	205,206
Knoors v. Sec. of State for Economic Affairs [1979] E.C.R. 399 (E.C.J.)	207
Levin v. Sec. of State for Justice [1982] 2 C.M.L.R. 454 (E.C.J.)	205
Morson & Jhanjan v. State of the Netherlands [1983] 2 C.M.L.R. 221 (E.C.J.)	208
Pecastaing v. Belgian State [1980] E.C.R. 691 (E.C.J.)	212
R. v. Bouchereau [1977] E.C.R. 1999 (E.C.J.)	211,221
R. v. Pieck [1980] E.C.R. 2171 (E.C.J.)	212
R. v. Saunders [1979] E.C.R. 1129 (E.C.J.)	208

	Page
R. v. Sec. of State for Home Affairs, ex p. Santillo [1980] E.C.R. 1585 (E.C.J.) [See also U.K. decision]	204,211,212,213
Re Public Employees (No. 2): Comm'r v. Belgium [1982] 3 C.M.L.R. 539 (E.C.J.)	214
Reyners v. Belgium State [1974] E.C.R. 631 (E.C.J.)	202,203,214
Robards v. Insurance Officer [1983] 2 C.M.L.R. 537 (E.C.J.)	205
Royer [1976] E.C.R. 497 (E.C.J.)	211,212
Rutili v. Minister for the Interior [1975] E.C.R. 1219 (E.C.J.)	210
Sagulo, Brenca, & Bakhouche [1977] E.C.R. 1495 (E.C.J.)	212
Sotgiu v. Deutsche Bundespost [1974] E.C.R. 153 (E.C.J.)	214
Unger [See Hoekstra]	
Van Duyn v. Home Office [1974] E.C.R. 1337 (E.C.J.) [See also U.K. decision.]	20,79,203,204,209,210
Vand Gend en Loos v. Nederlandse Administratie der Belastingen [1963] E.C.R. 1 (E.C.J.)	200,202
Watson & Belmann [1976] E.C.R. 1185 (E.C.J.)	204,212
Wurttembergische Milchverwertung-Südmilch-AG v. Ugliola [1969] E.C.R. 363 (E.C.J.)	205

UNITED STATES

Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972)	331
Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977)	270,330,331

	Page
Acosta v. Landon, 125 F. Supp. 434 (S.D. Cal. 1954)	270
Adair v. United States, 208 U.S. 161 (1908)	307
Adam v. Saenger, 303 U.S. 59 (1938)	229
Adams v. Tanner, 244 U.S. 590 (1917)	307
Adkins v. Children's Hospital, 261 U.S 525 (1923)	307
Afroyim v. Rusk, 387 U.S. 253 (1967)	346
Agosto v. I.N.S., 436 U.S. 748 (1978)	240
Aguilera-Enriquez v. I.N.S., 516 F.2d 565 (6th Cir. 1975)	331
Akhbari v. U.S.I.N.S., 678 F.2d 575 (5th Cir. 1982)	329
Allgeyer v. La., 165 U.S. 578 (1897)	307
Alvarez v. Dist. Director, 539 F.2d 1220 (9th Cir. 1976)	490
Anderson v. Holton, 242 F.2d 596 (7th Cir. 1957)	268
Aptheker v. United States, 378 U.S. 500 (1964)	488
Arias-Uribe v. I.N.S., 466 F.2d 1198 (9th Cir. 1972)	261
Armstrong v. I.N.S., 445 F.2d 1395 (9th Cir. 1971)	239
Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956)	270

	Page
Asimakopoulos v. I.N.S., 445 F.2d 1362 (9th Cir. 1971)	268
Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973)	275
Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972)	487
Attorney-General v. Bufalino, 371 F.2d 738 (D.C. Cir. 1966)	267
Baker v. Carr, 369 U.S. 186 (1962)	334,440,475,479,480, 482,483,487,489-92
Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863)	305
Barber v. Gonzalez, 347 U.S. 637 (1954)	244
Barrera-Leyva v. I.N.S., 637 F.2d 640 (9th Cir. 1980)	273
Baumgartner v. United States, 322 U.S. 665 (1944)	238
Berahmand v. I.N.S., 549 F.2d 1343 (9th Cir. 1977)	238
Bergen Dress Co. v. Bouchard, 304 F.2d 145 (3d Cir. 1962)	270
Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961)	272
Blythe v. Rinckley, 180 U.S. 333 (1901)	344
Bridges v. Wixon, 326 U.S. 135 (1945)	242
Bitang v. Regional Manpower Administrator, 351 F.2d 1342 (N.D. Ill. 1972)	225
Board of Regents v. Roth, 408 U.S. 564 (1972)	312
Bolling v. Sharpe, 347 U.S. 497 (1954)	308

	Page
Bonetti v. Rogers, 356 U.S. 691 (1958)	244
Boutilier v. I.N.S., 387 U.S. 118 (1967)	315,388,389
Bowe v. I.N.S., 597 F.2d 1158 (9th Cir. 1979)	261
Brandenburg v. Ohio, 395 U.S. 444 (1969)	320
Bridges v. California, 314 U.S. 252 (1941)	317
Brownell v. Cohen, 250 F.2d 770 (D.C. Cir. 1957)	269
Brownell v. Tom We Shung, 352 U.S. 180 (1956)	224,226,232
Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y.), aff'd, 449 F.2d 1305 (2d Cir. 1971)	330
Bugajewitz v. Adams, 228 U.S. 585 (1913)	325,326
Burrafato v. United States Dept. of State, 523 F.2d 554 (2d Cir. 1975)	234
Butterfield v. A.-G., 442 F.2d 874 (D.C. Cir. 1971)	225
Califano v. Goldfarb, 430 U.S. 199 (1977)	321
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)	325
Califano v. Sanders, 430 U.S. 199 (1977)	229
Carlson v. Landon, 342 U.S. 524 (1952)	270,273,287,497,505

	Page
Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948)	248
Carrasco-Favela v. I.N.S., 445 F.2d 865 (9th Cir. 1971)	451
Castillo-Felix v. I.N.S., 601 F.2d 459 (9th Cir. 1979)	259
Ceballos v. Shaughnessy, 352 U.S. 599 (1957)	268
Chae Chan Ping v. United States, 130 U.S. 581 (1889) [Chinese Exclusion Case]	245,286-290,296,299, 300,302-06,310,312, 314,319,326,332,339, 340,341,347,386,421, 491,505
Chao-Ling Wang v. Pilliod, 285 F.2d 517 (7th Cir. 1960)	270
Chappell v. Wallace, 103 S.Ct. 2362 (1983)	488
Chaunt v. United States, 364 U.S. 350 (1960)	238
Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968)	225,228
Cheung Sum Shee v. Nagle, 268 U.S. 336 (1925)	245
Chew Heong v. United States, 112 U.S. 536 (1884)	286,386
Chicago & Southern Air Lines, Inc., v. Waterman Steamship Corp., 333 U.S. 103 (1948)	487,489
Chin Bak Kan v. United States, 186 U.S. 193 (1902)	308
Chin Ying v. United States, 186 U.S. 202 (1902)	308
Chinese Exclusion Case [See Chae Chan Ping v. United States]	
Chiravacharadhikul v. I.N.S., 645 F.2d 248 (4th Cir. 1981)	259

	Page
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)	245,306
Chy Lung v. Freeman, 92 U.S. (2 Otto.) 275 (1875)	282,283,285,491
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)	273,274
Cockrill v. California, 268 U.S. 258 (1925)	344
Cohens v. Va., 19 U.S. (6 Wheat.) 264 (1821)	276,299,491
Coleman v. Miller, 307 U.S. 433 (1939)	480
Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938)	236
Consolo v. Fed. Maritime Comm'n, 383 U.S. 607 (1966)	236
Coppage v. Kansas, 236 U.S. 1 (1915)	307
County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978)	345
Craig v. Boren, 429 U.S. 190 (1976)	321
Cummings v. Mo., 71 U.S. (4 Wall.) 277 (1866)	347
Dastmalchi v. I.N.S., 660 F.2d 880 (3d Cir. 1981)	442
DeCanas v. Bica, 424 U.S. 351 (1976)	345,362,417
Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977)	337
Delgadillo v. Carmichael, 332 F.2d 388 (1947)	247,248,263
De Lucia v. I.N.S., 370 F.2d 305 (7th Cir. 1966)	451
Dennis v. United States, 341 U.S. 494 (1951)	319,387

	Page
Dessalernos v. Savoretti, 356 U.S. 269 (1958)	268
DiPasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947)	247,248,256,263
Doe v. Bolton, 410 U.S. 179 (1973)	308
Dong Sik Kwon v. I.N.S., 646 F.2d 909 (5th Cir. 1981) (en banc)	242
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977)	345
Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974)	261,330,490
Edye v. Robertson [See Head Money Cases]	
Ekiu v. United States, 142 U.S. 651 (1892)	301-04,312,326,332, 340
El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982)	421
Elk v. Wilkins, 112 U.S. 94 (1884)	346
Estrada-Ojeda v. Del Guercio, 252 F.2d 904 (9th Cir. 1958)	269
Ex p. Garland, 71 U.S. (4 Wall.) 333 (1866)	347
Ex p. Kawato, 317 U.S. 69 (1942)	418
Examining Bd. of Engineers, Architects, & Surveyors v. Flores de Otero, 452 U.S. 572 (1976)	345
Factora v. Dist. Director, 292 F. Supp. 518 (C.D. Cal. 1968)	275
Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972)	378
Fedorenko v. United States, 449 U.S. 490 (1981)	238

	Page
Feres v. United States, 340 U.S. 135 (1950)	488
Fiallo v. Bell, 430 U.S. 787 (1977)	277,308,320,321,323, 332,388,400,423,485, 497,505
Fidalgo-Velez v. I.N.S., 697 F.2d 1026 (11th Cir. 1983)	255,256
Field v. Clark, 143 U.S. 649 (1892)	483
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	488
Flemming v. Nestor, 363 U.S. 603 (1960)	345
Flores v. U.S.I.N.S., 524 F.2d 627 (9th Cir. 1975)	272
Flower Furniture Mfg. Corp. v. Esperdy, 229 F. Supp. 182 (S.D.N.Y. 1962)	271
Fok Yong Yo v. United States, 185 U.S. 296 (1902)	308
Foley v. Connelie, 435 U.S. 291 (1978)	345,497,499
Fong Haw Tan v. Phelan, 333 U.S. 6 (1948)	244
Fong Yue Ting v. United States, 149 U.S. 698 (1893)	287,293,303,305,306, 310,312,314,316,319, 324,325,326,332,340, 341,386,418,421,483, 503,505,506
Fook Hong Mak v. I.N.S., 435 F.2d 728 (2d Cir. 1970)	268
Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829)	245
Foti v. I.N.S., 375 U.S. 217 (1963)	225
Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976)	261,331,485
Frick v. Webb, 263 U.S. 326 (1923)	344

	Page
Frontiero v. Richardson, 411 U.S. 677 (1973)	473
Fuentes v. Shavin, 407 U.S. 67 (1972)	305
Gallardo v. I.N.S., 624 F.2d 85 (9th Cir. 1980)	257,374
Galvan v. Press, 347 U.S. 522 (1954)	308,317,318,319,326, 337,376,388,389,423, 483
Garcia v. Bolden, 691 F.2d 1172 (5th Cir. 1982)	455
Garcia-Gonzales v. I.N.S., 344 F.2d 804 (9th Cir. 1965)	244
Gegiow v. Uhl, 239 U.S. 3 (1915)	409
Ghajar v. I.N.S., 652 F.2d 1347 (9th Cir. 1981)	329
Ghorbani v. I.N.S., 686 F.2d 784 (9th Cir. 1982)	329
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)	281
Gilligan v. Morgan, 413 U.S. 1 (1973)	480
Giova v. Rosenberg, 379 U.S. 18 (1964)	225
Girouard v. United States, 328 U.S. 61 (1946)	244
Git Foo Wong v. I.N.S., 358 F.2d 151 (9th Cir. 1966)	252,256,265
Gitlow v. New York, 268 U.S. 652 (1925)	319
Goldberg v. Kelly, 397 U.S. 254 (1970)	305,312
Goldwater v. Carter, 444 U.S. 996 (1979)	487,493
Gomez v. Perez, 409 U.S. 535 (1973)	321
Gonzalez-Cuevas v. I.N.S., 515 F.2d 1222 (5th Cir. 1975)	331

	Page
Goon Wing Wah v. I.N.S., 386 F.2d 292 (1st Cir. 1967)	451
Graham v. Richardson, 403 U.S. 365 (1971)	345
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)	318
Griffin v. Illinois, 351 U.S. 12 (1956)	321
Grisham v. Hagan, 361 U.S. 278 (1960)	488
Griswold v. Connecticut, 381 U.S. 479 (1965)	308
Guzman-Guzman v. I.N.S., 559 F.2d 1149 (9th Cir. 1977)	239
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)	328,329,345,423, 472,484
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	287,308,314,315,317, 319,322,326,332,341, 400,418,423,483,484, 497,499,501,505
Hauenstein v. Lynham, 100 U.S. (10 Otto.) 483 (1880)	344
Head Money Cases, Edye v. Robertson, 112 U.S. 580 (1884)	285,289,298,299,302, 312,339,340
Hegerich v. Del Guercio, 255 F.2d 701 (9th Cir. 1958)	274
Heim v. McCall, 239 U.S. 175 (1915)	344
Heitland v. I.N.S., 551 F.2d 495 (2d Cir. 1977)	256
Henderson v. Wickham, 92 U.S. (2 Otto.) 259 (1875)	282,283,285,491
Hensley v. Municipal Ct., 411 U.S. 345 (1973)	225
Hermina-Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976)	227,230,232,233,234

	Page
Hess v. Indiana, 414 U.S. 105 (1973)	320
Hill v. U.S.I.N.S., 714 F.2d 1470 (9th Cir. 1983)	245
Hines v. Davidowitz, 312 U.S. 52 (1941)	293
Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957)	270
Hirabayashi v. United States, 320 U.S. 81 (1943)	421
Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840)	281
Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973)	487
Hosseinmardi v. I.N.S., 405 F.2d 25 (9th Cir. 1968)	271
Hsing v. Usery, 419 F. Supp. 1066 (W.D. Pa. 1976)	225
In re Abi-Rached, 10 I. & N. Dec. 551 (B.I.A., 1964)	252
In re Alvarez-Verduzco, 11 I. & N. Dec. 625 (B.I.A., 1966)	252,255
In re Amado, 13 I. & N. Dec. 179 (B.I.A., 1969)	459
In re Anwo, 16 I. & N. Dec. 293 (B.I.A., 1977)	259
In re Arias-Uribe, 13 I. & N. Dec. 696 (B.I.A., 1971)	260
In re B., 7 I. & N. Dec. 1 (A.-G., 1956)	451,455
In re Bauer, 10 I. & N. Dec. 304 (B.I.A., 1963)	248
In re Bilbao-Bastida, 11 I. & N. Dec. 615 (B.I.A., 1966)	252,442
In re Bowe, 17 I. & N. Dec. 471 (B.I.A., 1980)	459

	Page
In re Caudillo-Villalobos, 10 I. & N. Dec. 15 (B.I.A., 1965)	252
In re Cenatice, 16 I. & N. Dec. 162 (B.I.A., 1977)	442
In re Chery & Hasan, 15 I. & N. Dec. 380 (B.I.A., 1975)	442-43
In re Cienfuegos, 17 I. & N. Dec. 184 (B.I.A., 1979)	459
In re Corral-Fragoso, 11 I. & N. Dec. 478 (B.I.A., 1966)	252,255
In re Cortez, 16 I. & N. Dec. 289 (B.I.A., 1977)	442
In re Escalona, 311 F. Supp. 648 (D. Guam 1970)	242
In re F., 6 I. & N. Dec. 537 (B.I.A., 1955)	260
In re Florio, 43 F. 114 (S.D.N.Y. 1890)	285
In re G.A., 7 I. & N. Dec. 274 (B.I.A., 1956)	260
In re Giumares, 10 I. & N. Dec. 529 (B.I.A., 1964)	251
In re Griffiths, 413 U.S. 717 (1973)	345
In re Hom, 16 I. & N. Dec. 112 (B.I.A., 1977)	261
In re Karl, 10 I. & N. Dec. 480 (B.I.A., 1964)	250,251,255,264,419
In re Kolk, 11 I. & N. Dec. 103 (B.I.A., 1965)	252,253,255
In re L., 4 I. & N. Dec. 556 (B.I.A., 1951)	443
In re Lennon, 15 I. & N. Dec. 9 (B.I.A., 1974)	443

	Page
In re Lim, 13 I. & N. Dec. 169 (B.I.A., 1969)	459
In re Lok, 15 I. & N. Dec. 720 (B.I.A., 1976)	259
In re Longstaff, 716 F.2d 1439 (5th Cir. 1983)	245
In re M., 5 I. & N. Dec. 598 (B.I.A., 1954)	260
In re M., 5 I. & N. Dec. 642 (B.I.A., 1954)	260
In re M., 7 I. & N. Dec. 140 (B.I.A., 1956)	260
In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975)	346
In re Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (B.I.A., 1965)	252,264
In re Rangel, 15 I. & N. Dec. 789 (B.I.A., 1976)	264
In re R.E., 9 I. & N. Dec. 103 (B.I.A., 1960)	260
In re Russo, 255 F.2d 97 (1st Cir. 1958)	227
In re S., 5 I. & N. Dec. 116 (B.I.A., 1953)	259
In re S., 6 I. & N. Dec. 392 (B.I.A., 1954), aff'd by A.-G. (1955)	260
In re Santana, 13 I. & N. Dec. 362 (B.I.A., 1969)	443
In re Scherbank, 10 I. & N. Dec. 522 (B.I.A., 1964)	252,255
In re Silva, 16 I. & N. Dec. 26 (B.I.A., 1976)	261
In re Smith, 11 I. & N. Dec. 325 (B.I.A., 1965)	260

	Page
In re T., 5 I. & N. Dec. 389 (B.I.A., 1953)	260
In re T., 7 I. & N. Dec. 417 (B.I.A., 1957)	455
In re Tzimas, 10 I. & N. Dec. 101 (B.I.A., 1962)	442
In re Vilanova-Gonzalez, 13 I. & N. Dec. 399 (B.I.A., 1969)	238,451,455
In re Wong, 13 I. & N. Dec. 820 (B.I.A., 1971)	443
In re Wood, 12 I. & N. Dec. 170 (B.I.A., 1967)	252,255
In re Yanez-Jacquez, 13 I. & N. Dec. 449 (B.I.A., 1970)	252,255
I.N.S. v. Chadha, 103 S.Ct. 2764 (1983)	224,333-38,342,388, 442,492
I.N.S. v. Errico, 385 U.S. 214 (1966)	244
I.N.S. v. Jong Ha Wang, 450 U.S. 139 (1981)	270,373,374
I.N.S. v. Phinpathya, 104 S.Ct. 584 (1984)	257,258,373,374
Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979)	463
Int'l Mercantile Marine Co. v. Stranahan, 214 U.S. 344 (1909)	343
Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)	229
Itzcovitz v. Selective Service Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971)	252
James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953)	268
Japanese Immigrant Case [See Yamataya v. Fisher]	

	Page
Jarecha v. I.N.S., 417 F.2d 220 (5th Cir. 1969)	268
Javier v. I.N.S., 335 F. Supp. 1391 (N.D. Ill. 1971)	271
Jay v. Boyd, 351 U.S. 345 (1956)	242,258,272,311
Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc)	330
Jiminez v. Weinberger, 417 U.S. 628 (1974)	321
Johannessen v. United States, 225 U.S. 227 (1912)	325,346
Johnson v. Eisentrager, 339 U.S. 763 (1950)	236,418,506
Johnson v. Robison, 415 U.S. 361 (1974)	308,443
Jones v. Cunningham, 371 U.S. 236 (1963)	225
Jordan v. DeGeorge, 341 U.S. 223 (1951)	315
Joshi v. Dist. Director, 720 F.2d 799 (4th Cir. 1983)	255
Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960)	451,455
Kamheangpatiyooth v. I.N.S., 597 F.2d 1253 (9th Cir. 1979)	256,374
Kan Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973)	228
Kansas v. Colorado, 206 U.S. 46 (1907)	289
Keller v. United States, 213 U.S. 138 (1909)	276,333,343
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	346,347
Kent v. Dulles, 357 U.S. 116 (1958)	488
Kessler v. Strecker, 307 U.S. 22 (1939)	313
Khalil v. Dist. Director, 457 F.2d 1276 (9th Cir. 1972)	271

	Page
Kimm v. Rosenberg, 363 U.S. 405 (1960)	270
Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960)	488
Kirchberg v. Feenstra, 450 U.S. 455 (1981)	321
Kirsten-Sanders Dental Lab., Inc. v. Sahli, 348 F.2d 442 (6th Cir. 1965)	271
Kleindienst v. Mandel, 408 U.S. 753 (1972)	273,287,318,319,332, 388,389,423,483,505
Knoetze v. United States, 634 F.2d 207 (5th Cir. 1981)	330
Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870)	299,304,491
Kokkinis v. Dist. Director, 429 F.2d 938 (2d Cir. 1970)	239
Korematsu v. United States, 323 U.S. 214 (1944)	344,421
Kovac v. I.N.S., 407 F.2d 102 (9th Cir. 1969)	271
Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969)	321
Kwock Jan Fat v. White, 253 U.S. 454 (1920)	313,314,333,411,506
Kwong Hai Chew v. Colding, 344 U.S. 590 (1953)	242,314,333,423,506
Laird v. Tatum, 408 U.S. 1 (1972)	223
LaMont v. Postmaster General, 381 U.S. 301 (1965)	320
Landon v. Plasencia, 103 S.Ct. 321 (1982)	255,314,332,415,416, 497,505,506
Lapina v. Williams, 232 U.S. 78 (1914)	326
Laredo-Miranda v. I.N.S., 555 F.2d 1242 (5th Cir. 1977)	255

	Page
Lattig v. Pilliod, 289 F.2d 478 (7th Cir. 1961)	236
Lee Lung v. Patterson, 186 U.S 168 (1902)	308
Lees v. United States, 150 U.S. 476 (1893)	306,307,332
Lehmann v. United States ex rel. Carson, 353 U.S. 685 (1957)	326
Lem Moon Sing v. United States, 158 U.S. 538 (1895)	287,310,326,421,506
Lena v. I.N.S., 379 F.2d 536 (7th Cir. 1967)	273
Leng May Ma v. Barber, 357 U.S. 185 (1958)	245
Lennon v. I.N.S., 527 F.2d 187 (2d Cir. 1975)	244,274
Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975)	274
Letelier v. Republic of Chile, 488 F. Supp. 665, and 502 F. Supp. 259 (D.D.C. 1980)	488
Levy v. La., 391 U.S. 68 (1968)	321
Lewis v. Frick, 233 U.S. 291 (1914)	247,326
Li Sing v. United States, 180 U.S. 486 (1901)	308
Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960)	232,233
Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361 (1942)	337
Lieggi v. U.S.I.N.S., 389 F. Supp. 12 (N.D. Ill. 1975), rev'd in unrep'd opinion, listed at 529 F.2d 530 (7th Cir. 1976)	324,330
Llacer v. I.N.S., 388 F.2d 681 (9th Cir. 1968)	270
Lochner v. New York, 198 U.S. 45 (1905)	307

	Page
Loera v. Nutis, 543 F. Supp. 249 (E.D. Mo. 1982)	242
Longoria-Castenada v. I.N.S., 548 F.2d 233 (8th Cir. 1977)	255
Loos v. I.N.S., 407 F.2d 651 (7th Cir. 1969)	239
Lopez-Mendoza v. I.N.S., 705 F.2d 1059 (9th Cir. 1983) (en banc)	331
Loving v. Va., 388 U.S. 1 (1967)	344
Low Wah Suey v. Backus, 225 U.S. 460 (1912)	310,311
Loza-Bedoya v. I.N.S., 410 F.2d 343 (9th Cir. 1969)	232,233
Ludecke v. Watkins, 335 U.S. 160 (1948)	236
Luria v. United States, 231 U.S. 9 (1913)	346
Luther v. Borden, 48 U.S. (7 How.) 1 (1849)	476,483
Mackay v. McAlexander, 268 F.2d 35 (9th Cir. 1959)	272
Mackenzie v. Hare, 239 U.S. 299 (1915)	346
Mahler v. Eby, 264 U.S. 32 (1924)	326
Maldonado-Sandoval v. I.N.S., 518 F.2d 278 (9th Cir. 1975)	255,264
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Marks v. Experdy, 377 U.S. 214 (1964)	346

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Marti-Xiques v. I.N.S., 713 F.2d 1511 (11th Cir. 1983), vacated for rehearing, 724 F.2d 1463 (1984)	260,261
Mashi v. I.N.S., 585 F.2d 1309 (5th Cir. 1978)	329
Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950)	268
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Mayor, Aldermen, & Commonalty of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837)	281
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McGowan v. Md., 366 U.S. 420 (1961)	344
McGrath v. Kristensen, 340 U.S. 162 (1950)	268
McLaughlin v. Fla., 379 U.S. 184 (1964)	344
McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960)	256
Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956)	270,272
Menezes v. I.N.S., 601 F.2d 1028 (9th Cir. 1979)	330
Michael M. v. Superior Court, 450 U.S. 464 (1981)	321
Mills v. Habluetzel, 456 U.S. 91 (1982)	321
Miramontes v. I.N.S., 643 F.2d 573 (9th Cir. 1980)	255
Mississippi Univ. for Women v. Hogan, 102 S.Ct. 3331 (1982)	321
Moghanian v. U.S.D.O.J., 577 F.2d 141 (9th Cir. 1978)	271

	Page
Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)	276,505
Morey v. Doud, 354 U.S. 457 (1957)	344
Moser v. United States, 341 U.S. 41 (1951)	245
Mugler v. Kansas, 123 U.S. 623 (1887)	307
Mulcahey v. Catalanotte, 353 U.S. 692 (1957)	326
Munoz-Casarez v. I.N.S., 511 F.2d 947 (9th Cir. 1975)	252
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	320
Nademi v. I.N.S., 679 F.2d 811 (10th Cir. 1982)	329
Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1980)	327,329,483,491
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Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975)	330
Norris v. City of Boston [See Passenger Cases]	

	Page
North Amer. Industries v. Feldman, 722 F.2d 893 (1st Cir. 1983)	245
Noverola-Bolaina v. I.N.S., 395 F.2d 131 (9th Cir. 1968)	455
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Nyquist v. Mauclet, 432 U.S. 1 (1977)	345
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Oetjen v. Central Leather Co., 246 U.S. 297 (1918)	487
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Oloteo v. I.N.S., 643 F.2d 679 (9th Cir. 1981)	277
Orr v. Orr, 440 U.S. 268 (1979)	321
Oyama v. California, 332 U.S. 633 (1948)	344
Ozawa v. United States, 260 U.S. 178 (1922)	385
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Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982)	330
Pasquini v. Morris, 700 F.2d 658 (11th Cir. 1983)	242
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Patsone v. Pa., 232 U.S. 138 (1914)	344
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People v. Compagnie Generale Transatlantique, 107 U.S. 59 (1883)	283
People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915)	344
Pereira-Diaz v. I.N.S., 551 F.2d 1149 (9th Cir. 1977)	271
Perez v. Brownell, 356 U.S. 44 (1958)	346
Perez v. I.N.S., 643 F.2d 640 (9th Cir. 1981)	272
Perkins v. Elg, 307 U.S. 325 (1939)	346
Pesikoff v. Sec. of Labor, 501 F.2d 757 (D.C. Cir. 1974)	225
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P.U.C. v. United States, 355 U.S. 534 (1958)	443
Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969)	345,378
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Rassano v. I.N.S., 492 F.2d 220 (7th Cir. 1974)	238,274
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Reddy v. Sec. of Labor, 492 F.2d 538 (5th Cir. 1974)	225
Reed v. Reed, 404 U.S. 71 (1971)	321
Reid v. I.N.S., 420 U.S. 619 (1975)	245
Reyes v. Carter, 441 F.2d 734 (9th Cir. 1971)	271

	Page
Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir. 1976)	234
Rodriguez v. I.N.S., 389 F.2d 129 (3d Cir. 1968)	238
Roe v. Wade, 410 U.S. 113 (1973)	308
Rogers v. Bellei, 401 U.S. 815 (1971)	346
Rogers v. Quan, 357 U.S. 193 (1958)	245
Rosenberg v. Fleuti, 374 U.S. 449 (1963)	116,244,246,248, 250-59,261-65,424
Rostker v. Goldberg, 453 U.S. 57 (1981)	321
Roumeliotis v. I.N.S., 304 F.2d 453 (7th Cir. 1962)	270
Rowoldt v. Perfetto, 355 U.S. 115 (1957)	238,317
Rusk v. Cort, 369 U.S. 367 (1962)	232
San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973)	473
Santana-Figueroa v. I.N.S., 644 F.2d 1354 (9th Cir. 1981)	273
Santos v. I.N.S., 375 F.2d 262 (9th Cir. 1967)	273,274,275
Savorgnan v. United States, 338 U.S. 491 (1950)	346
Schenck v. United States, 249 U.S. 47 (1919)	319
Schneider v. Rusk, 377 U.S. 163 (1964)	346
Schneiderman v. United States, 320 U.S. 118 (1943)	238,244,415
Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)	290,346
Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952)	245,345,378
Service v. Dulles, 354 U.S. 363 (1957)	242

	Page
Shapiro v. Thompson, 394 U.S. 618 (1969)	321
Shaughnessy v. Pedreiro, 349 U.S. 48 (1955)	232
Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280 (1955)	267,450
Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953)	314,332,505,506
Shelton v. Tucker, 364 U.S. 479 (1960)	320
Sherman v. I.N.S., 350 F.2d 894 (2d Cir. 1965)	238
Shing Hang Tsiu v. I.N.S., 389 F.2d 994 (7th Cir. 1968)	239
Shoaee v. I.N.S., 704 F.2d 1079 (9th Cir. 1983)	329
Shoja v. I.N.S., 679 F.2d 447 (5th Cir. 1982)	329
Siang Ken Wang v. I.N.S., 413 F.2d 286 (9th Cir. 1969)	273
Sida v. I.N.S., 665 F.2d 851 (9th Cir. 1981)	257,272
Sik-Hung Chan v. I.N.S., 610 F.2d 651 (9th Cir. 1979)	257,374
Silva v. Bell, 605 F.2d 978 (7th Cir. 1979)	424
Silverman v. Rogers, 309 F. Supp. 570 (D. Mass.), rev'd, 437 F.2d 102 (1st Cir. 1970)	267,486
Skafte v. Rorex, 553 P.2d 830 (Col. 1976), appeal dismissed, 430 U.S. 961 (1977)	345,472
Skinner v. Oklahoma, 316 U.S. 535 (1942)	308
Smith v. Turner [See Passenger Cases]	
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)	305

	Page
Soo Yuen v. U.S.I.N.S., 456 F.2d 1107 (9th Cir. 1972)	239
Steel Seizure Case [See Youngstown Sheet & Tube Co. v. Sawyer]	
Sterling v. Constantin, 287 U.S. 378 (1932)	488
Taguchi v. Carr, 62 F.2d 307 (9th Cir. 1932)	247
Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)	345
Tang Tun v. Edsell, 223 U.S. 673 (1912)	239,310,311
Tapia-Acuna v. I.N.S., 640 F.2d 223 (9th Cir. 1981)	261,331
Terrace v. Thompson, 263 U.S. 197 (1923)	344,346,347
The Exchange, 11 U.S. (7 Cranch) 116 (1812)	286,288
Tiaco v. Forbes, 228 U.S. 549 (1913)	310
Tim Lok v. I.N.S., 548 F.2d 37 (2d Cir. 1977) (Lok I)	259
Tim Lok v. I.N.S., 681 F.2d 107 (2d Cir. 1982) (Lok II)	260
Toll v. Moreno, 458 U.S. 1 (1982)	284,345
Toon Ming Wong v. United States, 363 F.2d 234 (9th Cir. 1966)	252,256
Torabpour v. I.N.S., 694 F.2d 1119 (8th Cir. 1982)	329
Trias-Hernandez v. I.N.S., 528 F.2d 366 (9th Cir. 1975)	238
Trimble v. Gordon, 430 U.S. 762 (1977)	323
Trop v. Dulles, 356 U.S. 86 (1958)	346,347,502
Truax v. Raich, 239 U.S. 33 (1915)	344

	Page
Trujillo-Hernandez v. Farrell, 503 F.2d 954 (5th Cir. 1974)	346
United States v. Barajas-Guillen, 632 F.2d 749 (9th Cir. 1980)	330
United States v. Bland, 283 U.S. 636 (1931)	244
United States v. Carolene Products Co., 304 U.S. 144 (1938)	471
United States v. Correll, 389 U.S. 299 (1967)	463
United States v. Cox, 342 F.2d 167 (5th Cir. 1965)	223
United States v. Craig, 28 F. 795 (E.D. Mich. 1886)	285
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	287,296,301,312
United States v. Ju Toy, 198 U.S. 253 (1905)	310
United States v. Jung Ah Lung, 124 U.S. 621 (1888)	286
United States v. Lovett, 328 U.S. 303 (1946)	347
United States v. Macintosh, 283 U.S. 605 (1931)	244
United States v. Manzi, 276 U.S. 463 (1912)	244
United States v. N.A.S.D., 422 U.S. 694 (1975)	463
United States v. Rauscher, 119 U.S. 407 (1886)	245
United States v. Schwimmer, 279 U.S. 644 (1929)	244
United States v. Vuitch, 402 U.S. 62 (1970)	244

	Page
United States v. Wong Kim Ark, 169 U.S. 649 (1898)	347,505
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)	242,267,274,450,451, 455
United States ex rel. Adel v. Shaughnessy, 183 F.2d 371 (2d Cir. 1950)	272
United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923)	313
United States ex rel. Claussen v. Day, 279 U.S. 398 (1929)	247
United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950)	326
United States ex rel. Exarchou v. Murff, 265 F.2d 504 (2d Cir. 1959)	269
United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950)	236,310,312,313,314, 416,483,505
United States ex rel. Lo Duca v. Neelly, 213 F.2d 161 (7th Cir. 1954)	274
United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927)	226,227,232,234
United States ex rel. Partheniades v. Shaughnessy, 146 F. Supp. 772 (S.D.N.Y. 1956)	273
United States ex rel. Szlajmer v. Esperdy, 188 F. Supp. 491 (S.D.N.Y. 1960)	268
United States ex rel. Tisi v. Tod, 264 U.S. 131 (1924)	310
United States ex rel. Turner v. Williams, 194 U.S. 279 (1904)	287,309,319,423
United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929)	227,231,232

	Page
United States ex rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103 (1927)	310
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951)	237
Vaca v. Sipes, 386 U.S. 171 (1967)	223
Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936)	245
Vance v. Terrazas, 444 U.S. 252 (1980)	238
Vargas-Banuelos v. I.N.S., 466 F.2d 1371 (5th Cir. 1972)	255
Vissian v. I.N.S., 548 F.2d 325 (10th Cir. 1977)	261
Volkswagenwerk Aktiengesellschaft v. Fed. Maritime Comm'n, 390 U.S. 261 (1968)	463
Wadman v. I.N.S., 329 F.2d 812 (9th Cir. 1964)	245,256,257,264,265
Wall v. I.N.S., 722 F.2d 1442 (9th Cir. 1984)	260
Wan Chung Wen v. Ferro, 543 F. Supp. 1016 (W.D.N.Y. 1982)	242
Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935)	247
Wazini v. I.N.S., 392 U.S. 55 (9th Cir. 1968)	238
Webb v. O'Brien, 263 U.S. 313 (1923)	344
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	321
West Coast Hotel v. Parrish, 300 U.S. 379 (1937)	307
Whitney v. California, 274 U.S. 357 (1927)	319
Whitney v. Robertson, 124 U.S. 190 (1888)	245

	Page
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	344
Windsor v. McVeigh, 93 U.S. 274 (1876)	305
Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1956)	451
Wong Wing v. United States, 163 U.S. 228 (1896)	343
Wong Wing Hang v. I.N.S., 360 F.2d 715 (2d Cir. 1966)	239,272,275
Wong Yang Sun v. McGrath, 339 U.S. 33 (1950)	244,314,423,472
Woodby v. I.N.S., 385 U.S. 276 (1966)	237,238
Yaldo v. I.N.S., 424 F.2d 501 (6th Cir. 1970)	239
Yamataya v. Fisher, 189 U.S. 86 (1903) [Japanese Immigrant Case]	244,309,333,423
Yanez-Jacquez v. I.N.S., 440 F.2d 701 (5th Cir. 1971)	253
Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980)	327,328,329,393
Yates v. United States, 354 U.S. 298 (1957)	319
Yeung How v. North, 223 U.S. 705 (1911)	310
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	344
Yong v. Regional Manpower Administrator, 509 F.2d 243 (9th Cir. 1975)	225,273
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) [Steel Seizure Case]	488
Yuen Sang Low v. A.-G., 479 F.2d 820 (9th Cir. 1973)	243
Yukio Chai v. Bonham, 165 F.2d 207 (9th Cir. 1947)	248

	Page
Yusuf v. Regional Manpower Administrator, 390 F. Supp. 292 (W.D. Va. 1975)	270,273
Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir. 1965)	252
Zschernig v. Miller, 389 U.S. 429 (1968)	344

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Attorney-General of Canada v. Brent [1956] S.C.R. 318 (S.Ct. of Canada)	131
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SELECTED ABBREVIATIONS

aff'd	affirmed
A.P.A.	Administrative Procedure Act (United States)
B.I.A.	Board of Immigration Appeals (United States)
C.F.R.	Code of Federal Regulations (United States)
C.I.O.	Chief Immigration Officer (United Kingdom)
Comm.	Committee
Comm'n	Commission
Comm'r	Commissioner
E.C.J.	European Court of Justice (Court of Justice of the European Communities)
E.C.O.	Entry Clearance Officer (United Kingdom)
I.A.T.	Immigration Appeal Tribunal (United Kingdom)
Imm. A.R.	Immigration Appeal Reports (United Kingdom)
I. & N. Dec.	Immigration and Nationality Decisions (United States)
I.N.S.	Immigration and Naturalization Service (United States)
I.O.	Immigration Officer (United Kingdom)
rev'd	reversed
U.S.C.	United States Code

INTRODUCTION

In recent years, in both the United Kingdom and the United States, immigration law has begun to command more and more public attention. Few subjects have experienced as rapid an increase in either importance or degree of controversy. The magnitude of the national and individual interests, the intense political sentiments engendered by immigration policy, and the social questions flowing from the ethnic aspects of immigration control all coalesce to make the area a prime target for volatile debate. Not surprisingly, therefore, much has been written about the substantive immigration laws of both the U.K. and the U.S.[1]

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1. In the United Kingdom, the major general works are A. Dummett, A New Immigration Policy (1978); J.M. Evans, Immigration Law (2d ed., 1983); L. Grant & I. Martin, Immigration Law and Practice (1982); Handsworth Law Centre, Immigration Law Handbook (2d ed., 1980); I.A. Macdonald, Immigration Law and Practice (1983); M. Supperstone, Immigration: The Law and Practice (1983). For brief summaries, see S.A. de Smith, Constitutional and Administrative Law (4th ed., 1981, by H. Street & R. Brazier), at 415-31; J.M. Evans, Statutes, Immigration Act 1971 (1972) 35 Mod. L. Rev. 508; H.W.R. Wade, Administrative Law (5th ed., 1982), at 202-07. Cf. A. Bottomley & G. Sinclair, Control of Commonwealth Immigration (1970); C.F. Fraser, Control of Aliens in the British Commonwealth of Nations (1940). See also the many works focusing on nationality law (note 5 below). Note, however, that the Labour Party is committed to replacing both the Immigration Act 1971 and the British Nationality Act 1981 with a single comprehensive statute (see, e.g., The Times, 14 July 1982, at 3).

The major American works are A. Fragomen, A. Del Rey, & S. Bernsen, Immigration Law and Business (1983); C. Gordon & H.N. Rosenfield, Immigration Law and Procedure (rev. ed., 1984); E.J. Harper, Immigration Laws of the United States (1975); J. Wasserman, Immigration Law and Practice (3d ed., 1979). See also A. H. Liebowitz, Immigration Law and Refugee Policy (1983); E. Lowenstein, The Alien and the Immigration Law:

This thesis examines the role of the British and the American courts in cases arising under those laws. The subject presents a 'Who decides?' question of the first order. It goes to the allocation of power between the Judiciary, on the one hand, and the Legislature and the Executive, on the other hand.

Several comments about the scope of this thesis are necessary. Although principal emphasis will be on the role of the ordinary courts of law in immigration cases, it will also be necessary to consider the roles played by other adjudicative

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1. (continued) A Study of 1446 Cases (1958). The legislative documents are compiled in O. Trelles & J. Bailey, Immigration and Nationality Acts Legislative History and Related Documents (15 volumes) (1979). Current developments are provided periodically by the American Council for Nationalities Service, Interpreter Releases (per M. Roberts, ed.). For works on aliens' rights outside the immigration area, see note 7 below.

For comparative law and international law studies of immigration, see J.P. Dietz, Deportation in the United States, Great Britain, and International Law (1973) 7 Int'l Lawyer 326; G.S. Goodwin-Gill, International Law and the Movement of Persons Between States (1978); G.S. Goodwin-Gill, The Refugee in International Law (1984); R. Plender, International Migration Law (1972); R. Plender, The Exodus of Asians from East and Central Africa: Some Comparative and International Law Aspects (1971) 19 Amer. J. Comp. L. 287; cf. M. Knisbacher, Aliyah of Soviet Jews: Protection of the Right of Emigration under International Law (1973) 14 Harv. Int'l L.J. 89.

There is a vast literature on the social science aspects of immigration. Several works treating social and economic aspects of immigration are cited throughout chapters IV and V below. For treatment of the demography and economics of immigration, see M. Boyd, Immigration Policies and Trends: A Comparison of Canada and the United States (1976) 13 Demography 83; C. DeMuth, Immigration: A Brief Guide to the Numbers Game (1978); W.A. Fogel, Illegal Aliens: Economic Aspects and Public Policy Alternatives (1977) 15 San Diego L. Rev. 63; W.A. Fogel, Illegal Mexican Workers in the United States (1977); D. North & M. Houstoun, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market (1976); P. Rodino, Impact of Aliens on the American Labor Market (1974) 27 Rutgers L. Rev. 245; Symposium, U.S. Immigration Policy (1982) 45 L. & Contemp. Probs., issue #2.

bodies. The pertinent administrative tribunals are the adjudicators and the Immigration Appeal Tribunal (I.A.T.) in the United Kingdom,[2] and the immigration judges and the Board of Immigration Appeals (B.I.A.) in the United States.[3] As will be seen, these tribunals perform crucial functions in resolving immigration disputes. Their decisions will be studied, and the complementary relationships between courts and tribunals will be examined in some detail.

The decisions of the European Court of Justice will also be analysed. British accession to the European Communities, followed by enactment of the European Communities Act 1972, give those decisions direct relevance to British immigration law.[4] Moreover, the principles embodied in the opinions of the European Court can usefully be compared to those elicited from the decisions of the British courts.

The term 'immigration law' will be used here in its strictest sense to mean the body of substantive and procedural law defining who may enter, and who may remain in, a given country. The related area of nationality law, which concerns the acquisition and loss of citizenship, will be discussed only to the extent that it aids the analysis of the judicial role in

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2. See Immigration Act 1971, ss. 12-23.
3. See 8 U.S.C. ss. 1226(a), 1252(b); 8 C.F.R. s. 1.1(l) ('special inquiry officer', or 'immigration judge'); 8 C.F.R., part 3 (B.I.A.).
4. See pp. 198-99 below.

immigration cases.[5] The same is true of the law governing criminal prosecutions for alleged immigration offences,[6] and the law of immigrants' rights and obligations outside the context of immigration.[7]

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5. The principal legislation in the U.K. is the British Nationality Act 1981, implemented by the British Nationality (General) Regulations 1982, S.I. 1982, No. 986. See generally C. Blake, Citizenship, Law and the State: the British Nationality Act 1981 (1982) 45 Mod. L. Rev. 179; L. Fransman, British Nationality Law and the 1981 Act (1982); M.D.A. Freeman, British Nationality Act 1981 (1982); I.A. Macdonald & N. Blake, The New Nationality Law (1982); I. Stanbrook, British Nationality: The New Law (1982); Supperstone, note 1 above, ch. 3; R. White & F.J. Hampson, The British Nationality Act 1981 -- Civitas in Tres Partes Divisa Est (1982) Pub. L. 179. A good general text pre-dating the 1981 Act is A. Dummett, Citizenship and Nationality (1976). The leading historical study is J.M. Jones, British Nationality Law (rev. ed., 1956). On more specific subjects, see T. St. J.N. Bates, Judicial Review and Nationality Law (1982) Pub. L. 179; J.M. Jones, Who Are British Protected Persons? (1945) B.Y. Int'l L. 121.

For American nationality law, see Gordon & Rosenfield, note 1 above, ch. 11-20; J.P. Roche, The Expatriation Cases: Breathes There a Man with Soul So Dead ... ? (1963) S.Ct. Rev. 325; J.P. Roche, The Loss of American Nationality: The Development of Statutory Expatriation (1950) 99 U. Penn. L. Rev. 25.

For comparative and international studies, see N. Bar-Yaacov, Dual Nationality (1961); C. Joseph, Nationality and Diplomatic Protection: The Commonwealth of Nations (1969); C. Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland (1957 & 1960) (2 volumes); H.F. Van Panhuys, The Role of Nationality in International Law (1959).

6. In the U.K., see Immigration Act 1971, ss. 24-28; Supperstone, note 1 above, ch. 19. In the U.S., see 8 U.S.C. ss. 1306, 1321-30; Gordon & Rosenfield, note 1 above, ch. 9. See also pp. 343, 412 below.

7. Common issues include immigrants' eligibility for social security, for selected occupations, and for government employment, as well as land ownership rights, tax status, and military status. The leading American work is A.P. Mutharika, The Alien under American Law (1981). See also D. Carliner, The Rights of Aliens (1977); F.G. Dawson & I.L. Head, International Law, National Tribunals, and the Rights of Aliens (1971); Gordon & Rosenfield, note 1 above, ss. 1.30-1.46; M.R. Konvitz, The Alien and the Asiatic in American Law (1946), at 148-218; B. Sundberg-Weitman, Discrimination on the Ground of

The term 'role' has been defined in numerous ways. One study of judicial behaviour defines role as 'the cluster of normative expectations which exist at any given time as to the behaviour and attributes required of a person who holds a particular status or position'.[8] This definition usefully emphasises both that role is comprised of expectations and that those expectations are normative rather than descriptive. Another formulation defines role as 'functions, duties, and powers', and argues that a judge's own perception of his or her role has a significant bearing on judicial decisionmaking.[9] This definition has the advantage of providing greater specificity with respect to the objects of the normative expectations -- i.e., the sorts of behaviour and attributes about which the expectations are held. In this thesis, the two definitions will be combined, and the term 'role of a court' will be used to mean the normative expectations concerning the functions, duties, and powers of a court.[10]

That definition permits distinction based on the holder of the expectations.[11] In this thesis, primary attention will

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7. (continued) Nationality (1977); J. Weisman, Restrictions on the Acquisition of Land by Aliens (1980) Am. J. Comp. L. 39.
8. A. Paterson, The Law Lords (1982), at 3. See also ibid., at 202.
9. C. Palley, Decisionmaking in the Area of Public Order by English Courts, The Open University, D203, Block II, Part 3 (1976), at 41.
10. See also R.B. Seidman, The Judicial Process Reconsidered in the Light of Role Theory (1969) 32 Mod. L. Rev. 516, at 517 (role is complex of obligations that comprise a social position).
11. Paterson uses the term 'reference groups' to describe the holders of the expectations: see note 8 above, at 3, 202-03.

be focused on the judges' own perceptions of their roles. The author's perceptions of the judicial role -- i.e., normative expectations concerning judicial functions, duties, and powers -- will also be expressed. The organisation is described more specifically below.

The courts' own perceptions of their role can be ascertained in various ways. One method is to interview judges and other people associated with them.[12] The other principal means of assessing judicial role perception is to examine judges' written opinions in decided cases. The latter approach will be taken here, supplemented on occasion by consideration of the viewpoints expressed by judges in books, articles, and other extrajudicial statements.

With respect to written opinions, it is necessary to distinguish further between rhetoric and results. Both can be revealing, and both will be considered when they shed light on judicial role perception. It will be seen that in the immigration cases the rhetoric and the results have typically, though not always, converged.

In this thesis, the terms 'liberal' and 'conservative' will be used to describe the results reached in particular immigration cases or groups of such cases. In an immigration

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12. See especially Paterson, note 8 above (combining personal interviews with analysis of written decisions); R. Stevens, Law and Politics -- The House of Lords as a Judicial Body, 1800-1976 (1978). The tribulations encountered by researchers attempting this method are related in Paterson, at 215-16 n.26. The same footnote, however, describes several successful efforts. Section IV.A below draws on much of the information gathered in those latter sources.

case, the court must ultimately resolve a dispute between an immigrant and the government. If contrary dispositions were reasonably open to the court, a result favourable to the immigrant will be described as 'liberal' and a result favourable to the government will be described as 'conservative'. It is appreciated that these labels are often imprecise, but they provide a convenient shorthand for present purposes when understood in accordance with that definition.

It will also be necessary to describe the judicial role perception reflected in particular cases. In immigration cases, the ultimate question before the court will always be whether to invalidate a decision of some governmental entity. The entity might be an immigration officer; it might be the British Home Secretary or the American Attorney General; it might be an administrative tribunal; in the United States, it might be the Congress. In each of those cases, the court must make a conscious or unconscious judgment as to the degree of deference it ought to accord the challenged decision. In this thesis, when the court shows great deference to the governmental entity whose decision is being reviewed, the court will be said to have taken a 'deferential', or a 'restrained', view of its own role. When relatively little deference is shown, the court's role perception will be described as 'assertive'. Finally, apart from degree of deference, other aspects of judicial role perception will be considered in appropriate places.

The first three chapters of the thesis will illustrate by example the techniques courts have used, the results they have reached, and the rhetoric with which their opinions have been expressed, in immigration cases. The case selection will reflect several criteria: whether the issues were reasonably susceptible to differing solutions; whether the language of the opinion reveals useful information; whether the decision is representative or aberrational; and whether the problems posed by the various cases are sufficiently similar to permit the spotting of patterns. The functions of these three chapters are to furnish the empirical support, and to establish the broad patterns, on which the two remaining chapters will build. It will be shown that, with some important qualifications, the immigration cases have generally been characterised both by unusual conservatism and by unusual restraint.

More specifically, chapter I will examine immigration cases decided by the British courts, the I.A.T., and the European Court of Justice. The approaches of the American courts and the B.I.A. will be analysed in chapter II, except that the American constitutional cases will be considered separately in chapter III. For an understanding of substantive immigration law, the reader is referred to the sources cited above.

Chapter IV provides a descriptive analysis. It draws empirically on the cases discussed, and the broad patterns established, in the first three chapters. After breaking down the patterns more finely, it offers possible explanations for them. The argument will be that the results of the immigration

cases are the products of a vast complex of factors, some doctrinal and some external, and that the central external factor has been the courts' perceptions of their role.[13] The same chapter will describe patterns distinguishing the British immigration cases from the American immigration cases. Finally, within the area of immigration and within each country, variations from one type of immigration case to another will be examined.

The last chapter offers a prescriptive analysis. Submissions will be advanced as to what role the courts ought to play in immigration cases, as compared with other cases. The argument made will be that only exceptionally should the fact that the subject matter concerns immigration lessen the court's functions, duties, and powers.

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13. Discussion of the doctrinal factors is deferred until chapter V to minimise repetition.

CHAPTER I

JUDICIAL REVIEW OF IMMIGRATION DECISIONS IN THE UNITED KINGDOM

Several commentators have sensed great restraint on the part of the British courts in reviewing administrative decisions that arise under the immigration laws.[1] These conclusions, however, have been reached without the benefit of a systematic study of the approaches courts have employed, and the ultimate decisions they have rendered, in immigration cases. Thus, one aim of this chapter is to provide such a study. A second aim is to supply, together with the next two chapters, the framework for the analyses of the last two chapters.

The chapter will begin by summarising very briefly, in section A, certain of the fundamental principles underlying judicial review of administrative decisions in the United Kingdom.[2] Sections B, C, D, E, and F consider in varying

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1. See, e.g., S.A. de Smith, Judicial Review of Administrative Action (4th ed., by J.M. Evans, 1980), at 297, 370 (adhering to position taken by de Smith in 3d ed., at 326); J.M. Evans, Immigration Law (2d ed., 1983), at 38, 328, 418; J. Griffiths, Case and Comment, Immigration Law--Some Regrettable Retreats (1981) 40 Camb. L.J. 2, at 2; H.W.R. Wade, Administrative Law (5th ed., 1982), at 207, 507. See also Lord Gardiner, quoted in I.A. Macdonald, The New Immigration Law (1972), at 79 n.14.

2. For more general treatment of judicial review of administrative decisions, see, e.g., J. Beatson & M.H. Matthews, Administrative Law Cases and Materials (1983); P.P. Craig, Administrative Law (1983); de Smith, note 1 above; S.A. de Smith, Constitutional and Administrative Law (4th ed., by H. Street & R. Brazier, 1981), ch. 28; J.F. Garner, Administrative Law (5th ed., 1979); J.A.G. Griffith & H. Street, Principles of Administrative Law (5th ed., 1973); B. Schwartz & H.W.R. Wade, Legal Control of Government, Administrative Law in the United Kingdom and the United States (1972); Wade, note 1 above; R.E. Wraith & P.G. Hutchesson, Administrative Tribunals (1973), appendix I, at 323. See also W.A. Robson, Justice and Administrative Law (2d ed., 1947).

detail the major categories of decisions the British courts have been called on to make in immigration cases. These sections will deal, respectively, with factfinding, procedural fairness, the effects and interpretations of administrative rules and regulations, statutory interpretation, and the exercise of discretion. Section G will discuss the effect on immigration cases of the presumptions of constitutionality and regularity. In section H, representative decisions of the I.A.T. will be considered, and conclusions will be drawn. A similar analysis of the immigration decisions of the European Court of Justice will follow in section I.

A. Judicial Review: General Principles

Appeal and Review

English law distinguishes between appeal and review. A statutory appeal to a superior court[3] ordinarily empowers the appellate court to decide all questions of law, though usually nothing else.[4] When no appeal right is conferred, the High Court may nonetheless exercise its inherent supervisory power to review the decision of an inferior tribunal.[5] The power

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3. From some specialised tribunals, appeals may also be taken to a Minister or to a higher tribunal (other than a superior court): see de Smith, note 1 above, at 19. See, e.g., Immigration Act 1971, s. 20.
4. See generally de Smith, note 1 above, at 19, 126, 402; Tribunals and Inquiries Act 1971, s. 13(1).
5. See de Smith, note 1 above, at 19-20; P.J. Dalton & R.S. Dexter, Constitutional Law (1976), at 202-03. See also R. v. Electricity Commissioners [1924] 1 K.B. 171, at 205 (C.A.) (Atkin L.J., recognising the availability of certiorari and prohibition in judicial review of administrative proceedings); R. v. London Borough of Hillingdon, ex p. Royco Homes, Ltd. [1974] 2 All E.R. 643, at 648 (Div. Ct.).

to review is limited to specified grounds, narrower than those governing appeals,[6] but recent developments have reduced the pertinent differences, as noted below.[7]

Under the Tribunals and Inquiries Act 1971, a person dissatisfied in point of law may appeal to the High Court against the decisions of designated tribunals. Adjudicators and the Immigration Appeal Tribunal, however, are not included.[8] Thus, the High Court in immigration cases is limited to supervisory review.

Classifying Administrative Decisions

Decisions of administrative bodies can be classified in various ways. One scheme categorises administrative decisions as legal, factual, or discretionary,[9] depending on the nature of the task facing the decisionmaker. Discretion can be defined as the 'power to make a choice between alternative courses of action'.[10] As de Smith noted, under this

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6. See Amin v. E.C.O., Bombay [1983] 2 All E.R. 864 (H.L.), at 868 (per Lord Fraser of Tullybelton); Chief Constable of the North Wales Police Force v. Evans [1982] 1 W.L.R. 1155 (H.L.), at 1174 (per Lord Brightman).
7. See pp. 15-16 below. Appeal and review also differ remedially. An appellate court may usually alter the original decision; a reviewing court lacks that power: de Smith, note 1 above, at 138. But see R.S.C., Order 53, r. 9(4) and pp. 22-23 below.
8. Compare Tribunals and Inquiries Act 1971, s. 13(1) with ibid., sch. I., para. 8.
9. de Smith, note 1 above, at 96.
10. Ibid., at 278. See also R.C. Austin, Judicial Review of Subjective Discretion--At the Rubicon; Whither Now (1975) 28 Current Legal Prob. 150, at 174. For a similar definition, see K.C. Davis, Administrative Law Cases--Text--Problems (6th ed., 1977), at 443.

definition there exists no uniquely correct discretionary decision, although there might be many such decisions that can be labelled incorrect. In contrast, a question of law or fact is sometimes said to have a uniquely correct answer.[11] Because reasonable minds might differ over what that answer is, the line separating discretion from both law and fact is far from clear.

Nor can questions of fact always be distinguished easily from questions of law. De Smith defines a finding of fact as 'an assertion that a phenomenon exists, has existed or will exist, independently of any assertion as to its legal effect'.[12] In many cases this distinction is straight-forward. When it is not, de Smith concludes that courts tend to classify as legal those questions they deem it wise to review strenuously, and as factual those questions they do not.[13] The wisdom of reviewing a particular decision rests, in turn, on numerous policy considerations.[14]

One type of borderline case is the question whether an agreed set of primary facts conforms to the statutory standard. Such questions, which might contain combinations of legal, factual, and discretionary components, are sometimes described as questions of law,[15] and at other times as

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11. de Smith, note 1 above, at 97.
12. Ibid., at 128, paraphrasing L.L. Jaffe, Judicial Control of Administrative Action (1965), at 548.
13. de Smith, note 1 above, at 128.
14. Ibid., at 129.
15. For examples, see W.A. Wilson, Questions of Degree (1969) 32 Mod. L. Rev. 361, at 375 n.91. But see E. Mureinik, The Application of Rules: Law or Fact? (1982) 98 L.Q. Rev. 587 (arguing that application question is one of law).

questions of degree, which are a subcategory of questions of fact.[16] A question of degree is usually defined as one on which reasonable persons may differ, given the evidence before them.[17] This formulation has much in common with the definition of discretion, and de Smith suggests persuasively that the more vague the statutory standard, the less likely such a question is to be one of fact and degree, and the more likely it is to be one of discretion. For example, the question whether deportation would be 'conducive to the public good', an expression necessitating consideration of a broad range of facts and policy choices, has been treated by the courts as discretionary.[18]

The organisation of the cases within this chapter reflects the law/fact/discretion distinction rather than the law/fact/degree distinction. Although either classification would provide a manageable basis for studying the U.K. cases, the law/fact/discretion distinction has been adopted primarily because it facilitates comparison with the U.S. cases. The latter routinely distinguish among law, fact, and discretion, but do not generally use the terminology 'question of degree'.

Grounds for Relief

On what grounds may a reviewing court grant relief from a decision of an administrative body? A typical formulation is

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16. Wilson, note 15 above, at 375.
17. de Smith, note 1 above, at 131.
18. See pp. 147-59 below.

that relief may be granted only when the administrative body acted ultra vires or made an error going to jurisdiction;[19] when it made an error of law on the face of the record; and when it violated procedural rules that it was required to obey.[20] Apart from those general limitations on the supervisory powers of reviewing courts, limitations also flow from the particular remedy sought, as discussed below.

Recent developments have broadened the concept of jurisdictional error to the point where it is a rare legal question that does not go to jurisdiction.[21] Further, as discussed below,[22] review for jurisdictional error extends also to questions of fact. Similarly, an administrative body required to exercise discretion can commit a jurisdictional

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19. See, e.g., Wraith & Hutchesson, note 2 above, at 326 (referring specifically to review of administrative tribunals). Hutchesson states that jurisdictional error is ordinarily a ground for certiorari or prohibition, whereas ultra vires action is a ground for mandamus, declaration, or injunction: ibid. That formulation is generally consistent with the use of the term 'jurisdiction' in the context of judicial functions and 'ultra vires' in the contexts of administrative, executive, and legislative functions. See generally de Smith, note 1 above, at 68-89, 94-96, 108-19.
20. Ibid. Cf. de Smith, note 1 above, at 27.
21. See especially Anisminic Ltd. v. Foreign Comp. Comm'n [1969] A.C. 147 (H.L.); Pearlman v. Keepers & Gov'rs of Harrow School [1979] 1 Q.B. 56 (C.A.), at 69-70 (per Lord Denning M.R.); see also Lord Diplock, Administrative Law: Judicial Review Reviewed (1974) 33 Camb. L.J. 233, at 242-43. But see the dissent of Geoffrey Lane L.J. (as he then was) in Pearlman ([1979] 1 Q.B. at 74-76). And see South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Mfr'g Employees Union [1980] 3 W.L.R. 318 (P.C.) (narrow view of jurisdiction, though court was interpreting broadly worded ouster clause and no party claimed jurisdictional error); cf. In re Racal Communications Ltd. [1980] 3 W.L.R. 181 (H.L.). See generally J. Griffiths, Jurisdictional Review of Errors of Law (1980) 39 Camb. L.J. 232; H.W.R. Wade, New Twists in the Anisminic Skein (1980) 96 L.Q. Rev. 492.
22. See pp. 23-24 below.

error by asking itself the wrong question, by ignoring relevant considerations, or by taking into account irrelevant considerations--in short, when one of the common grounds for finding abuse of discretion is present.[23]

The Tribunals and Inquiries Act 1971 lists several tribunals, including the immigration appellate authorities, whose decisions must be accompanied by reasons upon request made on or before the giving of the decision.[24] The statute further provides that such reasons 'shall be taken to form part of the decision and accordingly to be incorporated in the record'.[25] Consequently, incorrect reasons will ordinarily appear on the face of the record, and therefore can form the basis for review.[26] Further, the no-evidence rule can also result in error of law on the face of the record when the record purports to include all the evidence.[27]

The third ground for relief mentioned above--breach of natural justice--is treated separately in section C below.

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23. de Smith, note 1 above, at 396.
24. Section 12(1)(a) and sch. 1, para. 8. National security cases are exempt from this requirement: ibid., s. 12(2).
25. Ibid., s. 12(5).
26. R. v. Med. App. Trib., ex p. Gilmore [1957] 1 All E.R. 796 (C.A.); R. v. Northumberland Comp. App. Trib., ex p. Shaw [1952] 1 All E.R. 122 (C.A.). See also M. Akehurst, Statements of Reasons for Judicial and Administrative Decisions (1970) 33 Mod. L. Rev. 154; R. v. Preston Supp. Bens. App. Trib., ex p. Moore [1975] 2 All E.R. 807, at 810 (C.A.)(record includes all documents); R. v. Crown Court at Knightsbridge, ex p. Int'l Sporting Club (London) Ltd. [1981] 3 All E.R. 417, at 422-24 (Div. Ct.)(record includes reasons contained in transcript of oral judgment); R. v. Supp. Bens. Comm'n, ex p. Singer [1973] 2 All E.R. 931, at 932 (Div. Ct.)(record includes reasons contained in informal document).
27. de Smith, note 1 above, at 127.

It is possible to view breach of natural justice as one type of jurisdictional error, although such a view does create problems, the treatment of which is beyond the scope of this thesis.[28]

Remedies[29]

Numerous remedies, of both public law and private law origin, are possible when an individual challenges the action or inaction of an administrative body. There are the prerogative orders (formerly prerogative writs) of certiorari, prohibition, and mandamus,[30] as well as the prerogative writ of habeas corpus. There are, in addition, the traditional private law remedies of damages, injunction, and declaration.

Certiorari is the most important of the prerogative orders in immigration cases. The traditional starting point for a discussion of its scope is the classic statement of Lord Atkin that certiorari (like prohibition) will lie '[w]herever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority'.[31]

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28. See de Smith, note 1 above, at 240-46.
29. This subsection is intended only to summarise those principles vital to an understanding of the cases examined in the succeeding sections of the chapter. For more thorough descriptions, see e.g., Craig, note 2 above, parts 3,4; de Smith, note 1 above, part 3; Griffith & Street, note 2 above, at 230-42; Law Commission No. 73, Report on Remedies in Administrative Law, Cmnd. 6407 (1976) [hereafter cited as Law Commission Report]; Wade, note 1 above, part VI.
30. See Supreme Court Act 1981, s. 29(1).
31. R. v. Electricity Commissioners [1924] 1 K.B. 171, at 205 (C.A.).

Lord Atkin's statement remains the modern basis for assessing the availability of certiorari, with several qualifications.[32] If all the elements are satisfied, issuance of certiorari--like that of the other prerogative orders--is subject to the court's discretion.[33] When certiorari issues, its effect is to bring up and quash the challenged decision; unlike an appeal, certiorari does not permit the court to substitute its own decision for that of the administrative body,[34] although one feature of the new application for judicial review, discussed below, is that a grant of certiorari may be accompanied by an order to reconsider the challenged decision in light of the court's opinion.[35]

Prohibition issues to prevent a body from proceeding further on a particular matter.[36] The requirements are very similar to those of certiorari.[37] One major difference,

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32. E.g., the requirement of 'legal authority' has generally been interpreted as statutory authority, although at least one non-statutory body, the Criminal Injuries Compensation Board, has been held subject to certiorari: see de Smith, note 1 above, at 385-87. The phrase 'questions affecting the rights of subjects' has been construed broadly to encompass many interests not technically giving rise to enforceable rights: see generally de Smith, note 1 above, at 387-92. A fairly liberal application has been given to the phrase 'duty to act judicially': see ibid., at 392-95; Craig, note 2 above, at 465-68; cf. pp. 45-53 below (duty to obey the rules of natural justice or to act fairly). Finally, certiorari is not limited to quashing jurisdictional errors; as noted above, it lies also to quash errors of law on the face of the record.
33. Law Commission Report, note 29 above, s. 19.
34. Ibid.
35. Supreme Court Act 1981, s. 31(5); Rules of the Supreme Court (Amendment No. 3) 1977 (S.I. 1977, No. 1955), Rule 5, substituting new version of R.S.C. Order 53, r. 9(4).
36. de Smith, note 1 above, at 25-26.
37. Ibid., at 381.

however, is that while certiorari is now available when a non-jurisdictional error of law appears on the face of the record, it is unclear whether the same is true of prohibition.[38]

Mandamus lies to compel the performance of a public duty. It has been issued in at least two immigration cases, in one against the Home Secretary[39] and in another against an immigration officer.[40] Unlike certiorari, mandamus will not issue on the ground that an error of law appears on the face of the record.[41] The expansive meaning ascribed in recent years to jurisdictional error, however, has drastically diminished the significance of this limitation. Finally, like certiorari and prohibition, mandamus may be refused in the exercise of the court's discretion.[42]

In addition to the public law remedies,[43] several traditionally private law remedies have been adapted for use in the public sphere: damages, injunction,[44] and declaration. The declaration requires further explanation here.

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38. Ibid., at 398. There might also be differences pertaining to locus standi: ibid., at 416-18.
39. R. v. Sec. of State for the Home Dept., ex p. Phansopkar [1975] 3 All E.R. 497 (Div. Ct. and C.A.).
40. R. v. C.I.O., Gatwick, ex p. Kharrazi [1980] 3 All E.R. 373 (C.A.).
41. See de Smith, note 1 above, at 546.
42. See ibid., at 557-64. A decision demonstrating the courts' reluctance to issue mandamus is Chief Constable of the North Wales Police Force v. Evans [1982] 1 W.L.R. 1155 (H.L.). See generally Craig, note 2 above, at 472-77; de Smith, note 1 above, at 538-64.
43. See also pp. 26-27 below (habeas corpus in immigration cases).
44. Injunctions are not ordinarily sought in immigration cases: see Crown Procedings Act 1947, s. 21(1,2).

A declaration simply declares the parties' rights and duties; it does not command any party to act or to refrain from acting, and does not pronounce any sanctions.[45] The advantages and disadvantages of declarations vis-a-vis other remedies, and the extent to which the differences have been altered by the application for judicial review, have been treated elsewhere.[46] Although declarations have not been sought often in immigration cases,[47] one problem potentially affecting their use is the lingering doubt whether a declaration will issue with respect to a non-jurisdictional error of law on the face of the record. One consequence of issuing such a declaration would be that two inconsistent decisions--that of the administrative body and that of the court--would exist simultaneously. This problem does not arise when the administrative decision is declared to be in excess of jurisdiction and therefore void, or when certiorari is issued to quash the administrative decision. The issue was considered in Punton v. Ministry of Pensions and National Insurance [Punton II], where the Court of Appeal expressed the view that a court could not declare that a non-jurisdictional error of law appeared on the face of the record.[48]

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45. de Smith, note 1 above, at 475-76.
46. See generally Craig, note 2 above, at 477-89, 496-517; de Smith, note 1 above, ch. 10. The declaration, unlike the injunction, is available in proceedings against the Crown or its servants: Crown Proceedings Act 1947, s. 21.
47. But see Van Duyn v. Home Office [1974] 1 W.L.R. 1107 (Ch.). The European Court decision in Van Duyn is discussed on pp. 203-04, 209-10 below.
48. [1964] 1 W.L.R. 226, at 235, 237 (C.A.). See also Punton v. Ministry of Pensions and National Insurance [1963] 1 W.L.R. 186 (C.A.) [Punton I].

A complicating factor in Punton II was that an award by the statutory authority was a prerequisite to payment of the benefits sought; thus a declaration would have been an empty gesture.[49] Since entry clearance in many cases is a prerequisite to entry,[50] an analogous problem could arise if a prospective immigrant were to seek a declaration that a refusal of entry clearance was based on a misinterpretation of law by the E.C.O. If the alleged error were found to be on the face of the record but non-jurisdictional, a court would face the Punton II problem. A declaration of invalidity would result in two conflicting decisions, and in addition would be an empty gesture because the applicant would still lack the entry clearance needed for admission. Although the problem has not yet been resolved,[51] its modern importance has been reduced by the broad meaning assigned to 'jurisdictional' error.[52]

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49. [1964] 1 W.L.R. at 234-37.
50. See, e.g., H.C. 169 (1983), paras. 35, 38, 39, 47; cf. paras. 41 ('should' have entry clearance), 45 (must have entry clearance or special voucher).
51. See, e.g., J. Beatson & M.H. Matthews, Supreme Court Rules (1978) 41 Mod. L. Rev. 437, at 444-45; P. Cane, A Fresh Look at Punton's Case (1980) 43 Mod. L. Rev. 266; de Smith, note 1 above, at 519-21 & 521 n.63. Beatson and Matthews, at 444-45, also discuss whether the Punton problem is affected by adoption of the application for judicial review. See also Re Tillmore Common, Heslington [1982] 2 All E.R. 615, at 621 (Ch.).
52. This problem should not arise when the alleged error is jurisdictional. Since the administrative decision is void, only one valid pronouncement will be outstanding. It might be argued that the declaration would still be an empty gesture because the statutory prerequisite to relief--a favourable decision by the particular administrative body--will not have been met. Since the decision is void, however, it would seem that the original application (in the case of the E.C.O.)

Application for Judicial Review[53]

Until recently, applications for the prerogative orders could not be combined with applications for the private law remedies of declaration, injunction, or damages.[54] Effective 1978, however, Order 53 of the Rules of the Supreme Court was amended to create a unified procedure known as the application for judicial review.[55] Under this procedure, one who has obtained leave to apply for judicial review[56] may seek, in the alternative or in combination, certiorari, prohibition, mandamus, declaration, or injunction.[57] In addition, at least when one of these remedies lies, the court may also award

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52. (continued) or statutory appeal (in the case of the National Insurance Commissioner) would again be outstanding. Thus the administrative body would retain whatever duty it originally had to render a decision, in much the same way that it would have such a duty if the decision were quashed by a grant of certiorari.

53. See generally Craig, note 2 above, at 498-517; de Smith, note 1 above, at 565-83. For short comments, see Beatson & Matthews, note 51 above; P. Elias, Remedies in Administrative Law--A Less than Modest Reform (1978) 37 Cambridge L.J. 205; C. Harlow, Comment (1978) Pub. L. 1; J.L. Lambert, Administrative Law--Reform of the Public Law Remedies in England (1978) 56 Canadian Bar Rev. 668; H.W.R. Wade, Reform of Remedies in Administrative Law (1978) 94 L.Q. Rev. 179.

54. See Law Commission Report, note 29 above, s. 21; Lambert, note 53 above, at 670.

55. See note 35 above; see also Supreme Court Act 1981, s. 31. The amendment followed the Law Commission Report, note 29 above, s. 43.

56. R.S.C. Order 53, note 35 above, s. 3(1). See also R. v. Greenwich Justices, ex p. Aikens, Times L. Rpt., 3 July 1982.

57. Ibid., s.1. The Order provides that certiorari, prohibition, mandamus, and certain injunctions shall be sought by applications for judicial review: s. 1(1). Other injunctions, and declarations, may be sought by applications for judicial review: s. 1(2).

damages under circumstances that would warrant a damages award in a private action.[58]

Nothing in the new procedure alters the substantive grounds for relief or the limitations on specific remedies.[59] The question arises, however, whether Order 53 is the exclusive vehicle for establishing that the decision of a public authority violated a right conferred by public law. In O'Reilly v. Mackman,[60] the House of Lords held that, as a general proposition, Order 53 is exclusive in such cases. It added in Cocks v. Thanet Dist. Council[61] that the same is true when the decision of a public authority prevents a person from proving a condition precedent to a private law right.

B. Review of Findings of Fact

The British courts have generally hesitated to set aside findings of fact[62] by administrative bodies. There are, however, two situations in which administrative decisions have been reviewed for factual error. The first, applicable even in the face of an ouster clause,[63] is that in which the finding goes to jurisdiction.[64] The scope of the court's review for

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58. Ibid., s. 7(1).
59. de Smith, note 1 above, at 566.
60. [1982] 3 All E.R. 1124 (H.L.).
61. [1982] 3 All E.R. 1135 (H.L.).
62. See the definition of 'fact' on p. 13 above.
63. See, e.g., R. v. Medical App. Trib., ex p. Gilmore [1957] 1 Q.B. 574 (C.A.); R. v. Minister of Health [1939] 1 K.B. 232 (C.A.). For the general effect of finality clauses on reviewability, see Tribunals & Inquiries Act 1971, s. 14(1).
64. R. v. Boycott, ex p. Keasley [1939] 2 K.B. 651 (Div. Ct.); Bunbury v. Fuller (1853) 9 Ex. 111.

jurisdictional error of fact varies with the circumstances of the case; courts typically insist on fairly strong grounds before taking a different view of the evidence.[65]

Second, either a finding of primary fact entirely unsupported by the evidence or an inference entirely unsupported by the primary facts will constitute error of law.[66] Although known as the 'no-evidence' rule, this principle has not been confined to the case in which there is literally no evidence to support the findings. If the evidence is so meagre that 'no reasonable body of persons properly instructed in the law' could make the challenged findings, an error of law will be found.[67] And if the record purports to contain all the evidence the administrative body considered, the error of law can be regarded as appearing on the face of the record.[68]

Reported immigration cases in which a court has been asked to set aside an administrative finding of true 'fact'[69] are relatively infrequent. From the few reported immigration cases raising the question, however, it would appear that the courts have been even less inclined to review immigration cases for factual error than they are generally to review for factual

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65. de Smith, note 1 above, at 139-41.
66. Ibid., at 133.
67. Ibid., at 137. That test has been assumed to be narrower than the American 'substantial evidence' test: ibid., at 137-39. An argument for the substantial evidence test is advanced in Austin, note 10 above, at 174.
68. de Smith, note 1 above, at 127.
69. When an immigration official is authorised to reach a broad conclusion, such as whether it is 'undesirable' to admit an entrant, or whether exclusion is 'conducive to the public good', the courts have generally treated the decisions as discretionary: see section F below.

error. In R. v. Sec. of State for the Home Dept., ex p. Phansopkar,[70] for example, there arose a factual dispute over whether the immigration officer had told two women seeking entry that he believed they had the right of abode in the U.K. The Divisional Court disposed of the issue in a single sentence: 'We cannot in this court settle or decide disputed issue of fact, and it is quite impossible for us to say that the facts are other than those spoken to by the immigration officer.'[71] By declaring itself unable to resolve disputed factual issues, the court implied it would not recognise even the no-evidence rule. Similar deference has been displayed in other immigration cases.[72]

In Alam Bi v. I.A.T.,[73] a woman and two boys appealed against the decision of an E.C.O. refusing entry clearance. The evidence was in conflict on whether the appellants were truly the members of the sponsor's family. The adjudicator, after a hearing at which the sponsor testified, found that the family relationship did exist. Although the adjudicator had been able to observe the demeanour of the principal witness, the I.A.T. reversed. The court upheld the I.A.T. decision,

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70. [1975] 3 All E.R. 497 (Div. Ct. and C.A. opinions in two consolidated cases).
71. Ibid., at 500. But the Court of Appeal later reversed on other grounds: ibid., at 502-13. See pp. 119-21 below.
72. E.g., R. v. I.A.T., ex p. Jeyaveerasingam [1976] Imm. A.R. 137 (Div. Ct.); Pinnock v. E.C.O. [1974] Imm. A.R. 22 (I.A.T.). And in R. v. Sec. of State for the Home Dept., ex p. Thakrar [1974] Q.B. 684 (Div. Ct.), aff'd by C.A., ibid., Lord Widgery C.J. ultimately upheld a finding against the immigrant on the sole basis of a diplomat's unexplained belief that the person had filed a particular application (ibid., at 693).
73. [1979-80] Imm. A.R. 146 (C.A.).

reasoning that the I.A.T. was not obligated to defer to the adjudicator's assessment of credibility because the I.A.T. was merely reinstating the decision of the E.C.O.

If these decisions on miscellaneous issues stood alone, it might be possible to dismiss them as simply reflective of the court's general reluctance to invalidate the factfinding of administrative bodies. The rhetoric might suggest more than the usual degree of deference, but the actual results are probably consistent with those in other contexts. One particular line of cases, however, does show exceptional judicial deference to factfinding by the immigration authorities.

The Immigration Act 1971 allows an immigration officer to remove an illegal entrant without a prior appeal.[74] Alleged illegal entrants have frequently sought habeas corpus to challenge the legality of their detention and removal. One question litigated in those cases has been the extent to which the court may review the administrative finding that the person is an illegal entrant.

Several writers have already analysed those cases in depth;[75] their efforts need not be repeated here. They have

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74. See ss. 33(1)(definition of illegal entrant); sch. 2, paras. 8-11, especially para. 9 (removal power), ss. 16(1)(a), 16(2)(no appeal except on ground that person is not the individual named in the order).

75. See especially Evans, note 1 above, ch. 6; N.P. Gravells, Removal of Illegal Entrants: The Scope of Judicial Review (1983) 99 L.Q. Rev. 363; I.A. Macdonald, Immigration Law and Practice (1983), chs. 14, 15. Accounts written before Khawaja (see note 77 below) include C.G. Blake, The Death of Habeas Corpus (1980) 130 New L.J. 772; L. Grant & I. Martin,

shown that, during most of the 1970's and until a decision of the House of Lords in 1983,[76] the courts declined to review independently the evidence supporting the administrative finding that the applicant was an illegal entrant. Rather, the officer's finding would be upheld as long as there were reasonable grounds for his or her belief. The same writings describe the respects in which that standard of review falls short of those ordinarily invoked to review jurisdictional facts for habeas corpus purposes.[77]

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75. (continued) Immigration Law and Practice (1982), at 260-67, 276-79; D.L. Jones, The Role of Habeas Corpus in Immigration Cases (1979) 95 L.Q. Rev. 171; C. Newdick, Immigrants and the Decline of Habeas Corpus (1982) Pub. L. 89; A. Nikol, Illegal Entry After 'Zamir' (1982) 132 New L.J. 935. See generally de Smith, note 1 above, at 596-603; R.J. Sharpe, The Law of Habeas Corpus (Oxford Univ. Thesis, 1973).

76. See Khawaja & Khera, note 20 below.

77. The earlier cases had not been so restrictive: see, e.g., R. v. Gov'r of Brixton Prison, ex p. Ahsan [1969] 2 Q.B. 222 (Div. Ct.); cf. Eleko v. Officer Administering the Gov't of Nigeria [1931] A.C. 662 (P.C.); R. v. Gov'r of Pentonville Prison, ex p. Azam [1973] 2 All E.R. 741, at 751, 753 (per Lord Denning M.R.) (C.A.), aff'd, [1973] 2 All E.R. 765 (H.L.). Later cases, however, cut back on the scope of review: see, e.g., R. v. Sec. of State for the Home Dept., ex p. Akhtar [1980] 2 All E.R. 735 (C.A.); R. v. Sec. of State for the Home Dept., ex p. Ali (Nasir) (C.A., unrep'd, 12 July 1978); R. v. Sec. of State for the Home Dept., ex p. Choudhary [1978] 1 W.L.R. 1177 (C.A.); R. v. Sec. of State for the Home Dept., ex p. Hussain [1978] 2 All E.R. 423 (Div. Ct.); Re Hassan [1976] 2 All E.R. 123 (Div. Ct.). The high-water mark of this judicial deference was Zamir v. Sec. of State for the Home Dept. [1980] 2 All E.R. 768 (H.L.). The narrow scope of review adopted in Zamir was disapproved in Khawaja & Khera v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.).

Most of the above cases also adopted quite a broad substantive reading of the term 'illegal entrant'. On that point, see also R. v. Sec. of State for the Home Dept., ex p. Khan (Ijaz) [1977] 3 All E.R. 538 (C.A.). But see R. v. Sec. of State for the Home Dept., ex p. Jayakody [1982] 1 W.L.R. 405 (C.A.) (immigrant need disclose only 'material' facts); R. v. Sec. of State for the Home Dept., ex p. Khan (Mangoo) [1980] 2 All E.R. 337 (C.A.) (entry by innocent mistake does not make entrant 'illegal'); R. v. Sec. of State for the Home Dept., ex p. Ram [1979] 1 W.L.R. 148 (Div. Ct.) (same).

C. Natural Justice and Fairness[78]

Natural justice has traditionally been described as encompassing two principles: nemo judex in causa sua (requirement of a disinterested and unbiased adjudicator) and audi alteram partem (requirements of notice and opportunity to be heard).[79] Within these two general guideposts, the precise scope of natural justice varies with the facts of the particular case.[80]

This section begins with a discussion of the theory underlying judicial review of administrative procedure. From there, the analysis will shift to the question of when courts will require observance of procedural safeguards. In that subsection, the general principles of procedural review will be summarised, some of the crucial developments will be noted, and some of the specific factors influencing the courts' willingness to impose procedural restraints will be identified.

Complicating any analysis of natural justice is the recent recognition, in numerous cases, of a duty on the part of certain public bodies to act 'fairly.' In the next subsection, therefore, the development of the fairness doctrine, its relationship to natural justice, and its effect on the law of procedural review will be explored. A number of illustrative

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78. In this thesis, the terms 'natural justice' and 'fairness' (see note 70 below) are used solely in their procedural senses. Possible substantive meanings are discussed in P. Jackson, Natural Justice (2d ed., 1979), at 1-8.
79. de Smith, note 1 above, at 156; Wade, note 1 above, at 414.
80. See the cases cited in note 157 below.

immigration cases will then be analysed in the context of the general principles previously discussed. The final subsection will offer conclusions both about procedural review in general and about its application to immigration cases in particular.

The Theory of Procedural Review

Both the development of natural justice[81] and the more recent emergence of the fairness doctrine raise at least two questions concerning the conceptual foundations of procedural review: What is the source of the High Court's power to impose procedural obligations on administrative bodies? And what purposes do such procedural rules serve?

On the first question, support can be garnered for at least two explanations of the High Court's power to require observance of procedural safeguards. Under one theory, the court is simply enforcing an obligation implicitly imposed on the administrative body by statute.[82] Under this view, the necessity for a particular safeguard is simply a matter of statutory interpretation.

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81. See H. H. Marshall, Natural Justice (1959), at 6-15. Marshall concludes that both prongs of natural justice developed from natural law principles (ibid. at 13), although neither prong is 'natural' in the sense of being fundamental to the beliefs of early, or even all modern, civilisations (ibid. at 5).

82. D.H. Clark, Natural Justice: Substance and Shadow (1975) Pub. L. 27, at 39; C.H. Koch, "Some Kind of Hearing" in England (1981) 23 Wm. & Mary L. Rev. 219, at 221; A. Large, Natural Justice: Judicial Myth or Judicial Review (1982) 12 Kingston L. Rev. 64, at 67; Wade, note 1 above, at 415. Accord, O'Reilly v. Mackman [1982] 3 All E.R. 1124, at 1127 (per Lord Diplock) (H.L.); Ridge v. Baldwin [1964] A.C. 40 (H.L.), at 141 (per Lord Devlin). Parliament may of course choose to exclude natural justice (de Smith, note 1 above, at 183; see also

The opposite theory is that fair procedure is required by the common law. The leading statement is that of Byles J. in Cooper v. Board of Works: '[A]lthough there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.'[83] The theory is that Parliament has not passed on the question, and that it is therefore open to the court to create interstitial common law principles.[84]

If the source of the procedural duties is statutory, a further problem arises: Is discharge of those duties a condition precedent to jurisdiction? If it is, then procedural

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82. (continued) Durayappah v. Fernando [1967] 2 A.C. 337, at 351 (P.C.)), but only by clear language (O'Reilly [1982] 3 All E.R. at 1127; Wiseman v. Borneman [1969] 3 All E.R. 275 (H.L.), at 285-86 (per Lord Wilberforce) and cases cited). See also Pearlberg v. Varty [1972] 1 W.L.R. 534 (H.L.), at 547 (per Lord Pearson).

Subordinate legislation can also provide detailed procedural safeguards. In such cases, some courts have placed a heavy onus on a party claiming that those safeguards are inadequate. J.M. Evans, Some Limits to the Scope of Natural Justice (1973) 36 Mod. L. Rev. 439, principally discussing the majority opinion in Furnell v. Whangarei High Schools Bd. [1973] 1 All E.R. 400 (P.C.). Not all courts agree: see Evans, at 440-41 & n.12. In fact, the existence of detailed procedural regulations has sometimes been used to imply duties to act judicially and to afford specific safeguards not included in the regulations: ibid., at 441 & n.13.

83. (1863) 143 Eng. Rep. 414, at 420 (Ct. of Common Pleas). Accord, Wiseman v. Borneman [1969] 3 All E.R. 275 (H.L.), at 278 (per Lord Morris of Borth-y-Gest), 285 (per Lord Wilberforce), and possibly 277 (per Lord Reid); Durayappah v. Fernando [1967] 2 A.C. 337, at 348 (P.C.); R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 3 All E.R. 545, at 552 (per Geoffrey Lane L.J., as he then was)(Div. Ct.). See also de Smith, note 1 above, at 172.

84. Justification for the modern existence of procedural review can diverge from historical explanation. One view, for example, is that the courts were originally motivated partly by their desire to preserve the supremacy of the common law: see Craig, note 2 above, at 262-63.

review might be seen simply as one application of the High Court's supervisory power to confine the actions of administrative bodies within their jurisdictional limits.

Whether a procedural deficiency gives rise to a jurisdictional defect and, if so, whether that makes the decision void rather than merely voidable, are questions that numerous writers have considered in detail.[85] One specific problem raised by this debate is whether a court should intervene to correct a procedural error when the error has not substantially prejudiced the aggrieved party. Several recent cases have suggested that in such a situation the court should not intervene.[86] The soundness of this suggestion rests in part on whether procedural fairness was intended by Parliament as a jurisdictional prerequisite. If it was, then the absence

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85. E.g., M.B. Akehurst, Void or Voidable -- Natural Justice and Unnatural Meanings (1968) 31 Mod. L. Rev. 2 (Part I), 138 (Part II); A.W. Bradley, A Failure of Justice and Defect of Police (1964) Camb. L.J. 83, at 100-04; de Smith, note 1 above, at 151-55, 240-46; Wade, note 1 above, at 415; H.W.R. Wade, Unlawful Administrative Action: Void or Voidable? (1967) 83 L.Q. Rev. 499 (Part I), (1968) 84 L.Q. Rev 95 (Part II).

86. For discussions of the prejudice requirement, see Clark, note 82 above, at 43-60; Craig, note 2 above, at 267-69; de Smith, note 1 above, at 240, 243-45; Large, note 82 above; A.R. Vining & D.C. McPhillips, New Developments in Natural Justice: Their Application to Tenure Decisions (1982) 27 McGill L.J. 330, at 337. See especially Malloch v. Aberdeen Corp. [1971] 1 W.L.R. 1578, at 1582-83 (per Lord Reid), 1595 (per Lord Wilberforce)(H.L.); Cinnamond v. British Airports Authority [1980] 1 W.L.R. 582, at 593 (per Brandon L.J.) (C.A.); Glynn v. Keele Univ. [1971] 1 W.L.R. 487 (Ch.). See also Ridge v. Baldwin [1964] A.C. 40, at 97-99 (H.L.)(per Lord Evershed, dissenting); R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701, at 713 (C.A.)(per Megaw L.J.). But see Annamunthodo v. Oilfields Workers' Trade Union [1961] A.C. 945, at 956 (P.C.). And see note 88 below.

of prejudice should not be held to cure the defect.[87] If it was not, then the soundness of the substantial prejudice requirement turns ultimately on one's view of the purposes that procedural rules are designed to further. If they are regarded only as a means to a just substantive result, as discussed below, the substantial prejudice rule might be thought unobjectionable, although even then there remains the problem of whether a court can ever be adequately assured that the procedural irregularity was indeed harmless.[88] If, however, procedure is valued for reasons other than its effects on the substantive outcome -- for example, public confidence in the legal system or the court's responsibility to confine administrative bodies within their jurisdictional limits -- then a prejudice requirement is on less solid footing.

The next question, then, is what purposes are served by the imposition of procedural constraints on administrative bodies. Numerous theories have been advanced. Some emphasise procedural justice as a means of attaining, or at least improving the probability of attaining, substantive justice. Others view procedural justice either as an end in itself or as

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87. Even under this view, there remains the possibility of a court refusing relief either because the court concludes that the procedure used was acceptable or because the court is unwilling to grant the discretionary remedy sought: de Smith, note 1 above, at 245.

88. See especially the objection of Megarry J. (as he then was) in John v. Rees [1970] Ch. 345, at 402 (Ch.). Possible issues that could arise when a court elects to apply the substantial prejudice requirement include: How substantial must the prejudice be? How great must be its likelihood? And who has the burden of proof on its existence?

a device for attaining objectives other than substantive justice.

One theory holds that procedural deficiencies undermine public confidence in the fairness of the administrative process.[89] This view, together with the difficulties inherent in projecting what results might have been reached had a different procedure been followed, lies at the base of the opposition to the substantial prejudice requirement discussed above. It is also one explanation for the view that a decision may be overturned when there is objective bias.[90] And since the public includes the aggrieved party, one corollary of this theory is that the dissatisfaction felt by the losing party might be compounded if that party perceived unfairness in the procedure. To the extent that the perception is reasonable, an objective theory of procedural fairness thus generates an additional benefit.

Another theory is that procedural errors make the substantive decision unreliable.[91] Providing procedural safeguards in general, and in particular giving each party

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89. See, e.g., R. v. Atkinson [1978] 1 W.L.R. 425, at 428, 429 (C.A.)(per Lord Scarman); R. v. Sussex JJ., ex p. McCarthy [1924] 1 K.B. 256, at 259 (Div. Ct.)(per Lord Hewart C.J.); Clark, note 82 above, at 58-59; de Smith, note 1 above, at 245, 251. See generally Jackson, note 78 above, at 84-99.
90. See, e.g., de Smith, note 1 above, at 250-51. See also Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, at 599 (per Lord Denning M.R.), 602 (per Danckwerts L.J.), 604, 606 (per Edmund Davies L.J.)(C.A.).
91. de Smith, note 1 above, at 245. See also R.A. Macdonald, Judicial Review and Procedural Fairness in Administrative Law (Part I) (1980) 25 McGill L.J. 520, at 536-43. For Part II, see (1980) 26 McGill L.J. 1.

notice and an opportunity to be heard, make for better informed decisions. Under that approach, adoption of procedural safeguards can arguably enhance the quality not only of factfinding, but of legal and discretionary decisionmaking as well.

A variant of this theory is that the need for procedural safeguards stems from the maxim 'treat like cases alike.'[92] The theory is that at least certain procedural safeguards -- in particular the two prongs of natural justice -- guarantee impartiality and objectivity, thus assuring uniform application of the law.[93]

A fourth theory is that procedural safeguards are justified as a way of promoting 'institutional rationality', applicable to all institutions regardless of whether they perform adjudicative functions, and by the participation of affected parties in the process of choosing the institutions that frame the procedural criteria.[94] From that perspective, procedural

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92. See the views of Hart, Fuller, and Bickel on this subject, summarised in Macdonald, note 91 above, at 539-42.
93. Ibid., at 539. Macdonald argues that this theory does not explain the need for procedural review in cases where there are no preexisting rules applicable to fixed fact situations. That view is subject to qualification. Even when a substantive decision has been left to the unfettered discretion of the administrative body, that body might desire to treat like cases alike until its policies change. If the facts are disputed, the decisionmaker might be unable to ascertain whether the two cases are truly alike. Therefore, if procedural safeguards facilitate factfinding, they arguably enhance the capacity of a body deciding even a purely discretionary matter to exercise that discretion uniformly if it wants to. Macdonald's view is consistent with that result only if a decisionmaker who possesses unfettered substantive discretion, but who chooses to treat like cases alike until it changes its general policy, is treated as applying a fixed rule. See also the discussion of retention of discretion, at pp. 124-33 below.
94. See Macdonald, note 91 above, at 542.

safeguards perform a democratising function by giving the parties a say in matters affecting them.

Still another justification of one particular procedural safeguard, the requirement of notice, is more practical in nature. The argument is that a party who knows the case against him or her might decide not to contest the action.[95] That party thus can be spared the expense, the time, the anxiety, and perhaps the publicity, that would flow from a formal hearing before a tribunal. The tribunal would avoid similar expenditures of time and effort, and the court would escape the time-consuming task of judicial review.

When Courts Will Require Observance of Procedural Safeguards

In the early part of this century the natural justice rules were generally applied when judicial tribunals were empowered to deprive individuals of certain property or liberty interests; when government departments had to decide legal and factual questions in adversarial settings; when the 'trappings of adjudication were present'; and in other miscellaneous situations.[96] Soon thereafter, however, the courts began to narrow the range of contexts in which these rules would apply.[97]

One case illustrating this stricter approach was Nakkuda Ali v. Jayaratne,[98] where the Privy Council held that the Ceylon Controller of Textiles had no obligation to observe the rules of natural justice when exercising his discretion to

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95. de Smith, note 1 above, at 196.
96. Ibid., at 164.
97. Ibid., citing Venicoff (see pp. 53-54 below).
98. [1951] A.C. 66 (P.C.).

revoke the licence of a textile dealer. The court concluded that the Controller's decision was 'executive' rather than 'judicial' because he was merely withdrawing a 'privilege'; alternatively, the court ruled that no duty to act judicially could be imposed because the regulations did not provide for notice of intent to revoke the license, or for an inquiry, or for a right of appeal to or from the Controller[99] -- i.e., the regulations did not expressly require the Controller to follow a procedure resembling that used by courts of law.[100]

This approach, which takes a strict view of which functions are 'judicial' and then assigns conclusive effect to that characterisation, was abandoned in Ridge v. Baldwin.[101] A chief constable who had been acquitted of criminal charges was dismissed by the watch committee on the statutory ground that he was found 'negligent in the discharge of his duty, or otherwise unfit for the same.' A majority of the House of Lords held that the watch committee were obliged to observe the rules of natural justice and that they had failed to do so.[102] Expressly disapproving Nakkuda Ali, Lord Reid approvingly cited previous decisions inferring a duty to act judicially from the nature of the power, rather than from the

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99. Ibid., at 78.
100. See also R. v. Met. Police Comm'r, ex p. Parker [1953] 1 W.L.R. 1150 (Div. Ct.); Stafford v. Min. of Health [1946] K.B. 621 (Div. Ct.). Courts developed several criteria for identifying 'judicial' attributes: see de Smith, note 1 above, at 80-87.
101. [1964] A.C. 40 (H.L.).
102. See the opinions of Lords Reid, Morris of Borth-y-Gest, and Hodson.

express language of the statute.[103] Further, all three of their Lordships who held the natural justice rules applicable considered the individual interests at stake -- Lords Reid and Morris noting Ridge's loss of pension rights and Lord Hodson observing that the dismissal had been predicated upon a charge of misconduct.[104] Finally, the watch committee's wide discretion in exercising their dismissal powers, a discretion seemingly making Ridge's retention of his job a 'privilege', did not prevent the majority from holding the natural justice rules applicable.[105] It was clear, then, that the right/privilege distinction adopted in Nakkuda Ali was not to be dispositive, and that the natural justice rules were not to be confined to functions that were judicial or quasi-judicial in the strict analytical sense.[106]

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103. See [1964] A.C. 40, at 75-79 (H.L.).
104. Ibid., at 68 (per Lord Reid), 124 (per Lord Morris), 132 (per Lord Hodson).
105. Several of their Lordships noted, however, that the result might have been different had the officer been dismissible at pleasure: ibid., at 65-66 (per Lord Reid), 122 (per Lord Morris of Borth-y-Gest), 129 (per Lord Hodson); cf. Chief Constable of the North Wales Police Force v. Evans [1982] 1 W.L.R. 1155, at 1161 (per Lord Hailsham of St. Marylebone), 1173 (per Lord Brightman). But see Malloch v. Aberdeen Corp. [1971] 1 W.L.R. 1578 (H.L.)(contrary rule implied from overall statutory scheme).
106. Whether a majority of the court abolished the judicial/administrative distinction by extending the natural justice rules to administrative decisions, or whether a majority meant to retain this dichotomy but broaden the definition of 'judicial', is not clear. For commentary urging the former interpretation, see Koch, note 82 above, at 228 (citing only Lord Hodson's speech); C. P. Seepersad, Fairness and Audi Alteram Partem (1975) Pub. L. 242, at 242 (citing only Lord Evershed's dissenting speech); Vining and McPhillips, note 86 above, at 334-35 (citing the speeches of Lords Evershed, Morris, and Hodson). Whether Lord Evershed was actually expressing the view that natural justice could attach to

Ridge v. Baldwin was followed by several analogous decisions.[107] In one such case, Durayappah v. Fernando,[108] the Privy Council laid out three factors influencing whether a duty to obey the natural justice rules could be inferred from the nature of the power: the nature of the interest at stake, the circumstances under which the administrative body may impede those interests, and the potential sanctions it may impose. As in Ridge v. Baldwin, neither the presence of wide discretionary powers nor the absence of an express statutory mandate to follow a formal procedure prevented the court from recognising a duty to obey the rules of natural justice.

At about the same time that the Privy Council was deciding Durayappah, the Divisional Court was deciding In re H.K.[109] Although the court held that an immigration officer had no duty to hold a hearing, all three judges recognised a duty to act fairly. The applicability and content of that duty, and its relationship to the duty to comply with the rules of natural justice, are considered below.[110]

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106. (continued) administrative functions, or whether he was simply assuming it arguendo, is not clear: see [1964] A.C. at 86. For the view that Ridge v. Baldwin did not abolish the judicial/administrative dichotomy, see Macdonald, note 91 above, at 534 n.84; D. J. Mullan, Fairness: The New Natural Justice (1975) 25 U. of Toronto L.J. 281, at 285 n.22 (both writers focusing on the judgment of Lord Reid).

107. E.g., Bd. of Trustees of the Maradana Mosque v. Mahmud [1967] 1 A.C. 13 (P.C.); Jeffs v. New Zealand Dairy Production and Marketing Bd. [1967] 1 A.C. 551 (P.C.).

108. [1967] 2 A.C. 337, at 349 (P.C.).

109. [1967] 2 Q.B. 617.

110. See pp. 45-53 below.

Several specific factors, related in ways that will be examined below, have influenced courts in deciding whether to impose either a duty to obey the rules of natural justice or a duty to act fairly. Assuming the statutory language is inconclusive, courts are apt to consider the right/privilege distinction, the application/expectation/forfeiture distinction, and the magnitudes of the competing individual and governmental interests.

The right/privilege distinction, as that term has been used in procedural cases, appears to focus on the presence or absence of a discretionary component. When the interest of the complainant can be served only by the favourable exercise of someone's discretion, as in Nakkuda Ali, the interest might be said to constitute a 'privilege.' In contrast, if the law mandates the granting of a benefit in the event designated facts exist (or conditions the removal of a benefit upon designating facts existing), and no discretion is involved, the interest might be said to constitute a 'right.'[111] The broader the discretion, the more likely a court will be to regard the decision as one of policy, to which the natural justice rules are inappropriate, and the less likely a court will be to view the decision as the application of preexisting

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111. Whether a court will classify a particular benefit as a 'right' or a 'privilege' is not always easy to predict. See, e.g., R. v. Gaming Bd., ex p. Benaim & Khaida [1970] 2 Q.B. 417 (C.A.), at 429-30 (per Lord Denning M.R.); McInnes v. Onslow Fane [1978] 3 All E.R. 211, at 217 (Ch.); cf. Nagle v. Feilden [1966] 1 All E.R. 689 (C.A.), at 694 (per Lord Denning M.R.) (substantive challenge).

rules or the resolution of disputed facts, to which the natural justice rules might seem more appropriate.[112]

Although the size of the discretionary component has often influenced courts in ascertaining the applicability of procedural restraints, only in a few cases has the mere existence of some limited discretion induced a court to label the complainant's interest as a privilege and to deny natural justice principally on that basis.[113] Today there are abundant cases in which the natural justice rules were invoked despite the discretionary nature of the decisionmaking power.[114] In at least one such case, R. v. Hull Prison Bd. of Visitors, ex parte St. Germain, two of the three judgments explicitly repudiated the right/privilege distinction.[115]

In recent years the right/privilege distinction has given way to the concept of legitimate expectation, best illustrated by the licencing cases in general[116] and by McInnes v. Onslow Fane[117] in particular. In McInnes, an area Council of the

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112. See generally de Smith, note 1 above, at 185-87.
113. See especially Nakkuda Ali v. Jayaratne [1951] A.C. 66 (P.C.); R. v. Metropolitan Police Commissioner, ex p. Parker [1953] 1 W.L.R. 1150 (Div. Ct.). See also the cases cited in de Smith, note 1 above, at 188 n.26. But see the immigration cases discussed on pp. 53-67 below.
114. E.g., Durayappah v. Fernando [1967] 2 A.C. 337 (P.C.); Ridge v. Baldwin [1964] A.C. 40 (H.L.); R. v. Barnsley Metropolitan B.C., ex p. Hook [1976] 1 W.L.R. 1052 (C.A.); cf. Malloch v. Aberdeen Corp. [1971] 1 W.L.R. 1578 (H.L.) (even teacher dismissible at pleasure has right to be heard, though majority relied on specific statutory scheme). See also J.H. Grey, Can Fairness Be Effective? (1982) 27 McGill L.J. 360, at 369.
115. [1979] 1 All E.R. 701, at 712 (per Megaw L.J.), 723-24 (per Waller L.J.)(C.A.), remitted, [1979] 3 All E.R. 545 (Div. Ct.).
116. See de Smith, note 1 above, at 221-25.
117. [1978] 3 All E.R. 211 (Ch.). See also Jackson, note 78 above, at 121-23.

British Boxing Board of Control had refused an application for a boxing manager's licence. The pertinent Board regulation provided that all licences were to be issued at the discretion of the Board. The applicant sought a declaration that the Board had breached the rules of natural justice or that it had acted unfairly by failing to hold an oral hearing and by refusing to disclose the case against him.

The court distinguished three types of cases: the forfeiture case, in which an existing right or position is taken away; the application case, in which someone refuses to grant a position sought; and the expectation case, in which the applicant has a legitimate expectation, based on what has already happened, that a particular benefit will be granted (e.g., certain licence renewals).[118] The court noted that forfeitures are typically grounded upon specific reasons, the validity of which might raise questions that make application of the natural justice rules appropriate. Applications, in contrast, are commonly decided on the basis of less defined criteria pertaining to the relative suitability of the applicant, rather than on the basis of specific charges; hence, the natural justice rules are less appropriate. Expectation cases can resemble forfeiture cases in the sense that the thwarting of a legitimate expectation raises the question of what has happened to eliminate the applicant's previous suitability.[119] Finding no expectation of a licence on the

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118. [1978] 3 All E.R. at 218.
119. Ibid. See also ibid. at 220-21.

facts presented, the court held the Board had fulfilled any procedural obligations it had.[120]

At the same time, the court made clear that whether the complainant has a legitimate expectation is not dispositive. It cited Breen v. Amalgamated Engineering Union,[121] where a majority had held that a union committee had no duty to disclose in advance its reasons for refusing to confirm the election of a shop steward. The court in McInnes noted that in Breen the court had reached that result even though Breen had had a legitimate expectation of confirmation. A fortiori, there was no such right in the present case, where the complainant lacked a legitimate expectation. Both courts relied on findings that the refusals had not been based on alleged dishonesty of the applicants.

The court in McInnes also observed that the case before it, unlike Breen, arguably concerned the 'right to work.' It discounted that difference, however, both by stressing the significance of the office Breen had sought and by questioning whether the 'right to work' included the right to choose a new career.[122]

Finally, the court in McInnes made general observations about the particular board whose decision was being challenged. It noted that the board had jurisdiction over

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120. See also R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701, at 723-24 (per Waller L.J.) (whether remission is a right or a privilege, a prisoner expects full remission unless it is forfeited).
121. [1971] 1 All E.R. 1148 (C.A.).
122. [1978] 3 All E.R. 211, at 222-23.

sporting activities, which in the court's view the board was best equipped to regulate. It also observed that the board's function was to maintain high standards in a field open to potential corruption. The court expressed a general reluctance to impose any procedural restraints that would tempt such a board to grant a future application solely to avoid litigation.[123]

Several principles can be extracted from McInnes. First, the discretionary nature of a decision does not by itself eliminate all procedural obligations. Other factors must be consulted. Second, one factor affecting whether a court should impose a particular procedural obligation is the location of the decision on the continuum between applications and forfeitures. That factor is apparently significant for several reasons, analysed below.[124] Third, a legitimate expectation, though a factor militating toward imposition of procedural constraints, is not dispositive. Other factors McInnes recognises are the magnitude of the individual interest (the court discusses the right to work and the importance of the union office at stake in Breen) and any adverse effects that procedural intervention will have on the particular administrative body.

Apart from specific distinctions such as that between rights and privileges and that between applications and forfeitures, the decision whether to impose procedural

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123. Ibid., at 223.
124. See pp. 69-70 below.

obligations typically reflects the court's general perceptions of the competing individual and governmental interests. Numerous cases have explicitly considered the impact the particular substantive decision will have on the individual, some courts basing the result on that factor and others ultimately finding countervailing factors more persuasive.[125] Two of the three Durayappah factors -- the nature of the interest and the potential sanction -- centre around individual impact.[126] Procedural obligations are especially likely to arise when the injury is to the complainant's livelihood or reputation,[127] or when the complainant has been divested of liberty or property.[128] Further, the individual's interest in obtaining a particular procedural safeguard will reflect not only the impact of the substantive decision, but also the

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125. E.g., Ridge v. Baldwin [1964] A.C. 40 (H.L.), at 68 (per Lord Reid, consequence is loss of pension rights), 123-24 (per Lord Morris of Borth-y-Gest, natural justice required when property rights affected), 132 (per Lord Hodson, misconduct charged); R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701 (C.A.), at 707, 712 (per Megaw L.J., loss of remission is punishment), 717 (per Shaw L.J., rights or liberties or status of subject at stake), 719-24 (per Waller L.J., length of remission loss a factor), remitted, [1979] 3 All E.R. 545 (Div. Ct.), at 552 (per Geoffrey Lane L.J., as he then was, substantial loss of liberty); R. v. Gaming Bd., ex p. Benaim and Khaida [1970] 2 Q.B. 417 (C.A.), at 430 (per Lord Denning M.R., Board need not provide applicant for gaming licence information as detailed as would be required for dismissal from office or deprivation of property); McInnes v. Onslow Fane [1978] 3 All E.R. 211 (Ch.), at 220-21 (denial of licence was not slur on character); In re Pergamon Press Ltd. [1971] 1 Ch. 388 (C.A.), at 399 (per Lord Denning M.R.), 402-03 (per Sachs L.J.) (but procedure followed was held fair).
126. Durayappah v. Fernando [1967] 2 A.C. 337, at 349 (P.C.).
127. See de Smith, note 1 above, at 161. See also Crompton v. General Medical Council [1982] 1 All E.R. 35 (P.C.).
128. Ibid., at 158. See also passages from Ridge v. Baldwin and Hull Prison, cited in note 125 above.

extent to which the particular procedural safeguard would enhance the quality of that substantive decision.[129]

Balanced against the individual's interest is the interest of the administrative body in dispensing with the requested procedural safeguard. A court might exclude a duty to disclose information to the complainant if disclosure would prejudice the public interest,[130] for example when the identity of an informant must be kept confidential[131] or when national security is believed to be implicated in wartime[132] or even in peacetime.[133] Procedural protection might also be narrowed to serve other public interests.[134]

Duty to Act Fairly

Until now, this discussion has focused on the general theory of procedural review and on the factors generally

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129. See de Smith, note 1 above, at 192-94 (availability of substitute safeguards).
130. Ibid., at 189-90.
131. E.g., Liversidge v. Anderson [1942) A.C. 206 (H.L.), at 221 (per Viscount Maugham); R. v. Gaming Bd. for Great Britain, ex p. Benaim and Khaida [1970] 2 Q.B. 417 (C.A.), at 431. Cf. Burmah Oil Co. Ltd. v Governor & Co. of the Bank of England [1980] A.C. 1090 (H.L.) (discovery of documents in civil case).
132. See, e.g., Liversidge v. Anderson [1942] A.C. 206, at 221 (H.L.) (per Viscount Maugham). Cf. R. v. Halliday [1917] A.C. 260 (H.L.), at 269-70 (per Lord Finlay L.C.), 271-72 (per Lord Atkinson).
133. E.g., R. v. Lewes JJ., ex p. Sec. of State for the Home Dept. [1973] A.C. 388, at 402 (per Lord Reid) (H.L.); R. v. Sec. of State for Home Affairs, ex p. Hosenball [1977] 1 W.L.R. 700 (C.A.), at 778 (per Lord Denning M.R.).
134. See de Smith, note 1 above, at 190-91. See also R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1978] 2 All E.R. 198 (Div. Ct.), at 204 (per Lord Widgery C.J.), 205-06 (per Cumming-Bruce L.J.), appeal allowed, [1979] 1 All E.R. 701 (C.A.), at 712-13 (per Megaw L.J.), 725 (per Waller L.J.); McInnes v. Onslow Fane [1978] 3 All E.R. 211 (Ch.), at 223.

influencing the degree of procedural protection courts will afford. Account must now be taken of the distinction, if indeed one exists, between a duty to obey the rules of natural justice and a duty to act fairly.[135] As noted earlier, the seminal case is In re H.K. (An Infant),[136] where the Divisional Court recognised a duty on the part of an immigration officer to act 'fairly' even when performing a function not analytically judicial. The decision in H.K. will be explored more fully at a later point. For now, it is enough to say that, although the fairness doctrine has subsequently been adopted in numerous cases, questions as to its meaning and significance remain: When does a duty to act fairly attach? When it does attach, does its content differ from that of the duty to follow the natural justice rules? Has the fairness doctrine expanded, contracted, or left unaltered the procedural protections that courts will afford to individuals?

Precisely when the fairness doctrine will apply is not settled. In the early 1970s, the judicial/administrative dichotomy occasionally emerged in a revised form: judicial functions would require adherence to the rules of natural

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135. Reference here is confined to the duty to adopt fair procedure. The substantive component of the duty to act fairly is discussed in de Smith, note 1 above, at 346. See also D.J. Mullan, Natural Justice and Fairness -- Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making? (1982) 27 McGill L.J. 250.

136. [1967] 2 Q.B. 617 (Div. Ct.). See also the famous statement of Lord Loreburn L.C. in Bd. of Education v. Rice [1911] A.C. 179, at 182 (H.L.) (duty to 'act in good faith and fairly listen to both sides' lies upon 'every one who decides anything').

justice, while administrative functions would require a presumably less expansive duty to act fairly.[137] Most courts, however, have fused the two concepts to some extent, viewing the fairness doctrine as merely the application of natural justice to decisions not analytically classifiable as judicial.[138] Under that view, the content of the fairness doctrine follows a continuum; the more 'judicial' the function is, and the less 'administrative' it is, the broader will be the procedural constraints.[139]

Whether the relationship between natural justice and fairness is viewed as a dichotomy or a continuum, it would be tempting to assume that the advent of the fairness doctrine has brought some form of procedural protection to individuals who had previously been outside the reach of natural justice and who thus would otherwise have received no procedural protection at all. There are at least two reasons, however, for resisting that temptation. First, courts recognising a duty to act fairly have found actual unfairness so seldom[140] that it has

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137. E.g., Pearlberg v. Varty [1972] 1 W.L.R. 534, at 547 (per Lord Pearson) (H.L.); Bates v. Lord Hailsham [1972] 1 W.L.R. 1373, at 1378 (Ch.).
138. E.g., Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175, at 195 (per Edmund Davies L.J.) (C.A.); In re Pergamon Press [1971] 1 Ch. 388, at 399-400 (per Lord Denning M.R.), 402-03 (per Sachs L.J.) (C.A.); R. v. Gaming Bd., ex p. Benaim and Khaida [1970] 2 Q.B. 417, at 430-32 (C.A.) (per Lord Denning M.R., with other two judges agreeing); McInnes v. Onslow Fane [1978] 3 All E.R. 211, at 219 (Ch.).
139. de Smith, note 1 above, at 185; Mullan, note 106 above, at 303; Vining & McPhillips, note 86 above, at 335-37. See also Jackson, note 78 above, at 100-04; cf. the discussion of McInnes, pp. 40-43 above.
140. Mullan, note 106 above, at 305-06 & n.24, counts 18 reported English decisions recognising the fairness doctrine as of 1975, but only 3 in which actual unfairness was found.

been asked whether the fairness doctrine has been confined largely to rhetoric.[141] Second, although there have indeed been several reported cases actually invalidating arguably non-judicial decisions found to be unfair, most such cases would probably have reached the same results on the basis of the law existing even prior to H.K., as the discussion below will show.

In R. v. Barnsley Metropolitan Borough Council v. Hook,[142] for example, a town market stallholder successfully attacked the procedure employed by a committee of the local Council in revoking his stallholder's licence. Lord Denning M.R. said that, regardless whether the function was judicial or administrative, the natural justice rules were breached.[143] Scarman L.J. classified the function as "judicial" and reached the same result.[144] Sir John Pennycuick suggested that the power was not "merely administrative", but implied through incorporation of the other two analyses of the natural justice issues that he shared Lord Denning's view that even administrative functions can be subject to the requirements of natural justice.[145] All three judgments relied explicitly on the importance of the complainant's interest in earning a livelihood.[146] Scarman L.J. (as he then was) relied

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141. See de Smith, note 1 above, at 163 & n.77.
142. [1976] 1 W.L.R. 1052 (C.A.).
143. Ibid., at 1057.
144. Ibid., at 1060.
145. Ibid., at 1062, 1063.
146. Ibid., at 1057, 1058, 1063.

additionally on the forfeiture aspect of the decision, observing that a forfeiture might frustrate plans, cause financial loss, and, in a case such as this where the forfeiture results from a charge of misconduct, slur one's reputation.[147]

By considering the impact on the individual in general, and such subfactors as financial loss and diminished reputation in particular, the court in Hook was proceeding along lines very similar to the analyses in Ridge and to some extent Durayappah. Thus, the result in Hook was ultimately based on doctrine that had been firmly in place even before H.K. had unveiled the duty to act fairly.[148]

Similarly, it is doubtful that the development of the fairness doctrine was vital to the decision of the Court of Appeal in the Hull Prison Visitors case,[149] noted earlier. First, although the decision required rejection of the notion that discretionary decisions cannot give rise to procedural obligations, that notion had already been discarded in Ridge, before H.K. and the inception of fairness doctrine. Second, as in Ridge and Durayappah, the impact on the individual affected the court's decision to impose procedural constraints. Third, all three judgments in the Hull Prison Visitors case found that

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147. Ibid., at 1058.
148. Although H.K. had actually been decided by the time the court in Durayappah rendered its decision, the latter court did not cite, and does not appear to have been influenced by, the opinions in H.K.
149. R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701 (C.A.). The House of Lords has approved the result in Hull Prison: see O'Reilly v. Mackman [1982] 3 All E.R. 1124, at 1126 (per Lord Diplock) (H.L.).

in fact the Board was discharging a 'judicial' function;[150] thus the natural justice rules might have been found applicable even under the rigid judicial/administrative dichotomy predating Ridge.[151]

One decision that might not be explainable solely on the basis of pre-H.K. law is R. v. Liverpool Corp., ex parte Liverpool Taxi Fleet Operators' Assn.[152] The Court of Appeal held that a local Council had acted unfairly by increasing the number of taxi licenses without giving existing licenceholders an opportunity to make submissions. Since the Council action was arguably legislative, it might be contended that the result could not be explained on the basis of traditional natural justice principles.[153] A subsequent decision, however, later distinguished the Council action in Liverpool Taxi as not being legislative;[154] moreover, two of the three judgments in Liverpool Taxi relied on the special fact that the Council had breached a public undertaking.[155]

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150. Ibid., at 709, 717, 724.
151. The same can be said about R. v. Kent Police Authority, ex p. Godden [1971] 2 Q.B. 662, at 669 (per Lord Denning M.R.), 671 (per Salmon L.J.), 673 (per Karminski L.J.) (C.A.) (function characterised as either 'judicial' or 'quasi-judicial'). Similarly, the result in R. v. Birmingham City Justice, ex p. Chris Foreign Foods [1970] 1 W.L.R. 1428 (Div. Ct.) might be attributed to the great weight courts place on property interests (see p. 355 & n.26, below), even though H.K. was cited. For further discussion of Godden and Chris Foreign Foods, as well as Liverpool Taxi, see Mullan, note 106 above, at 306-08.
152. [1972] 2 Q.B. 299 (C.A.).
153. See de Smith, note 1 above, at 181-82.
154. Bates v. Lord Hailsham [1972] 1 W.L.R. 1373, at 1377-78 (Ch.).
155. Only Lord Denning M.R. would have been willing to reach the same result without relying on the public undertaking: [1972] 2 Q.B. 299 at 308.

The above analysis suggests that the fairness doctrine, as distinguished from the more liberalised version of natural justice recognised in cases such as Ridge and Durayappah, has rarely resulted in extending procedural protection to individuals who would otherwise have had none. A separate but related question is whether, when the fairness doctrine does apply, its content differs from that of the natural justice rules. Although the answers to this question have not been uniform, many courts have either explicitly equated natural justice with fairness or have implied as much by using the two terms interchangeably.[156] Under that view, since the precise content of the natural justice rules varies from case to case,[157] the same will be true of the duty to act fairly.

If natural justice is synonymous with fairness, the question becomes what the content of this doctrine is. Although a detailed discussion of the specific procedural protections required in particular fact situations is beyond

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156. See, e.g., O'Reilly v. Mackman [1982] 3 All E.R. 1124, at 1126-27 (per Lord Diplock)(H.L.); Wiseman v. Borneman [1971] A.C. 297, at 308, 309, 310-12, 320 (H.L.); R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701, at 721 (per Waller L.J.)(C.A.), remitted to Div. Ct., [1979] 3 All E.R. 545, at 552; Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175, at 195 (C.A.); R. v. Gaming Bd., ex p. Benaim and Khaida [1970] 2 Q.B. 417, at 430-32 (C.A.); McInnes v. Onslow Fane [1978] 3 All E.R. 211, at 219 (Ch.). Cf. R. v. Sec. of State for the Home Dept., ex p. Mughal [1974] 1 Q.B. 313, at 325, 331 (C.A.). See also G.D.S. Taylor, Fairness and Natural Justice -- Distinct Concepts or Mere Semantics? (1977) 3 Monash U.L. Rev. 191.

157. Wiseman v. Borneman [1971] A.C. 297, at 308-09 (H.L.); R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701, at 713 (C.A.); Russell v. Duke of Norfolk [1949] 1 All E.R. 109, at 118 (C.A.).

the scope of this discussion,[158] one observation should be made. As noted earlier, it has generally been assumed that natural justice embodies two distinct principles: the audi rule and the requirement of a disinterested and unbiased adjudicator. Several post-H.K. cases, however, raise the possibility that audi is not an indispensable component of natural justice.[159] Whether the fairness doctrine is responsible for this development is not known, but such an explanation is plausible since the crux of the fairness doctrine is to individualise the question of which procedural safeguards the occasion demands. For similar reasons, the fairness doctrine might have contributed in some degree to the development of the substantial prejudice requirement discussed earlier.[160]

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158. See, e.g., Mullan, note 106 above, at 305-12; Taylor, note 156 above, at 202-07. The fluidity of the content is seen by some as a disadvantage: e.g., de Smith, note 1 above, at 240; M. Loughlin, Procedural Fairness: A Study of the Crisis in Administrative Law Theory (1978) 28 U. of Toronto L.J. 215, at 240; Mullan, note 106 above, at 297 (acknowledging this criticism), 315 (but finding this danger outweighed by other advantages of simplification and individuation).

159. See, e.g., Breen v. A.E.U. [1971] 2 Q.B. 175, at 195 (per Edmund Davies L.J.), 200 (per Megaw L.J.); R. v. Aston Univ. Senate, ex p. Roffey [1969] 2 Q.B. 538, at 552 (per Donaldson J.), 556 (per Blain J.) (natural justice does not always require audi; statements were obiter because court proceeded to find breach of natural justice rules, though declined to grant prerogative writs)(Div. Ct.); cf. Norwest Holst Ltd. v. Sec. of State for Trade [1978] 1 Ch. 201, at 226 (per Ormrod L.J.), 228 (per Geoffrey Lane L.J., as he then was)(C.A.)(audi possibly inapplicable at preliminary stages). The suggestion that natural justice does not always encompass audi has been questioned: see, e.g., Clark, note 82 above, at 28-43; Large, note 82 above, at 69-71.

160. See pages 31-32 above.

In sum, although conclusions on this point must be tentative, the fairness doctrine has not appreciably expanded the classes of cases in which some measure of procedural protection will be accorded. Cases like Ridge and Durayappah, operating independently of the fairness doctrine articulated in H.K. and its progeny, provide the doctrinal framework by which almost all the post-H.K. cases actually finding procedural unfairness can be explained. Although there might be cases that cannot be so easily dismissed in this manner,[161] they appear to be few in number. At the same time, there is a reasonable probability that the fairness doctrine may have had the effect of contracting the content of the procedural protection that the more liberalised versions of natural justice might otherwise have conferred. The recent suggestions that natural justice does not invariably encompass audi and the recent recognition of the substantial prejudice requirement might be evidence of this influence.[162]

The Immigration Cases

A sampling of those immigration cases raising the issue of procedural review can now be evaluated in the light of the principles discussed up to this point. Consideration must begin with the 1920 decision of the Divisional Court in Venicoff's Case.[163] An Order in Council authorised the Home

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161. See discussion of Liverpool Taxi, p. 50 above.
162. For discussions of the remedial implications of the fairness doctrine, see Mullan, note 106 above, at 287; Taylor, note 156 above, at 207-08.
163. R. v. Inspector of Leman Street Police Station, ex p. Venicoff [1920] 3 K.B. 72 (Div. Ct.). Accord, R. v. Gov'r of

Secretary to deport any alien whenever he 'deemed' it 'conducive to the public good'. The Home Secretary, without holding a hearing, ordered Venicoff deported on this ground. Venicoff submitted to the court an affidavit alleging that someone had falsely accused him of living on the earnings of a prostitute.

Venicoff argued, inter alia, that deportation of an alien without a hearing violated the principles of natural justice. The court rejected the natural justice argument, noting the broad discretion conferred on the Home Secretary in reaching what the court described as an 'executive' decision, and mentioning the emergency circumstances of the First World War. The court also speculated that a hearing might have been withheld out of fear that the alien would abscond, although no barrier to keeping Venicoff in custody during the hearing was apparent.

The deference implicit in Venicoff becomes especially visible when the case is contrasted with R. v. Tribunal of Appeal Under the Housing Act, 1919,[164] decided by the same court less than one month later. A local authority, exercising statutory powers, prohibited the building of a picture house on the ground that it would consume resources needed for the building of dwelling houses. The statutory appellate tribunal, after receiving written representations from the builder and the local authority, dismissed the builder's appeal without providing an opportunity for the builder to refute the

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164. [1920] 3 K.B. 334 (Div. Ct.).

allegations of the local authority. A majority of the court, relying principally on the fact that a property interest was at stake,[165] found a breach of natural justice. Yet in Venicoff the magnitudes of the individual interests at stake -- both personal liberty and reputation -- had been ignored. Although the ultimate decisions facing the governmental officials in both cases were policy decisions, both rested on disputed facts that hearings might have helped to resolve. Despite these similarities, the cases reached opposite results.[166]

For several decades, the continued viability of the Venicoff decision was not seriously questioned. Then, in 1962, the Court of Appeal decided the Soblen case.[167] An American citizen, convicted of a non-extradictable offence in the United States, was being brought from Israel to the U.S. Dr. Soblen cut his wrists on the plane, and during a stopover in London was allowed to land temporarily for medical treatment. After completion of the treatment, the Home Secretary ordered

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165. Ibid., at 340 (per Earl of Reading C.J.), 344 (per Sankey J.).

166. Venicoff's position was even stronger than that of the builder. First, the decisionmaker in the Housing Tribunal case was a statutory appellate tribunal. That fact made relief even more difficult, because the court had to determine whether the fundamental principle prohibiting the deprivation of liberty or property without an opportunity to be heard applies to appellate tribunals. In addition, the builder had to surmount a broadly worded statutory provision authorising the tribunal to dispense with a hearing when they are of the opinion that the case 'can properly be determined' without one: ibid.

167. R. v. Gov'r of Brixton Prison, ex p. Soblen [1963] 2 Q.B. 243 (C.A.). See P. O'Higgins, Disguised Extradition: The Soblen Case (1964) 27 Mod. L. Rev. 521; C.H.R. Thornberry, Dr. Soblen and the Alien Law of the United Kingdom (1963) 12 Int'l & Comp. L.Q. 414.

Dr. Soblen deported on 'public good' grounds and directed that he be placed on a flight to the United States. Dr. Soblen objected only to the destination, asking for permission to be removed instead to Czechoslovakia, which was willing to accept him. The Home Secretary refused his request without a hearing.

In considering the argument that the destination decision was invalid for failure to observe natural justice rules, Lord Denning M.R. first noted the general rule that a public officer depriving a person of liberty or property must give the person an opportunity to be heard. Expressly refusing to disapprove Venicoff, however, he then held that the deportation of aliens was an exception to this rule. His Lordship repeated the Venicoff argument that the Home Secretary might have feared an escape prior to the hearing, although Soblen, like Venicoff, had been in police custody. In addition Lord Denning M.R. speculated that national security considerations might have been the basis for the lack of a hearing. He did not consider, however, whether national security, though justifying restrictions on the alien's access to certain government evidence against him, would be jeopardised by permitting some limited form of hearing consistent with legitimate national security needs.[168]

Lords Justices Donovan and Pearson reached the same result. Lord Justice Donovan conceded that, when a statute or regulation interferes with personal liberty so drastically, it

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168. See now H.C. 169 (1983), para. 150.

should not be read to dispense with *audi* unless it does so 'either expressly or by necessary implication.'[169] Both Lords Justices, however, emphasised the 'executive' nature of the Home Secretary's policy decision whether to deport an alien.[170] Parliamentary acquiescence in the result of *Venicoff*, together with the practical difficulties a court would face in fashioning a proper procedure, persuaded them not to interpret the Aliens Order 1953 as requiring a duty to obey *audi*.

Shortly after *Ridge v. Baldwin*, discussed above,[171] the Privy Council decided *Shareef v. Commissioner for Registration of Indian and Pakistani Residents*.[172] Shareef had applied for registration as a citizen of Ceylon pursuant to a statutory provision granting such registration as of right when specified residence requirements have been met. The Deputy Commissioner, who had both investigated and adjudicated such applications, made a finding that the residence requirements had not been satisfied. The Privy Council, citing *Ridge v. Baldwin*, held that the finding had been invalid for failure to provide a hearing. It should be noted that, unlike the discretionary administrative decisions questioned in *Venicoff* and *Soblen*, the decision in *Shareef* concerned a statutory *right* to enter if the facts were as Shareef claimed them to be; thus, even the

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169. [1963] 2 Q.B. at 305.
170. *Ibid.*, at 305-06, 315-16.
171. See pp. 36-37 above.
172. [1965] 3 W.L.R. 704.

right/privilege distinction is consistent with the outcome of this case. The Privy Council showed similar procedural assertiveness in A.-G. v. Ryan,[173] another nationality case in which the asserted interest was a 'right' rather than a privilege.

The next major development, cited earlier, was the decision in In re H.K.[174] A Commonwealth citizen sought to enter the U.K. with his father, a U.K. resident. The applicable statute required the immigration officer to admit H.K. if the officer was satisfied that H.K. was under age 16. H.K. presented his passport, which showed him to be a few months shy of his 16th birthday. The immigration officer, believing H.K. looked more than 16, referred him to a medical officer, who examined H.K. and estimated his age as "17 years +". The immigration officer then interviewed the father and son separately and concluded that H.K. was over 16. The chief immigration officer (C.I.O.) formed the same impression, refused leave to enter, and ordered H.K. removed by noon the next day. H.K. was not given the opportunity to provide the officer with the evidence he was later able to submit to the court: medical evidence impugning the findings of the port medical officer, a translation of an official document showing H.K. to be under 16, and statements of others. All three judgments recognised a duty on the part of the immigration officer to act 'fairly', even though not

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173. [1980] A.C. 718 (P.C.).
174. [1967] 2 Q.B. 617 (Div. Ct.).

performing a judicial function. They held, however, that the procedure by which the officer had refused leave to enter[175] was fair.

Several observations can be made. First, H.K. was not granted a formal hearing and was not granted any meaningful opportunity to present to the immigration officer all the evidence ultimately provided to the court.[176] Second, in refusing relief, H.K. extends Venicoff and Soblen in at least two[177] respects. Whereas the immigrants in the latter cases had been aliens, so that the courts might possibly have been indirectly influenced by notions relating to the prerogative power of the Crown,[178] the entrant in H.K. was a Common-wealth citizen. More important, the pertinent legislation in Venicoff and Soblen had conferred broad discretion, whereas the statutory provision operative in H.K. created an automatic right to enter once the immigration officer was satisfied that a factual condition had been met. Thus, even if the right/privilege distinction resurrected later in Schmidt[179] were to be applied, H.K.'s interest would seem to qualify as a 'right'. Further, since H.K. could legitimately expect to be

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175. H.K. also challenged the subsequent refusal to alter the original decision, but the remedies sought were not appropriate. The Home Office nonetheless agreed to reconsider H.K.'s application in light of the evidence submitted to the court.
176. The one exception was a certificate that H.K. could have presented initially and that the immigration officer cannot be faulted for failing to solicit.
177. On the other hand, H.K. was seeking initial entry, whereas Venicoff and Soblen were resisting deportation. The latter interest can be regarded as stronger: see pp. 414-15 below.
178. See pp. 134-63 below.
179. See pp. 61-64 below.

admitted upon establishing that he was under age 16, procedural protection could have been conferred under a legitimate expectation theory. Third, unlike the opinions in Ridge, the opinions in H.K. virtually ignore the magnitude of the individual interest.[180]

Finally, though the court's recognition of a duty to act fairly marks a theoretical advance in judicial protection, the content of that duty is not clear from the various opinions. Lord Parker C.J. suggested that the officer must provide an opportunity to satisfy him of the pertinent facts and let the immigrant know the officer's immediate impression; Salmon L.J. implied that the absence of bias, capriciousness, and dishonesty would suffice.[181] If, as concluded above,[182] the fairness doctrine has not appreciably expanded the scope of procedural protection beyond the expansion already resulting from Ridge and its progeny, then the theoretical advance articulated in H.K. will be of little or no benefit to immigrants and will in fact diminish their protection to the extent that the outcome of the case extends the reach of Venicoff and Soblen. Even if the fairness doctrine ultimately liberalises the general law of procedural review, the actual holdings in H.K. and the other cases analysed below reveal

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180. The only mention of this factor was by Salmon L.J.: [1967] 2 Q.B. at 633; despite his acknowledgment of the individual impact, he agreed with the others that no further procedural protection was necessary.
181. Ibid., at 630, 633, respectively.
182. See pp. 47-51.

great restraint in applying the doctrine to immigration cases.[183]

The H.K. decision was soon followed by In Re Mohamed Arif.[184] The pertinent provision conferred on immigration officers the discretion to admit a child between ages 16 and 18 if satisfied that the child will be joining his or her Commonwealth citizen parents in the U.K. In each case the immigration officer examined the child's birth certificate and interviewed the alleged father and son separately, concluding that the parent/child relationship did not exist. In each case the court repeated the H.K. admonition requiring immigration officers to act fairly, but upheld their decisions nonetheless. The decision theoretically broadens the scope of judicial protection, as the child's claim, unlike that of H.K., rested on the discretion of the immigration officer. Still, there was no indication of what would have to happen before the duty to act fairly would be held to have been breached.

The next major development was Schmidt v. Sec. of State for Home Affairs.[185] Two aliens studying scientology in the U.K. applied to the Home Secretary for extensions of their student visas to obtain qualifications allegedly needed to earn their livelihoods working for the Church of Scientology.[186] After their applications were filed, the Minister of Health

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183. See also W. Birtles, Natural Justice Yet Again (1970) 33 Mod. L. Rev. 559, at 561 & n.11.
184. [1968] 1 Ch. 643 (C.A.).
185. [1969] 2 Ch. 149 (Ch. & C.A.).
186. Ibid., at 152.

announced that, having found scientology harmful, the government would no longer grant extensions of stays to scientology students. Without affording an opportunity to make representations, the Home Secretary refused both applications on the basis of the Minister's statement. The plaintiffs sought declarations that, inter alia, the Home Secretary must observe the rules of natural justice in deciding the applications.

The Chancery Division dismissed the claims as an abuse of process, finding them 'obviously and almost incontestably bad.'[187] The Court of Appeals dismissed the appeal.[188] Lord Denning M.R. repeated what he had said in Soblen: Aliens are an exception to the rule that, before being deprived of liberty or property by a public official, a person has a right to be heard. He reasoned that an alien has no 'right' to be in the U.K. except by licence of the Crown, and also has no legitimate expectation. He contrasted the present case with the situation in which leave is revoked before expiration of the allotted time, where there might indeed be a legitimate expectation. H.K. was distinguished on the basis that the immigrant there was a Commonwealth citizen who had a statutory right of entry if the facts were as alleged. Lord Denning M.R. concluded there was no duty to provide either reasons or an opportunity to be heard when an alien applies for a

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187. Ibid., at 156, 160, quoting the test articulated in Dyson v. A.-G. [1911] 1 K.B. 410, at 419 (C.A.)(per Fletcher Moulton L.J.).
188. Russell L.J. dissented on the ground that the case was not suitable for summary dismissal: ibid., at 171-72.

renewal.[189] Widgery L.J. (as he then was) agreed, stressing that there is no 'right' to a renewal and therefore no duty on the part of the Home Secretary 'to act fairly.'[190]

The restraint embodied in Schmidt is evident both from its finding that no legitimate expectation was present and from its assumption that the absence of a legitimate expectation is dispositive. Lord Denning M.R. correctly pointed out that the aliens had no 'right' to enter. When he added that they had no legitimate expectation, however, he might have meant either of two things. If he inferred the absence of a legitimate expectation solely from the absence of a right, then he has returned full circle to the right/privilege distinction discredited in many other modern cases.[191] If, instead, his finding of no legitimate expectation was based on independent facts, they were not stated. The opinion did not suggest that applications for extensions of student visas are ordinarily refused, and the Government statement on which these particular refusals were based had not been made until after the students had applied for extensions.

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189. Ibid., at 170-71, citing the unreported decision in R. v. Sec. of State for the Home Dept., ex p. Singh (Avtar) (Div. Ct., 25 July 1967) (even Commonwealth citizen has no right to make representations when applying for admission under provision giving immigration officer discretionary power). See also Uppal v. Home Office, The Times L. Rep., 21 Oct. 1978 (C.A.), at 21, complaint concerning procedural fairness declared inadmissible in Uppal v. United Kingdom [1981] 3 E.H.R.R. 391, at 397-98 (Euro. Comm'n).
190. [1969] 2 Ch. at 173, 174.
191. See p. 40 above.

The facts in Schmidt are most analogous to the intermediate category recognised in McInnes. While an order of exclusion is analogous to the application category and an order of deportation before leave has expired is analogous to the forfeiture category, an application for variation of leave seems tantamount to the middle category, typified by renewals of licences. It was open to the court in Schmidt to adopt the approach later adopted in McInnes, and then to treat variation of leave as being closer to a forfeiture than to denial of an initial application.

It was also open to the court to hold that, even assuming there was no legitimate expectation of renewal, this conclusion is not dispositive. The decision in Breen and the analysis of that decision in McInnes suggest that the presence of a legitimate expectation does not guarantee particular procedural safeguards. The court in Schmidt could have held, conversely, that the absence of a legitimate expectation does not preclude them. The plaintiffs in Schmidt were alleging adverse effects on their livelihoods. Moreover, the reason for the denials could stigmatise the plaintiffs because of their association with the Church of Scientology. Finally, since there was no intimation of any practical impediment to allowing the aliens to make representations at a hearing, a duty to provide that opportunity could have been imposed.

The Immigration Appeals Act 1969, incorporated with minor changes into the Immigration Act 1971,[192] established a

192. See Immigration Act 1971, ss. 12-21.

system of statutory appeals to both adjudicators and the I.A.T. against specified immigration decisions. The subordinate legislation, which defines the procedure for such appeals, provides many of the safeguards denied to the complainants in the natural justice cases discussed above.[193] As a result, many of the narrow issues presented by the pre-1969 cases have been rendered moot.

Those cases are still significant, however, because many immigration decisions are not appealable.[194] Even when appeal is permitted, a requirement of prior departure from the U.K. can render that remedy impractical, so that the complainant might prefer to initiate judicial proceedings. In such instances it might be the decision of an immigration officer or the Home Secretary, rather than that of an appellate tribunal subject to procedural limitations, that is challenged in court.[195]

One such case was R. v. Secretary of State, ex p. Mughal.[196] Mughal was a would-be returning resident who had a statutory right to enter the U.K. if he could satisfy the immigration officer that his original clandestine entry was before 1968, a disputed fact. After interviewing Mughal and obtaining tax records from the Inland Revenue, the officer was not satisfied that Mughal's entry was pre-1968. He therefore refused leave to enter. The issue was whether the officer had

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193. See Immigration Appeals (Procedure) Rules 1972 (S.I 1972, No. 1684), as amended by S.I. 1982, No. 1026; Immigration Appeals (Notices) Regs. 1972 (S.I. 1972, No. 1683), as amended by S.I. 1982, No. 1027.
194. See p. 442 above.
195. See pp. 80-83 above.
196. [1973] 3 All E.R. 796 (C.A.).

breached the rules of natural justice by failing to disclose the information provided by the Inland Revenue. Holding that the officer's only duty was to act fairly, the court concluded unanimously that that duty had been discharged. No mention was made of the fact that Mughal was asserting a right rather than a privilege, of the magnitude of Mughal's interest in resuming his residence, or of the possibility that the records of the Inland Revenue could be mistaken.

More recently, in R. v. Sec. of State for Home Affairs, ex p. Santillo,[197] the Home Secretary made a decision to deport an E.E.C. national after a criminal court had made a non-binding recommendation of deportation. The Divisional Court held that the Home Secretary had no duty to notify the alien of the evidence on which the decision to follow the court's recommendation was based. The Divisional Court invoked the right/privilege distinction; it accepted the argument of the Home Office that the applicant was asking for an 'act of grace' and thus had no legal 'right'.[198] The Court of Appeal unanimously affirmed, with only one Lord Justice disavowing the right/privilege rationale of the Divisional Court.[199]

In the cases discussed thus far, the applicability of the natural justice rules hinged on the size of the discretionary element involved, and accordingly on the legitimacy of the complainant's expectation. Aside from those considerations,

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197. [1981] 2 W.L.R. 362 (Div. Ct. & C.A.).
198. Ibid., at 366 (per Donaldson L.J.), 370 (Comyn J., agreeing).
199. Ibid., at 377 (per Templeman L.J.).

natural justice principles can be limited by the nature of the subject matter. In R. v. Secretary of State, ex p. Hosenball,[200] for example, an alien journalist was ordered deported on 'public good' grounds, in the interest of national security. The Home Secretary, in lieu of the normal appellate procedure, substituted a process by which an advisory panel was to hear the alien's representations.[201] No provision was made for representation by counsel, or for disclosure of the government evidence. The Court of Appeal upheld the decision to deport, ruling that the natural justice rules are modifiable to the extent necessary for national security.

Procedural assertiveness is rare in immigration cases, but it is not unknown.[202] In A.-G. of Hong Kong v. Shiu,[203] the Privy Council held that an alleged illegal entrant to Hong Kong was entitled to a hearing before being expelled. In that case, however, the court found a legitimate expectation on the basis that the government had voluntarily undertaken to provide a hearing.[204]

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200. [1977] 1 W.L.R. 766 (C.A.).
201. The Immigration Act 1971, s. 15(3), expressly excepts such cases from the appeal provisions. For the substitute procedure used in Hosenball, see H.C. 82 (1973), para. 42, now H.C. 169 (1983), para. 150.
202. For a fairly assertive I.A.T. decision, see Oberoi v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 175. But see Tambimuttu v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 91 (I.A.T.).
203. [1983] 2 All E.R. 346 (P.C.).
204. Interestingly, the court in Shiu seemed to focus on the legitimate expectation of having a hearing, rather than on the legitimate expectation of remaining in Hong Kong.

Conclusions

When the court finds a clear Parliamentary intent either to require or not to require a particular procedure, then of course that is the end of the matter. The problems arise when the Parliamentary intent cannot be deciphered, either because Parliament has not addressed the issue or because the statutory scheme is sufficiently ambiguous with respect to the specific procedural issue raised that the court has a choice as to how it should proceed. In those situations, courts have employed various approaches to determine whether particular procedural requirements should be imposed on particular administrative bodies. Those approaches have required consideration of the right/privilege and application/forfeiture distinctions, and an assessment of the competing individual and governmental interests.

It is submitted that when the Parliamentary intent is not clear, courts in fact resolve these procedural issues chiefly by applying their own perceptions of the strengths of the competing policy considerations. More specifically, sometimes consciously and sometimes unconsciously, courts balance the individual interest in having the requested procedural safeguard against the public interest in dispensing with it. To measure the individual interest in having the requested procedural guarantee, courts consider (a) the magnitude of the substantive interest ultimately at stake, and (b) the benefits of the particular safeguard. The latter reflects the degree to which the requested procedural safeguard would increase the

probability of flushing out the information needed to adjudicate that substantive interest.[205] The weight placed on the public interest in dispensing with the requested procedural safeguard reflects both the costs of the procedure itself and the judge's personal philosophy on the question of whether the particular procedural question should be decided by a court or left to the discretion of the administrative body -- i.e., the judge's conception of his or her role, discussed below.[206]

The application/forfeiture and right/privilege distinctions are admittedly useful aids. As discussed below, they help courts to evaluate the individual's interest in receiving procedural protection.

The courts' use of the application/forfeiture distinction might be explained in any of several possible ways: First, the distinction goes to the legitimacy of the complainant's expectation. The courts might be assuming that one is more likely to expect the retention of a benefit already conferred than to expect the conferral of the benefit as an initial matter. Legitimate expectation, in turn, might be thought relevant to the individual's ultimate substantive interest, the theory being that expectation induces reliance. Thus, if that is the correct explanation for the court's use of the application/forfeiture distinction, the distinction is relevant

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205. Cf. Craig, note 2 below, at 265 (courts balance individual interest, benefit of added safeguards, and costs of safeguards).
206. See pp. 366-76 below.

to legitimate expectation and therefore to the substantive individual interest.

Second, a forfeiture is more likely to have resulted for a specific reason than is the refusal of an initial application. The latter is frequently based on less defined criteria reflecting the general suitability of the applicant vis-a-vis other applicants. Thus a forfeiture is more likely than an application refusal to cast a slur on a person's character, thereby adding to the magnitude of the individual's substantive interest. Third, again because of the more specific nature of the 'charge' likely to underlie a forfeiture, the more likely it is that the disputed issues will be sufficiently concrete to benefit from a hearing.

All the above explanations concern either the ultimate substantive individual interest or the usefulness of procedural safeguards in securing that interest. Thus, under any of these explanations, the application/forfeiture distinction is relevant only as a factor bearing on the individual interest in receiving procedural safeguards. It follows that, no matter how probative the distinction is in performing that evaluation, it should not be given conclusive effect. Characterising a decision as the refusal of an application rather than a forfeiture should not be fatal to a procedural argument if, despite that characterisation, the magnitude of the individual interest is great enough.

Similar observations can be made about the right/privilege distinction. If the complainant's interest is a privilege in

the sense that it hinges on the favourable exercise of discretion, then the decision is based partly on policy. The broader the policy component of the decision, and the lesser the extent to which the decision turns on a specific ground, the less useful a court is likely to regard a procedural safeguard as a device for resolving the particular decision, and thus the lesser will be the individual's interest in receiving that safeguard.

But even a policy decision can rest on disputed facts. When it does, procedural guarantees can be useful or even essential to an informed decision. Moreover, the wide latitude of substantive discretion, if anything, arguably accentuates the need for procedural restraints to prevent arbitrariness.[207] Finally, if one accepts the objective theory of procedural review -- that justice must be seen to be done -- then a visible attempt to prevent arbitrary decisionmaking is especially valuable.

The right/privilege distinction might be useful in another respect. One who has a 'right' to a particular benefit legitimately expects to receive that benefit if the facts on which the right depends are proved. In contrast, one whose interest is contingent on the favourable exercise of someone else's discretion has less legitimate reason to expect that benefit. And legitimate expectation, as shown above, is in turn relevant to the magnitude of the individual interest.

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207. Cf. Malloch v. Aberdeen Corp. [1971] 1 W.L.R. 1578, at 1597 (per Lord Wilberforce)(H.L.).

Still, one might legitimately expect a favourable discretionary decision on the basis of past practice. For that reason, the absence of a right does not necessarily imply the absence of a legitimate expectation.

In summary, courts balance the individual interest in receiving procedural guarantees against the costs of providing them. The application/forfeiture and right/privilege distinctions are relevant to the magnitude of the individual interest. For the reasons given above, however, they should not be considered dispositive. If the individual interest in receiving procedural safeguards is otherwise great enough, then those safeguards should not be withheld solely because the decision was a 'privilege' or the refusal of an application.

As applied to the immigration cases, there is a rational basis for furnishing greater procedural protection in deportation cases (forfeitures) than in exclusion cases (applications). But even an immigrant applying for original admission can have a strong individual interest in procedural protection. A fortiori, one applying for an extension of stay -- analogous to the middle category in McInnes -- can have an important interest deserving of procedural protection.

Similarly, it might be useful to distinguish between an applicant seeking admission as a person who claims the right of abode, and one who requires leave to enter. The former can be said to have a right, the latter only a privilege. Again, however, the interest underlying that privilege can be

extremely important; procedural safeguards should not be withheld solely because the person is seeking a 'privilege'.

The immigration cases, though not the nationality cases such as Shareef and Ryan, show a general pattern of deference to administrative action. It is ironic that the first major case announcing the fairness doctrine -- the Divisional Court decision in H.K.[208] -- was an immigration case. For the reasons given earlier, the fairness doctrine has not had an appreciable liberalising effect in general, and has not yet been felt in the actual results of the immigration cases, including H.K. itself.

The above discussion also suggests that when the statutory language is not conclusive, the courts' decisions in natural justice and fairness cases have generally reflected their conscious or unconscious balancing of the competing individual and public interests. Yet in immigration cases, where such important interests as liberty, livelihood, and reputation are frequently at stake, the magnitude of the individual interest is routinely ignored. And in both Soblen and Schmidt, where the courts acknowledged the fundamental principle that a public official may not deprive an individual of liberty without affording an opportunity to be heard, aliens were explicitly dismissed as an exception.

The right/privilege distinction, discredited as a dispositive test, has been used to justify the deference, as in

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208. [1967] 2 Q.B. 617.

Schmidt. When the particular interest does rise analytically to the level of a right, however, the court is unlikely to invoke the right/privilege distinction, as can be seen from H.K., Arif, and Mughal.

Courts in immigration cases also seem very reluctant to find legitimate expectations. This is evident not only from cases like H.K. and Schmidt, but even from Venicoff, where the deportation order amounted to a forfeiture rather than a refusal of an initial application. In addition, once the court in Schmidt held that the alien had no legitimate expectation, it implicitly regarded that holding as conclusive of the result, even though, as discussed above, the chief relevance of a legitimate expectation is as a factor affecting the magnitude of the individual interest, which in immigration cases would seem great.

Finally, it is acknowledged that persuading a court to find procedural unfairness is seldom an easy task, even outside the context of immigration. Courts are understandably wary of imposing their own standards of procedural fairness on administrative bodies to whom responsibility has been delegated and in whom considerable expertise has accumulated. Nor is it suggested that immigration cases are the only ones singled out for special deference.[209] Rather, the suggestion is that

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209. See examples given by de Smith, note 1 above, at 178. Students might be added to the list: see, e.g., Ward v. Bradford Corp. (1971) 135 J.P. & L.G.R. 580, (1971) 70 L.G.R. 27 (C.A.); Glynn v. Keele University [1971] 1 W.L.R. 487 (Ch.); R. v. Aston University Senate, ex p. Roffey [1969] 2 Q.B. 538 (Div. Ct.). This view is taken, e.g., in J.A.G. Griffith, The Politics of the Judiciary (1977), at 150-67, 170, 197, but questioned in Jackson, note 78 above, at 167-68.

immigration cases are one group of cases in which the reluctance to afford procedural protection has been significantly greater than can be explained by the general principles governing natural justice and the fairness doctrine.

D. Administrative Rules and Regulations

The Immigration Act 1971 contains three major provisions authorising the Home Secretary to issue rules or regulations for administering the Act. One such provision, exercisable by statutory instrument, provides for giving notice of immigration decisions and notice of the right to appeal.[210] A second, also exercisable by statutory instrument, provides for regulating the appeal procedure itself.[211] Rules or regulations have been issued under both provisions,[212] and no one has seriously doubted their status as delegated legislation.

A third provision, however, authorises rules governing 'the practice to be followed' in regulating the entry and stay of people required by the Act to have leave to enter.[213] The rules so issued, commonly known as the Immigration Rules,[214] must be laid before Parliament, where they can be disapproved by a resolution of either House within forty days.[215] Questions concerning their legal status have arisen.

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210. Immigration Act 1971, s. 18(1,3).
211. Ibid., s. 22(1,7).
212. See note 193 above.
213. Immigration Act 1971, s. 3(2).
214. H.C. 169 (1983), replacing H.C. 394 (1980), which in turn had replaced H.C. 79, 80, 81, and 82 (1973).
215. Immigration Act 1971, s. 3(2).

This section consists of two parts. The first part will analyse the status of the Immigration Rules in light of the relevant statutory provisions, the Rules themselves, and court decisions. The second part will examine how the courts have gone about interpreting the content of these and other rules and regulations pertaining to immigration.

The Legal Status of the Immigration Rules

The principal debate over the legal status of the Immigration Rules has centred around whether the Rules are delegated 'legislation', which the immigration authorities are bound to follow, or mere 'administrative' pronouncements not giving rise to any legally enforceable rights or obligations.[216] As the succeeding discussion will show, the courts have generally, though not always, concluded that the Rules are not delegated legislation. This subsection will begin by analysing the court decisions addressing that question and will reach conclusions concerning the present state of the law. It will then demonstrate the degree of judicial conservatism implicit in those decisions by isolating patterns and by illustrating the comparative strength of the arguments supporting the characterisation of the Rules as delegated legislation. Next, it will consider whether the Rules, if they are indeed delegated legislation, should be classified as mandatory or directory. Finally, some intermediate alternatives will be identified.

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216. For a description of the various senses in which legislative acts have been distinguished from administrative acts, see de Smith, note 1 above, at 71-76; see especially ibid., at 73-76.

The Immigration Rules are binding on the statutory appellate authorities; the statute explicitly requires allowance of an appeal on the ground that a decision violated the Immigration Rules.[217] Consequently, when an immigrant appeals against the decision of an immigration officer on the ground that the officer misconstrued the Immigration Rules, and the appellate authorities dismiss the appeal after concluding erroneously that the officer's interpretation was correct, the reviewing court may quash the decision of the appellate authorities on the ground of error of law on the face of the record.[218] In this way, the Rules indirectly bind immigration officers and even the Home Secretary[219] in cases subject to statutory appeals.

But suppose a statutory appeal is not taken, either because it is not available for the particular decision[220] or because for some reason the immigrant elects not to exercise a right of

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217. Ibid., ss. 19(1)(a)(i)(adjudicators), 19(4)(I.A.T. on first appeal), 20(1)(I.A.T. on second appeal). See also Pearson v. I.A.T. [1978] Imm. A.R. 212 (C.A.)(per Stephenson L.J.); R. v. Sec. of State for Home Affairs, ex p. Hosenball [1977] 1 W.L.R. 766 (C.A.), at 785-86 (per Geoffrey Lane L.J., as he then was), 788 (per Cumming-Bruce L.J.); R. v. I.A.T., ex p. Kotake (Div. Ct., unrep'd, 17 Feb. 1983); Nisa v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 20 (I.A.T.).

218. E.g., Alexander v. I.A.T. [1982] 2 All E.R. 766 (H.L.). In such cases, as long as a timely request for reasons has been made, any error of law will necessarily appear on the face of the record: see p. 16 above.

219. See R. v. I.A.T., ex p. Shaikh [1981] 3 All E.R. 29 (Div. Ct.).

220. As to which immigration decisions may be the subjects of statutory appeals, see Immigration Act 1971, ss. 13-17; see generally Macdonald, note 75 above, ch. 11.

appeal.[221] May a court review the decision of an immigration officer or the Home Secretary for compliance with the Immigration Rules?

Until Hosenball, discussed below, courts assumed when the issue came up that the Immigration Rules were law. In R. v. C.I.O., Heathrow Airport, ex p. Bibi,[222] an immigration officer refused leave to enter on the ground that the immigrant lacked an entry clearance, a document required by the Immigration Rules. Seeking to quash the decision, the immigrant argued inter alia that the immigration officer should have departed from the Rules because, as applied to her case, they violated the European Convention on Human Rights. Roskill L.J. rejected as 'startling' the submission of counsel for the immigrant that the Immigration Rules were not part of the U.K. law. Noting the statutory authority for the issuance of the Rules, the statutory laying procedures, and the fact that it is 'unheard of' for a document merely setting out sound administrative practice to be subject to a negative resolution by either House, he concluded that the Rules have the same legal force as the statute itself.[223]

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221. Failure to exhaust a statutory right of appeal can be an independent reason for refusing to grant relief. When the statutory appeal is to a tribunal specially established for resolving such disagreements, it is not always clear whether the failure causes the court to lose jurisdiction or whether, instead, it is at most a factor affecting the court's discretion to grant the particular remedy: see generally de Smith, note 1 above, at 358-62, 425-27. See also R. v. C.I.O., Gatwick Airport, ex p. Kharrazi [1980] 3 All E.R. 373 (C.A.), at 380 (per Lord Denning M.R.).

222. [1976] 1 W.L.R. 979 (C.A.).

223. Ibid., at 985.

Geoffrey Lane L.J. (as he then was) agreed that immigration officers had no discretion to waive the Rules.[224]

Then, in R. v. Secretary of State for Home Affairs, ex p. Hosenball,[225] an alien challenged a deportation order on the ground, inter alia, that the Home Secretary had diverged from the procedure prescribed by the Immigration Rules. This time it was the Home Office arguing that the Rules are not binding, and the court abruptly changed direction. Lord Denning M.R. disapproved the language in Bibi that had characterised the Rules as delegated legislation. He said they were not rules of law, but 'rules of practice laid down for the guidance of immigration officers and tribunals.'[226]

Geoffrey Lane L.J. (as he then was) agreed. He observed that the Act attached only limited consequences to Parliamentary disapproval of the Rules; i.e., the Rules were to remain in force until the Home Secretary devised new Rules to meet the Parliamentary objections.[227] He noted too that the Act implicitly allows the Home Secretary to depart from the Rules with the consent of the immigrant.[228] Cumming-Bruce L.J.

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224. Ibid., at 988. Lord Denning M.R. also said that immigration officers 'must go simply by the immigration rules' (ibid., at 985), but the context suggests that he might have meant only to emphasise the inapplicability of the Convention. See also Van Duyn v. Home Office [1975] 1 Ch. 358 (E.C.J.), at 369 (obiter that Immigration Rules have 'legislative force'); R. v. Sec. of State for Home Affairs, ex p. Jackaria (1977) 121 Sol. J. 337 (Div. Ct.) (court rejected on merits claim that Home Secretary had violated Immigration Rules; court did not question relevance of that inquiry).
225. [1977] 1 W.L.R. 766 (C.A.).
226. Ibid., at 780-81.
227. Ibid., at 785, citing Immigration Act 1971, s. 3(2).
228. Ibid., at 785-86, citing Immigration Act 1971, s. 19(2).

also agreed, adding that the content of many of the Rules is merely informative and descriptive of executive procedures.[229] The result of the case, therefore, is that a court may not review a decision of the Home Secretary for compliance with the Immigration Rules. This holding was extended in Patel v. C.I.O., Heathrow[230] to bar review of decisions taken by immigration officers for compliance with the Immigration Rules.[231]

Then, inexplicably, came the decision of the Court of Appeal in R. v. C.I.O., Gatwick Airport, ex p. Kharrazi.[232] An immigration officer refused leave to an Iranian boy to enter the U.K. as a student. The applicant sought to quash the decision on the ground that the immigration officer had misinterpreted the Immigration Rules. The court could have invoked the principle adopted in both Hosenball and Patel that the Rules are not law, and thus not enforceable against immigration officers by a reviewing court. Instead, a majority of the court held that the immigration officer had misdirected himself in law and accordingly that certiorari should issue.[233] Lord Denning M.R. invoked his earlier suggestion

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229. Ibid., at 788.
230. [1977] Imm. A.R. 116 (C.A.). Roskill L.J. conceded (ibid., at 117) that his statements in Bibi were no longer operative.
231. See also Amin v. E.C.O., Bombay [1983] 2 All E.R. 864 (H.L.), at 868 (per Lord Fraser of Tullybelton); Zamir v. Sec. of State for the Home Dept. [1980] 2 All E.R. 768 (H.L.), at 771 (the Rules 'have no statutory force'); R. v. I.A.T., ex p. Nathwani [1979-80] Imm. A.R. 9 (Div. Ct.).
232. [1980] 3 All E.R. 373 (C.A.).
233. Waller L.J. dissented on other grounds: ibid., at 380-83.

in Pearlman v. Keepers and Governors of Harrow School[234] that no administrative authority 'has jurisdiction to make an error of law on which the decision of the case depends.'[235]

As Lord Denning M.R. had pointed out in Pearlman, the use of that device will almost always enable a court to find that a particular error of law goes to jurisdiction.[236] Thus the practical effect of Kharrazi could be to nullify the principle adumbrated in Hosenball and Patel. Further, since the latter cases held the Immigration Rules not to be 'law' in the sense of conferring rights enforceable against immigration officers, there remains the question of why their violation should be error of 'law' at all, let alone error of law going to jurisdiction.

One possibility is that Kharazzi is merely an aberration. The court was presented with a difficult interpretation problem, and its silence on the question of the legal status of the Immigration Rules might indicate that it simply did not consider the question.

Another possible explanation is that the court, by finding that the immigration officer had misconstrued the Rules, concluded that he had not asked himself the correct question, and therefore that he had effectively failed to exercise his discretionary power. Would this approach still swallow up the principles announced in Hosenball and Patel? The answer might

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234. [1979] Q.B. 56 (C.A.).
235. [1980] 3 All E.R. at 379.
236. [1979] Q.B. at 69-70.

be that, consistently with all three decisions, the immigration officer is still permitted to make a conscious and not manifestly unreasonable decision to depart from the Immigration Rules in a particular case, but that a misinterpretation of the Rules would constitute an error of law.

A third possibility is that the court does regard a failure to follow the Immigration Rules -- whether conscious or inadvertent -- as an error of law, but that it regards itself also as having a discretion whether to label the error as jurisdictional. As Lord Denning M.R. observed in Pearlman, the expansive definition of jurisdiction adopted in that case gives the court a choice whether to invalidate a decision resting on legal error.[237]

Fourth, it might be that the failure to follow the Immigration Rules is an error of law, inherently going to jurisdiction, but that the court's discretion is merely the remedial discretion whether to issue a prerogative order. It was pointed out in Kharrazi that certiorari may be refused if there exists a convenient remedy by way of appeal.[238] Aware that the applicant could exercise his appeal right only after returning to Iran, and that once he returned he would be unable to leave Iran for several years, Lord Denning M.R. found the appeal right impractical in this case.[239]

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237. [1979] Q.B. at 70.
238. [1980] 3 All E.R. at 380.
239. Ibid., at 377.

That last consideration raises the related possibility that the court's discretion to review an immigration officer's decision for compliance with the Immigration Rules attaches only to those cases in which the statute authorises an appeal. In those cases, when an appeal is actually taken, the court may quash the decision of the appellate authorities for error of law in refusing to set aside an immigration officer's decision resting on a misinterpretation of the Immigration Rules. Arguably, when appeal is impractical, the failure to lodge it should not alter the result.

In Hosenball, Patel, and Kharazzi, either the Home Secretary or an immigration officer had been alleged to have departed from the Immigration Rules to the detriment of the immigrant. The converse question, noted earlier in connection with Bibi, is whether the immigration authorities may depart from the Rules to the benefit of the immigrant. The 1971 Act does not answer this question directly, but section 19 provides guidance. Section 19(1)(a)(ii) requires the adjudicator to allow an appeal against a discretionary decision of either the Home Secretary or an immigration officer if the adjudicator would have exercised discretion differently. Section 19(2) qualifies that provision by prohibiting allowance of the appeal on the sole ground that the Home Secretary had refused to depart, or had refused to authorise an immigration officer to depart, from a rule. That qualification would have been unnecessary if the statute had intended to withhold from the Home Secretary the power to waive a rule in favour of an

deviates from that pattern. In contrast, when immigrants argued that the Rules were not binding, they were rebuffed in both Bibi and Choudhary.[249]

The conservatism reflected in those results can also be assessed by comparing the strengths of the competing arguments. Strong arguments for characterising the Rules as delegated legislation can be made on the basis of the statutory text. First, Parliament does not normally order Secretaries of State to issue rules providing guidance for their subordinates concerning the performance of their jobs. Thus, the fact that the Immigration Act 1971 expressly mandates the issuance of the Immigration Rules[250] is itself some evidence that more than intra-departmental guidance was contemplated. Second, Parliament required not only that such Rules be issued, but also that they be laid before Parliament, where they would be subject to disapproval by a resolution of either House.[251] Statutory laying procedures are, as noted by Roskill L.J., 'unheard of' for administrative circulars merely setting out 'what the Home Office conceives to be good administrative practice.'[252] The statutory laying requirement is hardly an academic point, for Parliament has twice rejected proposed

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249. See pp. 78-79, 84-85 above.
250. See s. 3(2).
251. Ibid. The various types of laying procedures are described in Sir C.K. Allen, Law and Orders (3d ed., 1965), at 122-32.
252. R. v. C.I.O., Heathrow Airport, ex p. Bibi [1976] 1 W.L.R. 979, at 985 (C.A.).

person who did not satisfy the requirements of the Immigration Rules. Consequently, when an immigration officer inadvertently admitted such a person, the Home Secretary was permitted to remove the person as an illegal entrant. Whether that broad an interpretation of the term 'illegal entrant' was intended by Parliament, however, is a matter of some dispute.[244] Nor was the result dictated by practical necessity, since the Home Secretary, if dissatisfied with a grant of leave to enter, may remedy the problem by varying the immigrant's leave.[245] The practical issue is procedural. With certain exceptions, an immigrant who has not left the U.K. may appeal against a decision varying leave,[246] but not against a decision ordering his or her removal as an illegal entrant.[247]

The conservatism reflected in the cases considering the legal significance of the Immigration Rules is evident in at least two ways. First, the patterns have varied depending on which party would be advantaged by giving the Rules binding effect. When immigrants sought to quash decisions of the immigration authorities on the ground that the Rules had been violated, it was held in both Hosenball and Patel that the Rules do not confer binding rights,[248] although Kharrazi

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244. See pp. 26-27 above.
245. Immigration Act 1971, ss. 3(3), 4(1); HC 169 (1983), paras. 94, 97.
246. H.C. 169 (1983), para. 95.
247. See Immigration Act 1971, s. 16(2).
248. Cf. Purewal v. E.C.O. [1977] Imm. A.R. 93 (I.A.T.)(Home Secretary's amnesty announcement not binding on E.C.O.). See also Birdi v. Sec. of State for Home Affairs (1975) 119 Sol. J. 322 (C.A.).

deviates from that pattern. In contrast, when immigrants argued that the Rules were not binding, they were rebuffed in both Bibi and Choudhary.[249]

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252. R. v. C.I.O., Heathrow Airport, ex p. Bibi [1976] 1 W.L.R. 979, at 985 (C.A.).

Immigration Rules,[253] a course of action that once again would seem extraordinary if the Rules were solely the instructions of a Secretary of State to his employees.

Third, the statute requires that the Rules be framed so as not to worsen the positions of Commonwealth citizens who were settled in the U.K. on the effective date of the Act.[254] If the Immigration Rules provide nothing more than guidance to the officials administering it, this important substantive guarantee could be circumvented by issuing the required Rule and then disregarding it.

Fourth, the Act requires immigration officers to 'act in accordance with such instructions (<u>not inconsistent with the immigration rules</u>) as may be given them by the Secretary of State.'[255] On its face, this provision would seem to make the Rules indirectly binding on immigration officers; the officers are bound by the Home Secretary's instructions, but only if those instructions are consistent with the Rules. Perhaps that conclusion could be resisted by arguing that the provision was intended only to make the Rules binding in proceedings before the statutory appellate authorities. As so construed, however, the provision would be otiose, since that result is already dictated by another provision.[256] Moreover, even if the repetition were dismissed as inadvertent, there

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253. See 34 H.C. Deb. (6th series), col. 435 (15 Dec. 1982); 846 H.C. Deb. (5th series), col. 1454 (22 Nov. 1972).
254. Section 1(5).
255. Sch. 2, para. 1(3) (emphasis added).
256. See s. 19(1)(a)(i).

would be no apparent reason for Parliament to distinguish expressly between rules and instructions in the same sentence, if indeed the rules themselves were intended to be nothing more than instructions.

Two textual arguments might be made in response. One would be that the Act describes the Rules as governing the '<u>practice</u> to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode.'[257] Arguably, the word 'practice' connotes a degree of informality suggesting something less official than delegated legislation. This argument cannot be discredited entirely, but its force is diminished in any case by other provisions of the same statute that authorise rules prescribing the 'practice and procedure' to be followed in appeals. Since the power to make those latter rules is exercisable by statutory instrument,[258] the word 'practice' cannot automatically be deemed to convey a sense of informality.

A second argument against treating the Rules as delegated legislation, however, is that the objection to the previous argument can be turned around and even expanded. Why, the argument might run, would Parliament require Orders in Council[259] or statutory instruments[260] for certain rules and regulations, but not do the same for the Immigration Rules, unless the intent was that the Rules were not to be regarded as

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257. Sections 1(4), 3(2) (emphasis added).
258. Sections 22(1)(b), 22(7).
259. <u>E.g.</u>, ss. 3(7), 10(3).
260. <u>E.g.</u>, ss. 4(3), 4(4), 9(7), 18(3), 22(7).

delegated legislation? The difference in treatment admittedly has legal significance. As observed by Geoffrey Lane L.J. (as he then was) in Hosenball, the effect of the laying procedure applicable to the Immigration Rules is that, if Parliament disapproves the Rules, they remain in force until the Home Secretary makes the necessary changes within forty days after the disapproval.[261] In contrast, the Orders in Council and statutory instruments cited above are subject to annulment upon disapproval.[262]

Although the argument has merit, the practical difference between disapproval of the Immigration Rules and annulment of other rules or regulations should not be exaggerated. Even when a statutory instrument is subject to annulment by resolution of either House, a prayer of annulment does not invalidate anything previously done under the instrument.[263] Thus, the only difference in this respect is that disapproval of the Immigration Rules leaves the Home Secretary free to apply the Rules for a period no longer than forty days. More important, there is a simple explanation for the difference in adoption procedure. If the Immigration Rules were annulled upon disapproval of either House, there would be no Immigration Rules in force at all during the interval between disapproval and resubmission. The immigration officers would have no authority to admit any arriving passengers,[264] and even if

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261. [1977] 1 W.L.R. at 785.
262. See notes 259, 260 above. Section 10(3), in fact, goes even further. It requires the affirmative approval of both Houses.
263. See Statutory Instruments Act 1946, s. 5(1).
264. See Immigration Act 1971, sch. 2, para. 1(3).

they did, there would be neither substantive criteria nor procedures for discharging that authority. In contrast, all the powers that the Act makes exercisable by statutory instrument or Order in Council are either powers that would cause no significant disruption if their exercise were deferred for short intervals, or powers to change existing law, or both.[265] Thus, unlike the Immigration Rules, Parliamentary rejection of rules proposed pursuant to such other powers would not create a vacuum of vital authority.

Nor does the fact that rules are not embodied in a statutory instrument or Order in Council, by itself, deprive them of legislative force. That the Immigration Rules are not denominated statutory instruments exempts them from the publication and other requirements contained in the Statutory Instruments Act 1946.[266] But statutory instruments have never been held to comprise the only category of delegated legislation. In Blackpool Corp. v. Locker,[267] for example, the Defence Regulations[268] had authorised the Minister of Health to subdelegate to local authorities his power to requisition property for the homeless. The Regulations did not specify the form of the instrument to be used for the subdelegation, and the minister employed a circular for this purpose. The court held binding the specifications contained

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265. See provisions cited in notes 50, 51 above.
266. See s. 1(1).
267. [1948] 1 K.B. 349 (C.A.). Accord, Acton B.C. v. Morris [1953] 1 W.L.R. 1228 (C.A.). Cf. Jackson Stansfield & Sons v. Butterworth [1948] 2 All E.R. 558 (C.A.).
268. Defence (General) Regulations 1939, reg. 51.

in the circular. Evershed L.J. added that doubts about whether to treat a provision of an instrument as a limitation or merely an instruction should generally result in a construction more favourable to the private citizen[269] -- a philosophy not yet implemented in the context of immigration. There is, in addition, a series of cases in which the courts have given binding effect to the rules issued by the Criminal Injuries Compensation Board, even though no statute authorises such a scheme at all.[270]

Apart from the compelling textual arguments for treating the Rules as delegated legislation, several policy arguments bearing on legislative intent can be made. The Immigration Rules do more than establish internal mechanics. They are substantive rules and significant procedural rules that determine the final outcome in large numbers of immigration cases -- cases in which important individual interests are frequently at stake. In the United States, the substantive criteria for the admission and expulsion of aliens are spelled out by Congress, and not left to the administrative agencies. In the United Kingdom, for reasons considered below,[271] Parliament has prescribed the broad outline of immigration control, and has delegated to the Home Secretary, who is

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269. [1948] 1 K.B. at 386.
270. R. v. Crim. Inj. Comp. Bd., ex p. Tong [1976] 1 W.L.R. 1237 (C.A.); R. v. Crim. Inj. Comp. Bd., ex p. Ince [1973] 1 W.L.R. 1334 (C.A.); R. v. Crim. Inj. Comp. Bd., ex p. Lawton [1972] 1 W.L.R. 1589 (Div. Ct.); R. v. Crim. Inj. Comp. Bd., ex p. Schofield [1971] 1 W.L.R. 926 (Div. Ct.); R. v. Crim. Inj. Comp. Bd., ex p. Lain [1967] 2 Q.B. 864 (Div. Ct.).
271. See pp. 406-07 below.

accountable to Parliament, the task of filling in that outline with more detailed substantive and procedural prescriptions. But if the Act is interpreted to reduce the stature of the Rules to that of intra-departmental guidance, the result is that critical policy decisions affecting important individual interests can be effectively made by individual immigration officers. It is one thing to say that particular Rules may confer on immigration officers the power to make certain designated discretionary decisions. To confer a general discretion on immigration officers to depart from the Rules, however, would reduce the predictability essential to individuals planning immigration to the U.K., and would aggravate any already unavoidable problems of disparate treatment inherent in the application of broadly worded provisions to individual cases.

Second, to treat the Rules as other than delegated legislation creates an anomaly that Parliament should not be assumed to have intended. As noted earlier, the Rules are clearly binding on the appellate tribunals. Thus, when a case has come up through the appellate machinery, a reviewing court may quash the decision of the appellate tribunal if it rests on a misinterpretation of the Rules. The practical effect is to make the Rules binding on immigration officers when they reach decisions subject to statutory appeal. Yet, when a decision is not appealed, the results of Hosenball and Patel appear to eliminate misinterpretation of the Rules as a ground for quashing the decision. Therefore, whether a reviewing court

may take steps ultimately resulting in the invalidation of a decision resting on a faulty interpretation of the Rules by an immigration officer will hinge on whether the decision is subject to appeal. No policy basis for that distinction is perceived; the resulting anomaly should not be imputed to Parliament in the absence of language far more conclusive than that contained in the 1971 Act.

Although the courts have generally not so held, the arguments discussed above strongly support the position that the Immigration Rules ought to be regarded as delegated legislation. But even legislation, whether primary or delegated, can contain provisions the breach of which do not invalidate otherwise intra vires decisions. Every statute duly enacted by Parliament, for example, is legislation;[272] yet selected provisions of Parliamentary enactments may be held not to bind those whom they purport to limit.[273] The pertinent distinction, generally drawn in the context of formal and procedural provisions,[274] is between those provisions that are 'mandatory' and those that are 'directory'. When a public body violates a mandatory provision, its decision is void or at least voidable.[275] When a provision is directory,

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272. de Smith, note 1 above, at 73.
273. See, e.g., R. v. Dacorum Gaming Licensing Comm., ex p. EMI Cinemas and Leisure Ltd. [1971] 3 All E.R. 666 (Div. Ct.) (trivial deviation irrelevant). But cf. R. v. Leicester Gaming Licensing Comm., ex p. Shine [1971] 2 All E.R. 1329 (Div. Ct.) (non-trivial deviation fatal).
274. D.L. Keir & F.H. Lawson, Cases in Constitutional Law (6th ed., by Lawson & D.J. Bentley, 1979), at 38-39; de Smith, note 2 above, at 349; Wade, note 1 above, at 218.
275. de Smith, note 1 above, at 142; Wade, note 1 above, at 218 (non-observance is 'fatal').

substantial compliance will be enough, and even total non-compliance might be irrelevant.[276]

Suggestions for determining which of these categories a given provision fits have emphasised two general factors: the language of the provision and its practical importance. Words like 'shall' prima facie impose a duty to do the prescribed act, although even a provision using such words might be held merely directory if the provision concerns only the machinery rather than the substance.[277] Seemingly much more important than the literal language has been the practical consequences. A court typically balances the inconvenience of insisting on strict compliance against the inconvenience of ignoring the violation.[278] This generally requires (a) consideration of the importance of the provision, especially its significance in protecting individual rights and the value ordinarily placed on those rights, and (b) the relation that the provision bears to the purpose of the legislation.[279] In particular, the breach of a formal or procedural rule will typically be disregarded if the breach is trivial or has not produced substantial prejudice.[280]

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276. de Smith, note 2 above, at 349; cf. Wade, note 1 above, at 218.
277. Grunwick Processing Laboratories Ltd. v. ACAS [1978] A.C. 655 (H.L.), at 690 (per Lord Diplock), 698 (per Lord Salmon), 703 (per Lord Keith of Kinkel).
278. Wade, note 1 above, at 219.
279. de Smith, note 1 above, at 142. See, e.g., Howard v. Bodington (1877) 2 P.D. 203 (Ct. of Arches), at 211.
280. de Smith, note 1 above, at 142-43; Wade, note 1 above, at 219. Alternatively, a court can often reach the same result by interpreting the provision to require only substantial compliance (see, e.g., Sheffield City Council v. Graingers

Although the guidelines are rough, they provide some aid in analysing the Immigration Rules, which for purposes of this discussion will be taken to be delegated legislation. The language of the Rules varies widely from one provision to another. Three broad categories can be discerned. In many paragraphs, the designated official appears to be required either to do something or to refrain from doing something. Formulations typical of this group include words to the effect that specified action 'will be', 'is to be', or 'are to be' taken; that something 'must be' or 'needs' to be done; or that a certain type of entrant 'is entitled to admission'. In some instances, the negative of one of those phrases appears; something 'is not to be' done, or something may be done 'only if' a particular condition is met. The actions that are to be taken when the specified prerequisites do exist also cover a broad range. The official might be required to reach a particular ultimate decision, such as admission or refusal of leave to enter; or the provision might say only that certain factors, sometimes extremely general, 'are to be' considered, or that something is to be done unless 'strong compassionate reasons' dictate relief.[281]

Wines Ltd. [1978] 2 All E.R. 70 (C.A.)), even if the provision is deemed mandatory (ibid., at 74-75, per Scarman L.J., as he then was).

281. Provisions of H.C. 169 (1983) containing language that sounds mandatory include paras. 7, 9, 12, 13, 16-18, 21, 22, 24, 27-30, 35-41, 45-52, 54, 56, 62, 63, 67-69, 73, 76-78, 83, 84, 88, 89, 95, 96, 99, 104, 110, 112, 113, 116, 118, 119, 121-23, 125, 126, 132-34, 138, 140, 143, 145, 150, 153, 154, 156, 158, 160, 161, 165-71, 173-77.

A second type of provision states that specified action 'may' be taken, or that specified factors 'may' be considered in reaching a particular decision.[282] These provisions, at least on the surface, appear to confer a discretionary power.

An intermediate group prescribes action that 'should' be taken, or factors that 'should' be considered.[283] Similar provisions describe what 'will normally' or 'should normally' occur.[284] In both groups, the intent would seem to be to confer a discretionary power but to confine the discretion by guiding the repository to a predetermined result in the absence of unusual circumstances.

Are these various provisions mandatory or directory? The provisions in group I are couched in language comparable to the word 'shall'. As noted earlier, they are prima facie mandatory. If the practicalities are evenly balanced, that initial presumption should prevail. The provisions in groups II and III do not receive the benefit of such a presumption. Their status will be influenced more heavily by the competing practicalities. One provision in each of the three groups will be considered.

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282. See, e.g., ibid., paras. 6, 14, 15, 18, 20, 24, 26, 28, 30-33, 39, 43, 44, 49, 51, 57, 58, 61-63, 65, 75, 76, 80, 85, 86, 93, 94, 98-100, 104, 105, 107, 110, 111, 114-17, 120-22, 125, 126, 128, 131, 133, 138, 143, 144, 148, 156, 159, 160, 164, 166, 168, 171.
283. Ibid., paras. 5, 10, 14, 15, 18, 20-26, 28-30, 32, 34, 35, 40-42, 44, 48, 52, 53, 55, 58, 63, 64, 74, 79-81, 84, 86-92, 100, 101, 103, 107-09, 114-17, 120, 122-25, 128, 130-32, 135-37, 141, 147, 169.
284. Ibid., paras. 7, 20, 28, 65, 71, 72, 79, 97, 109, 142, 146, 155, 158, 162, 163, 168, 171. Cf. para. 155.

Paragraph 13 states that a passenger who holds a current, duly issued, entry clearance 'is not to be refused leave to enter unless the Immigration officer is satisfied' that any of several designated exceptions exists. The exceptions include false representations in securing the document, a change of circumstances removing the eligibility existing at the time the document was issued, and a belief that exclusion would be conducive to the public good. Suppose an immigration officer, although not satisfied that any of the exceptions applies, refuses to admit the holder of an entry clearance because the officer believes the holder will overstay. The mandatory language 'is not to be refused' creates an initial presumption that the rule is mandatory. This result is fortified by a comparison of the practicalities. The holder, relying on the eligibility determination made by the entry clearance officer overseas, has traveled to the U.K., possibly at great expense and possibly having forfeited opportunities at home. Those considerations undoubtedly underlay at least in part the Home Secretary's purpose in framing that requirement. The list of exceptions leaves ample latitude for excluding the holder of an entry clearance when the immigrant's reliance, though substantial, is outweighed by other interests. Thus, in cases not fitting within any of the exceptions, it should be assumed that the Home Secretary found the immigrant's reliance to be the more important of the competing practicalities.

In contrast is paragraph 14, which authorises the immigration officer to examine the holder of an entry clearance

to determine whether any of the above exceptions applies, but cautions that 'the examination should not be carried further than is necessary for this [and one other] purpose'. If an immigration officer asks a question unrelated to those purposes, would the decision refusing leave to enter be invalid? The word 'should' does not trigger any presumption that the rule is mandatory. Moreover, the asking of an irrelevant question, without more,[285] would seem too trivial a violation to invalidate an exclusion decision. Therefore, in all probability, a court would hold that the Home Secretary did not intend to make paragraph 14 mandatory.

A final example is paragraph 28, part of which provides that an immigration officer 'may' admit the holder of an expired work permit 'if satisfied that circumstances beyond [the immigrant's] control prevented his arrival before the permit expired and that the job is still open to him'. Would the officer's refusal to consider evidence of the latter conditions be a basis for invalidating an exclusion decision? Again there is no starting presumption, but this time the answer would seem to be yes. The rule reflects an important substantive decision by the Home Secretary that the inconvenience the exclusion would create for the immigrant and possibly also for the employer outweigh any minor inconvenience in considering the evidence offered to explain the late arrival. Consequently, that rule should be held mandatory.

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285. Quaere whether relief would be available if the question, in addition to being irrelevant, were a serious privacy invasion or otherwise abusive.

That last example raises the question whether it is a contradiction in terms to speak of a rule that confers a discretionary power as 'mandatory'. The answer is that there is no contradiction so long as the term 'mandatory' is properly understood. To say that a provision is mandatory, as distinguished from directory, is to say that a violation of the provision is a basis for invalidating the resulting decision. That the provision confers a discretionary power means that it should be held violated if the authority either fails to exercise discretion, or abuses or exceeds it.[286] Holding such a provision mandatory therefore renders both those constraints operative.

The conclusions reached thus far are (a) that, except for the Kharrazi decision, the Immigration Rules have generally been held not to be delegated legislation; (b) that the arguments for a contrary conclusion are very weighty; (c) that, if the Rules were held to be delegated legislation, some of the provisions would be mandatory and others would be directory; and (d) that the classifications would be made by examining both the language and the practicalities of the individual provisions. It will now be shown that, even if a court is unwilling to treat the Rules as formal delegated legislation, several less forceful alternatives are readily available.[287]

One alternative is suggested by Niarchos (London) Ltd. v. Secretary of State for the Environment.[288] The Secretary of

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286. See section F below.
287. See also de Smith, note 1 above, at 74-75.
288. (1978) 35 P. & C.R. 259 (Div. Ct.).

State misinterpreted a development plan. The plan was not delegated legislation, and thus was not binding on him. The court held, however, that the Home Secretary had misdirected himself by failing to follow his own rules when he purported to do so. Similarly, a court could hold that the Immigration Rules are not delegated legislation, and thus the Home Secretary and the immigration officers have the discretion to depart from them, but that they misdirect themselves if they misinterpret Rules they purport to follow. As noted earlier, this analysis might explain the decision in Kharrazi. If this view were adopted explicitly, the misdirection could be treated as an error of law either going to jurisdiction in the Pearlman sense, as implied in Kharrazi, or appearing on the face of the record if it does so appear. Further, under this view, there is no reason that even a conscious discretionary decision to depart from the Rules should not be subject to review under the usual headings of abuse of discretion.[289]

A second alternative, slightly narrower, is to look to the Rules as evidence of the purposes that the statute makes it proper for an official to consider in exercising statutory discretion.[290] Since the very issuance of the Rules reflects the Home Secretary's implicit view that the Rules so issued are consistent with the statute, the assumption seemingly underlying this approach is one of deference to the interpretation placed on a statute by the body responsible for implementing it.

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289. See generally pp. 133-34 below.
290. See, e.g., Bristol Dist. Council v. Clark [1975] 1 W.L.R. 1443 (C.A.), at 1451 (per Scarman L.J., as he then was).

It could be applied both to a provision conferring discretion and to one worded in automatic terms.

Finally, violation of a particular procedural provision might be evidence, not dispositive, that the challenged decision was reached unfairly.[291] Two of the judgments in Hosenball contained dicta to that effect, but found no unfairness on the facts of that case.[292]

The preceding alternatives rested on the supposition that the courts are unwilling to classify the Rules as delegated legislation. If a court were otherwise willing to treat the Rules as delegated legislation, but concerned about the potential extremes to which such a course could lead, several safeguards are possible. First, a court could insist on a showing of substantial prejudice as a condition for invalidating the challenged decision. It could accomplish that result in any of three ways. The court could hold the Rules to be delegated legislation but directory as to precise compliance, to use Wade's terminology.[293] Alternatively, the court could regard the particular rule as mandatory delegated legislation

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291. See de Smith, note 1 above, at 74 & n.35.
292. [1977] 1 W.L.R. at 781 (per Lord Denning M.R.), 786 (per Geoffrey Lane L.J., as he then was). Still another possibility is the use of estoppel in cases where the immigrant has reasonably relied on the violated provision. See generally P.P. Craig, Representations by Public Bodies (1977) 93 L.Q. Rev. 398; M.A. Fazal, Reliability of Official Acts and Advice (1972) Pub. L. 43.
293. Wade, note 1 above, at 218. See also R. v. Dacorum Gaming Licensing Comm., ex p. EMI [1971] 3 All E.R. 666 (Div. Ct.); cf. R. v. Hull Prison Bd. of Visitors, ex p. St. Germain [1979] 1 All E.R. 701 (C.A.), at 713 (dictum, per Megaw L.J., that disciplinary decisions will be invalidated for breach of Prison Rules only when procedural injustice is substantial).

but interpret the rule as requiring only substantial compliance.[294] A third route to that result is to consider the degree of prejudice as a factor in exercising the discretion to issue a prerogative order. A court is not expected to abandon common sense, and if the violation is a harmless technicality, a decision not to intervene would be appropriate. There is admittedly a danger in invoking a substantial prejudice requirement,[295] but it is submitted that review subject to such a requirement is preferable to no review at all. Moreover, a court committed to refusing relief in a particular case would not need a substantial prejudice requirement to achieve that end; the provision could be interpreted either as directory, or as mandatory but not violated.

A second device that would soften the impact of treating the Immigration Rules as delegated legislation would be to narrow the scope of review in cases where the challenged decision is that of the Home Secretary, who issued the Rules.[296] Under these circumstances, it seems sensible to place some weight on his interpretation. The approach could be to uphold his construction if it is reasonably tenable,[297] or simply to consider, as one item of evidence, the fact that the

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294. See Sheffield City Council v. Graingers Wines Ltd. [1978] 2 All E.R. 70 (C.A.), at 75 (per Scarman L.J., as he then was).
295. See the criticisms directed at the invocation of such a requirement in the natural justice context: pp. 31-33 above.
296. Or, if the particular provision was issued by a predecessor, the current Home Secretary would at least have made a decision not to alter it.
297. See, e.g., R. v. Crim. Inj. Comp. Bd., ex p. Schofield [1971] 1 W.L.R. 926 (Div. Ct.), at 932 (per Bridge J.).

Home Secretary adopted a particular interpretation. This reasoning does not apply to decisions by immigration officers, and even with respect to decisions of the Home Secretary the deference should not be exaggerated. First, Parliament had to accept the Home Secretary's proposed Rules in order for them to be effective; Parliament might have placed on them the same interpretation the court is inclined to adopt. Second, the challenged decision in all likelihood will have been made not by the Home Secretary personally, but by a subordinate.[298]

Still another theoretical safeguard, though probably one of little practical import, is for the court to consider, in approaching an interpretation problem, the fact that the Rules contain much informal material. Lord Roskill, writing for a unanimous court in Alexander v. I.A.T., said that the Rules were to be construed less rigidly than a statute or statutory instrument; they were to be interpreted according to their natural meaning.[299] This approach might be thought to provide some freedom from literality, but it seems doubtful that a court would give even a formal statutory provision a meaning the court considered 'unnatural'.

Interpretation of Content of Rules and Regulations

Whether or not the Immigration Rules are delegated legislation, courts may be called upon to interpret their content, particularly when reviewing decisions of the appellate authorities. Questions can also arise concerning the interpretation

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298. See pp. 127-31 below.
299. [1982] 2 All E.R. 766, at 770 (H.L.).

of those rules and regulations that are indisputably delegated legislation. The discussion that follows analyses selected cases performing those interpretation functions.

Several decisions have interpreted the notice and timing provisions of the rules and regulations governing statutory appeals. One noteworthy decision is R. v. I.A.T., ex p. Samaraweera.[300] The issue was whether, on a proper construction of the Rules, a formal notice of appeal had to be filed with the I.A.T. within a designated time in cases where an adjudicator had already granted leave to appeal to the I.A.T. All three judges acknowledged that on this point the language of the rules was ambiguous.[301] Justice May, dissenting, said:

> These rules are badly drafted and accordingly I have no doubt that if they can be construed in favour of a would-be appellant, then they should be so construed.[302]

Nonetheless, the majority resolved the admitted ambiguity in favour of the Government.[303]

The decisions interpreting substantive provisions have been equally conservative. In R. v. I.A.T., ex p. Martin,[304] the

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300. [1974] 2 All E.R. 171 (Div. Ct.).
301. Ibid., at 174 (per Lord Widgery C.J.), 175 (MacKenna J.), 175 (May J.). For the successor provision, see Immigration Appeals (Procedure) Rules 1972, S.I. No. 1684, para. 15(2).
302. Ibid., at 175.
303. Other decisions interpreting the rules and regulations governing the notice and timing of appeals similarly reveal a conservative tone: see, e.g., R. v. I.A.T., ex p. Mehta (V.M.) [1976] Imm. A.R. 174 (C.A.); R. v. I.A.T., ex p. Armstrong [1977] Imm. A.R. 80 (Div. Ct.); R. v. I.A.T., ex p. Singh (Jaspal) (1977) 121 Sol. J. 544 (Div. Ct.); R. v. I.A.T., ex p. Suleman [1976] Imm. A.R. 147 (Div. Ct.). But see R. v. I.A.T., ex p. Mehta (R.P.) [1976] Imm. A.R. 38 (C.A.).
304. [1972] Imm. A.R. 275 (Div. Ct.).

Home Secretary refused the application of a Commonwealth citizen for an extension of stay. One paragraph of the Immigration Rules authorised indefinite leave for a person of independent means, who could support himself without employment. A separate paragraph authorised indefinite leave for one who wished to set himself up in business and could earn a sufficient income to avoid having to take employment. The immigrant here had two sources of income -- her business and aid from her father -- that together were sufficient support, although neither taken alone would have been adequate. The court interpreted the Rules to require applicants to fall completely within one category, even though such a construction would seem to defeat the clear purpose of both Rules to admit otherwise qualified immigrants who would not be taking employment.

Purposive analyses have been rejected in other cases as well.[305] In R. v. I.A.T., ex p. Manek,[306] where the Court of Appeal interpreted a provision of the Immigration Rules covering the admission for settlement of the dependants of a person who "is already in the United Kingdom and settled here". The sponsor had been temporarily out of the country at the time of the dependant's application for admission. Without considering which interpretation would better serve the purpose of the provision, the court held that physical absence at the moment of the application rendered the provision inapplicable.

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305. A convincing purposive argument resting on the ejusdem generis principle was rejected in favour of a literal argument in R. v. I.A.T., ex p. Joyles [1972] 1 W.L.R. 1390 (Div. Ct.).
306. [1978] 3 All E.R. 641 (C.A.).

A literal approach would have benefitted the immigrant in R. v. I.A.T., ex p. Kotake.[307] A provision of the Immigration Rules authorised people 'admitted as visitors' to apply for permission to set up businesses. No provision explicitly authorised such applications from people admitted as students. The court departed from the literal languge to hold that a person who had been admitted as a visitor, but who had later changed to student status, could not apply for permission to set up a business. The same willingness to deviate from literality, to the detriment of the immigrant, was displayed by the Court of Appeal in Alexander v. I.A.T.,[308] where a literal interpretation would not have produced an absurd result. The House of Lords ultimately reversed unanimously.[309] The significance of the case is not that the House of Lords adopted an interpretation favourable to the immigrant, but that the Court of Appeal had to disregard clear language to reach the opposite result.

Despite the above decisions and many other conservative interpretations of the Immigration Rules and various regulations,[310] there are occasional deviations from that

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307. Div. Ct., unrep'd, 17 Feb. 1983.
308. [1982] 1 All E.R. 763 (C.A.).
309. [1982] 2 All E.R. 766 (H.L.).
310. E.g., R. v. I.A.T., ex p. Manilal (Div. Ct., unrep'd, 10 March 1983); R. v. I.A.T., ex p. Sohal [1981] Imm. A.R. 20 (Div. Ct.); R. v. Sec. of State for Home Affairs, ex p. Jackaria (1977) 121 Sol. J. 337 (Div. Ct.); R. v. Sec. of State for Foreign Affairs, ex p. Greenberg [1947] 2 All E.R. 550, at 555 (Vac. Ct.); cf. Rhemtulla v. I.A.T. [1979-80] Imm. A.R. 168 (C.A.)(fairly clear case).

pattern. In R. v. I.A.T., ex p. Shaikh,[311] for example, the I.A.T. had held that the Home Secretary had properly refused an extension of a student's stay on the basis that he was not satisfied the student would leave the U.K. at the conclusion of his studies. But the rule governing extensions of stay made no mention of such a requirement, an omission the court found instructive in light of another provision expressly imposing such a requirement when the application is for original entry clearance overseas. The court reasoned that the language of the rule should be honoured unless the result would be absurd, and that the distinction between granting an entry clearance as an original matter and granting an extension once the student was in the U.K. was perfectly rational.[312] Since the court's reasoning was convincing, a contrary result would have been difficult to defend; thus the result, though avoiding the strong conservatism of some of the other cases analysed above, should not be overplayed.

Probably greater assertiveness was shown in R. v. C.I.O., Gatwick, ex p. Kharrazi, noted earlier for its bearing on the question of the legal status of the Immigration Rules,[313] but noteworthy here for the liberal interpretation it placed on the content of one such rule. The pertinent provision required a would-be student to satisfy the E.C.O. that he intended to leave the country on completion of his 'course of study'.

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311. [1981] 3 All E.R. 29 (Div. Ct.).
312. Ibid., at 35.
313. [1980] 3 All E.R. 373 (C.A.). See pp. 80-83 above.

Kharrazi had been accepted for a three-year O-level course at a public school, but hoped eventually to get permission to remain in the U.K. for his A-levels and ultimately for study at a university. The issue was whether the phrase 'course of study' referred to the course for which the student has been accepted, or a longer-term sequence of studies. Either interpretation would have been reasonable. The court unanimously adopted the broader meaning, two of the judgments relying explicitly on a pragmatic, purposive analysis. Waller L.J. observed that the narrower meaning would make it impossible for a person to come to the U.K. for both school and university studies.[314] Dunn L.J. added that the narrower approach would encourage dishonesty.[315]

Conclusions

As shown at the beginning of this section, the courts have generally rejected arguments by immigrants that the Immigration Rules are delegated legislation. The conservatism manifested by those results is highlighted both by the departure from that viewpoint in cases in which immigrants have sought waivers of the Rules, and by the strength of the arguments supporting the characterisation of the Rules as delegated legislation. It is submitted that, if the Rules were to be treated as delegated legislation, some paragraphs should be held mandatory and others directory. The language and practicalities of

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314. Ibid., at 380-82 (but dissenting on other grounds).
315. Ibid., at 383.

individual provisions should be consulted for purposes of that determination. It was also shown that there are several intermediate alternatives between recognising no legal effect and treating the Rules as delegated legislation. Finally, even if the Rules were to be treated as delegated legislation, there are ways of softening the impact of the change.

With respect to the content of the Rules and other regulations, the conservative patterns remain generally intact. The courts have favoured literality over a purposive approach, at least when the literal language benefitted the Government and a purposive analysis would have favoured the immigrant. That combination was present in such cases as Martin, Manek, and Joyles. In Kotake, however, where a literal approach would have benefitted the immigrant, the Divisional Court abandoned literality without citing an alternative purposive rationale. The Court of Appeal did the same thing in Alexander, although there the House of Lords ultimately reversed. And in Samaraweera, where all three judges acknowledged an ambiguity, a majority adopted the interpretation urged by the Government. Finally, such cases as Shaikh and Kharrazi exemplify the occasional willingness of the courts to deviate from these patterns -- in Shaikh by adopting a literal interpretation consistent with the purpose of the provision, and in Kharrazi by using a purposive approach to decipher ambiguous language.

E. Statutory Interpretation

One especially revealing line of statutory interpretation decisions has been those concerning illegal entrants. As noted earlier, several writers have already covered these cases thoroughly.[316] The writings demonstrate the broad meaning the courts have assigned to the statutory term 'illegal entrant', with the practical result that important procedural safeguards have been eliminated. Even Khawaja,[317] though disapproving some of the more extreme precedent, reaffirmed the broad definition of 'illegal entrant.'

Several other statutory interpretation cases have concerned the right to appeal. Under section 14(1) of the 1971 Act, 'a person who has a limited leave to enter or remain in the United Kingdom may appeal to an adjudicator . . . against any refusal to vary it'. In R. v. I.A.T., ex p. Subramaniam,[318] the Court of Appeal, interpreting the phrase 'person who has limited leave', held that one who applied for variation of a

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316. See pp. 26-27 above.
317. Khawaja & Khera v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.). All their Lordships held that those who enter by making fraudulent representations to immigration officers, and not merely those who enter clandestinely, are illegal entrants, and thus subject to removal without a hearing. A majority also held that, for purposes of that definition, the entrant owes a positive duty of candour: ibid., at 771-72 (per Lord Fraser of Tullybelton), 773 (per Lord Wilberforce), 787-88 (per Lord Bridge of Harwich). At the same time, they recognised limits to what the entrant is required to disclose; they placed on the government the burden of proving deception; and they asserted a judicial power to review the findings of fact by the immigration officer.
318. [1976] 3 W.L.R. 630 (C.A.).

leave that had previously expired could not appeal against the subsequent refusal. The court based its interpretation on practical grounds. Because of a combination of transition and other provisions, recognising a right of appeal would have enabled Subramaniam to remain permanently in the U.K.[319] It was to prevent what the court regarded as an abuse that it chose to interpret section 14(1) as it did.

Having decided to dismiss the appeal, the court announced an important dictum. It was said that if a person applied for variation before leave expired, but the application was refused by the Home Office after expiry of leave, the person would have a right to appeal. Again, the court based its conclusion on practicality. To limit the appeal right to instances in which the refusal issued before leave expired would make the right hinge on the length of time taken by the Home Office to decide, a factor beyond the control of the applicant.[320]

The same issues were later presented to the House of Lords in Suthendran v. I.A.T.[321] In a 3-2 decision the court approved the holding in Subramaniam that one who applies for variation after leave expires has no right to appeal against the subsequent refusal to vary. Unlike the Court of Appeal,

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319. See [1976] 3 W.L.R. at 634 (per Lord Denning M.R.). Several cases have placed restrictive interpretations on the terms 'ordinary residence' and 'settled': e.g., R. v. I.A.T., ex p. Coomasaru [1983] 1 All E.R. 208 (C.A.); R. v. Sec. of State for the Home Dept., ex p. Margueritte [1982] 3 All E.R. 909 (C.A.); In re Manan [1971] 1 W.L.R. 859 (C.A.).
320. [1976] 3 W.L.R. at 636.
321. [1976] 3 W.L.R. 725.

however, the House of Lords gave little consideration to the practicalities, preferring to rest its case on the literal language 'one who has leave'.[322] That same reliance caused the court to disapprove the Subramaniam dictum that would have allowed an appeal right when the application had been filed before expiry of leave but refused after expiry. Their Lordships discarded without serious analysis the observation of the Court of Appeal that such an interpretation would cause the appeal right to depend on the speed with which the application is processed. Instead, several of their Lordships dismissed the problem by suggesting that at most the possibility of delay was a statutory flaw with which the court should not be concerned, or that the Home Secretary would not act oppressively, or that the Home Secretary could voluntarily grant leave to remain pending appeal if he wished.[323]

The Subramaniam and Suthendran decisions thus illustrate the constrasting ways in which the two courts performed their statutory interpretation functions. In Subramaniam, the court's holding was based on a purposive interpretation that favoured the Home Office. Its dictum, also reached through purposive means, favoured the immigrant. In Suthendran, the House of Lords addressed both issues by resorting to literality, reaching conclusions favourable to the Home Office. The degree of the court's literality was later noted

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322. Ibid., at 729-30 (Viscount Dilhorne), 731 (Lord Simon), 734 (Lord Russell).
323. Ibid., at 730, 731, 734-35.

in Grant v. Borg,[324] where the court liberally resolved a related statutory issue in favour of an immigrant charged with a criminal offence for overstaying his limited leave.

The holdings in Subramaniam and Suthendran were extended in R. v. Immigration Appeal Adjudicator, ex p. Bhanji.[325] Once again, the decision refusing the immigrant's application for variation of leave was made after the limited leave had expired. The notice of the decision, however, gave the immigrant an additional month in which to make arrangements to depart. In Suthendran, Lord Russell of Killowen had suggested in dictum that such a notice might constitute a new leave, one that might itself give rise to a right of appeal.[326] The Court of Appeal rejected the dictum, however, reasoning that the Home Secretary's notice was merely an 'indulgence' rather than a 'variation of leave'[327]--even though the notice itself used the latter term. The House of Lords reached the same result in Halil v. Davidson, where Lord Russell pointed out that, even if his previous dictum is correct, all the immigrant might do is to apply to the Home Secretary to vary the leave given by the notice and, if unsuccessful, appeal against the latter refusal.[328]

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324. [1982] 1 W.L.R. 638 (H.L.).
325. [1977] Imm. A.R. 89 (C.A.).
326. [1976] 3 W.L.R. at 735.
327. [1977] Imm. A.R. at 91.
328. [1979-80] Imm. A.R. 164, at 166 (H.L.); cf. Singh (Balbir) v. Sec. of State for the Home Dept. [1978] Imm. A.R. 204 (C.A.) (no estoppel). See also Craig, note 292 above. For other conservative statutory interpretations pertaining to variation of leave, see R. v. I.A.T., ex p. Mehmet [1977] 2 All E.R. 602 (Div. Ct.); R. v. I.A.T., ex p. Jeyaveerasingam [1976] Imm. A.R. 137 (Div. Ct.).

Also illustrative is a series of cases in which the courts have held that the appellate authorities may not consider evidence of events occurring after the decision being appealed.[329] Reliance was placed on the literal language of the statutory provision authorising the appellate authorities to allow an appeal when 'discretion should have been exercised differently'.[330] The past tense of the underlined phrase, together with the court's general view of the overall appellate scheme, persuaded the court that evidence of new circumstances was inadmissible. That interpretation, with respect, is plausible. But precluding the admission of that evidence forces the appellate authorities to pass on fact situations that no longer exist. Since the appellate authorities are ultimately empowered to substitute their discretionary judgments for those of the immigration officers, a more practical interpretation might have been that Parliament intended to permit the appellate authorities to admit evidence of changed circumstances. Absent clear language to the contrary, that avenue was open to the courts in those cases.

Another line of statutory interpretation cases worth discussing concerns a doctrine known as the 'Bhagwan Gap'. Under the now repealed Commonwealth Immigrants Act 1962,

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329. See R. v. I.A.T., ex p. Kotecha [1983] 2 All E.R. 289 (C.A.); R. v. I.A.T., ex p. Bastiampillai [1983] 2 All E.R. 844 (Div. Ct.)(though immigrant ultimately prevailed on other grounds); R. v. I.A.T., ex p. Weerasuriya [1983] 1 All E.R. 195 (Div. Ct.).

330. Immigration Act 1971, s. 19(1)(a)(ii)(emphasis added) (adjudicators), 20(1)(I.A.T.).

immigration officers were able, for the first time, to exclude Commonwealth citizens on specified grounds.[331] The Act made it a criminal offence to enter or remain in the U.K. after being refused such admission.[332] Nothing in the Act, however, expressly prohibited Commonwealth citizens from entering at an unauthorised point and thereby escaping inspection entirely. That deficiency was not remedied until 1968.[333] In D.P.P. v. Bhagwan,[334] a Commonwealth citizen who had entered clandestinely with other people, between 1962 and 1968, was criminally charged with conspiracy to evade controls on immigration. The House of Lords unanimously held that the accused had not conspired to do anything prohibited by the Act. Recognising that to construe the 1962 Act as proscribing landing without examination would deviate from the common law rights of Commonwealth citizens to enter the U.K. at will, Lord Diplock held that no such interpretation would be appropriate without express statutory language to that effect. In so holding, he emphasised that criminal sanctions were involved.

The Bhagwan Gap has been applied restrictively outside the criminal context. Under the 1971 Act, all persons who were 'settled' in the U.K. on 1 January 1973, the date the Act came into force, had indefinite leave to enter and to remain.[335]

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331. Commonwealth Immigrants Act 1962, s. 2.
332. Ibid., s. 4(1).
333. See ibid., s. 4A(1,2).
334. [1972] A.C. 60 (H.L.).
335. Immigration Act 1971, s. 1(2).

In R. v. Secretary of State for the Home Dept., ex p. Mughal,[336] the Court construed this transition provision to mean that, upon departing temporarily from the U.K., such a person would not be permitted to return without obtaining a fresh leave. Two Lords Justices went even further, holding that a U.K. resident who was physically absent from the U.K. on the appointed day could not qualify under the transition provision.[337] It was open to the court to take a broader view of the Parliamentary intent to ameliorate the hardships that would otherwise be incurred by long-settled residents. Because the provision was designed to preserve the ties possessed by long-settled residents, the court could have enquired whether Parliament intended an interpretation so literal that a person's permanent residence right would hinge on an event as inconsequential as a temporary visit outside the country.[338]

Next came R. v. Gov'r of Pentonville Prison, ex p. Azam.[339] A Commonwealth citizen had entered clandestinely after 1968, but was immune from criminal prosecution because the statute of limitations had expired. Despite the courts' expressed reluctance to construe statutes affecting substantive rights as having retroactive effect,[340] the House of Lords

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336. [1973] 3 All E.R. 396 (C.A.).
337. See the opinions of Megaw L.J. and Scarman L.J. (as he then was).
338. See Rosenberg v. Fleuti, 374 U.S. 449 (1963), discussed on pp. 246-58 below.
339. [1973] 2 All E.R. 741 (C.A.), 765 (H.L.).
340. Ingle v. Farrand [1927] A.C. 417 (H.L.). See the lone dissent of Lord Salmon, [1973] 2 All E.R. at 776.

held that, upon passage of the 1971 Act, such an immigrant became removable as an illegal entrant.

Two cases addressing problems of entry clearance provide a vivid contrast. In Amin v. E.C.O., Bombay,[341] the issue was whether a person may appeal to an adjudicator against a decision refusing a 'special voucher'-- a document issued overseas pursuant to a non-statutory discretionary scheme for admitting certain East African Asians who hold British passports. The Immigration Act 1971 provides a right of appeal against a refusal of 'entry clearance'.[342] The statute defines 'entry clearance' as 'a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence of a person's eligibility . . . for entry into the United Kingdom.'[343] The question was whether that definition encompassed special vouchers.

By a vote of three to two, the House of Lords held it did not. Two reasons were given: Lord Fraser of Tullybelton stressed the non-statutory[344] nature of the special voucher programme and the discretionary nature of the decisions in individual cases. He maintained that an applicant for a special voucher therefore had no 'right' to receive one, and thus no means of showing an error of law. Accordingly, appeal

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341. [1983] 2 All E.R. 864 (H.L.).
342. Section 13(2).
343. Ibid., s. 33(1).
344. The reference to the non-statutory origin of the special voucher scheme raises the possibility, discussed on pp. below, that the scheme was perceived as an exercise of the royal prerogative.

would be unworkable and the statute would not be read to provide a right of appeal without clear language to that effect.[345]

As discussed later, however, the fact that a decision is discretionary does not mean it cannot be incorrect.[346] In this case, the applicant's substantive argument was that the officer had refused to consider her a 'head of household', a prerequisite to receiving the voucher, solely because she was a woman. She maintained that the officer's action violated the Sex Discrimination Act 1975. As Lord Scarman observed in dissent, the statutory interpretation issue on which her argument hinged is susceptible to adjudication.[347]

Lord Fraser of Tullybelton gave a second reason for his decision: Under the Immigration Rules, once a special voucher was issued, the holder could not be excluded on discretionary grounds.[348] The statutory entry clearance definition covered documents that were to be taken as evidence of eligibility for entry. A special voucher was not such a document because it was more than evidence of eligibility; it was authority for entry.[349] It was certainly open to the court, however, to describe the voucher as conclusive evidence of eligibility for

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345. [1983] 2 All E.R. at 867-68.
346. See pp. 12-13 below.
347. [1983] 2 All E.R. at 876.
348. The court was applying H.C. 79 (1973), para 38. Actually, as Lord Scarman points out, there are certain grounds on which even the holder of a special voucher may be excluded: see [1983] 2 All E.R. at 876.
349. Ibid., at 868-70.

entry, and to say that a document does not cease to be evidence because it is conclusive.[350]

Finally, the court held that the Sex Discrimination Act 1975 does not apply to the issuance of immigration documents. The statute makes it unlawful for any person providing 'goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services'.[351] The court read into the statute a requirement that, if the act is by the government, the act be similar to those committed by private persons. Other cases have similarly given the Sex Discrimination Act a limited reading in the immigration context.[352]

In contrast with Amin is the unusually[353] assertive decision of the Court of Appeal in R. v. Secretary of State for the Home Dept., ex p. Phansopkar.[354] Two British subjects sought to enter the U.K. They claimed patriality as the wives of U.K. patrials. The statute authorised the Home Secretary to specify in the Immigration Rules a procedure for obtaining a 'certificate of patriality' in proof of such a claim. The Immigration Rules, in turn, provided that certain categories of patrials, including those to which the appellants belonged,

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350. See ibid., at 876 (per Lord Scarman, dissenting).
351. Sex Discrimination Act 1975, s. 29(1).
352. See, e.g., Kassam v. I.A.T. [1980] 2 All E.R. 330 (C.A.); R. v. I.A.T., ex p. Ahluwalia [1979-80] Imm. A.R. 1 (Div. Ct.).
353. See also R. v. C.I.O., Lympne Airport, ex p. Singh (Amrik) [1969] 1 Q.B. 333 (Div. Ct.) (purposive interpretation favourable to immigrant).
354. [1975] 3 All E.R. 497 (Div. Ct. and C.A.).

could enter without leave only if they held 'a certificate of patriality duly issued . . . by a British Government representative overseas or by the Home Office'.

The queue for such certificates was over 14 months in the overseas offices, because the applications were merged with those from people seeking entry certificates. Accordingly, both women applied for the certificates from the Home Office. The applications were refused on the ground that the Home Office practice was to require those claiming patriality as wives of patrials to obtain their certificates from overseas offices in their native countries. Both women appealed against the refusals.

The court granted mandamus compelling the Home Secretary to decide the applications at the Home Office. It held that a person claiming patriality is entitled to an adjudication of that claim within a reasonable time. It is difficult to determine from the written opinions whether that holding was grounded on an interpretation of the 1971 Act or on the Rule permitting application to the Home Office. Lord Denning M.R. first cited the Magna Carta clause 'to no one will we delay or deny right or justice'.[355] He then found 'implicit in this legislation', referring presumably to the 1971 Act, that one who is truly a wife of a patrial is entitled to fair and reasonably timely examination of her application.[356]

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355. [1975] 3 All E.R. 497, at 507.
356. Ibid.

Lord Denning M.R. next cited the pertinent provision of the Immigration Rules, concluding apparently from its choice of application centres that the women could apply to either office.[357] Throughout his opinion was emphasis on the 'right' of a patrial to enter upon proof of status--a factor that distinguishes the case from Amin, where only a discretionary 'privilege' was at issue. The concurring opinions of Lawton and Scarman L.JJ. could similarly be interpreted in any of several ways.[358] Perhaps the most likely explanation is that the court construed the Rule governing issuance of certificates of patriality so as not to violate the statutory right of patrials to enter within a reasonable time.

One factor occasionally appearing in immigration cases is the existence of an international agreement. A court may construe an ambiguous statute or regulation to conform to international obligations, although admittedly the rhetoric often exceeds the results.[359] In immigration cases, however, it has been much more common to do precisely the opposite, construing the treaty provision narrowly so as not to conflict

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357. Ibid.
358. There are references in both opinions to the 1971 Act, the Immigration Rules, and the Magna Carta, with Scarman L.J. (as he then was) placing additional reliance on the European Convention for the Protection of Human Rights 1950. In all three opinions, it is unclear how many of these arguments are intended as independent justifications for the holding.
359. See generally de Smith, note 1 above, at 9, 100 (acknowledging difficulty of identifying cases that would clearly have been decided differently).

with the statute. Thus, in R. v. C.I.O., Heathrow Airport, ex p. Bibi,[360] a Pakistani citizen settled in the U.K. at the commencement of the 1971 Act attempted later to bring in his wife and child as visitors. The immigration officer excluded them on the ground they were likely to remain permanently. Counsel argued that article 8(1) of the European Convention, which guarantees respect for family life, would be violated by the exclusion. The Court of Appeal, rather than interpret the statute in light of the Convention, interpreted the Convention as referring only to a very limited respect for family life. Similar approaches have been taken in other immigration cases.[361]

These cases illustrate several things. First, they demonstrate again the strong judicial conservatism in immigration cases. Second, they reveal a marked preference for literal interpretation, to which the courts resorted in Suthendran, the line of cases addressing the admissibility of evidence of changed circumstances, Azam, one of the issues in Mughal, and one of the arguments in Amin. On those few applications of purposive analysis, the purpose was generally

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360. [1976] 1 W.L.R. 979 (C.A.).

361. E.g., R. v. Sec. of State for the Home Dept., ex p. Fernandes, The Times L. Rep., 21 Nov. 1980 (C.A.); R. v. Sec. of State for Home Affairs, ex p. Singh (Bhajan) [1975] 2 All E.R. 1081 (C.A.); Uppal v. Home Office, The Times L. Rep., 21 Oct. 1978 (Ch.)(deportation will not infringe right to petition recognised by European Convention). For the subsequent history of Uppal, see Uppal v. United Kingdom [1981] 3 E.H.R.R. 391 (complaint concerning substantive violations declared admissible, complaint concerning procedural violations declared inadmissible), 399 (friendly settlement)(Euro. Comm'n).

defined adversely to the immigrant, as in Subramaniam, the second issue in Mughal, and the alternative argument in Amin. Such cases as Bhagwan and Grant suggest a more liberal approach when the immigration issue arises in criminal proceedings. Perhaps that tendency could be explained as recognition of a 'right' to be acquitted unless proved guilty. The same emphasis on the distinction between automatic rights and interests dependent on discretion might partly explain the differing approaches in Amin and Phansopkar.

F. Review of the Exercise of Discretion[362]

Certain discretionary administrative decisions have been held unreviewable. These include decisions that are made unreviewable by statutes,[363] and at least certain decisions made pursuant to the royal prerogative, discussed below. The British courts do not, however, decline review of all administrative decisions that might be termed political

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362. Some of the examples noted in this section could reasonably be viewed as questions of degree. For definitions of the terms 'discretion' and 'degree', see pp. 12-14 above. For general treatment of judicial review of administrative discretion, see J.G. Cowan, Administrative Discretion: An Analysis of the Role of Judicial Review (Oxford Thesis 1977); Craig, note 2 above, ch. 10; de Smith, note 1 above, ch. 6; G.D.S. Taylor, Judicial Review of Improper Purposes and Irrelevant Considerations (1976) 35 Camb. L. Rev. 272; Wade, note 1 above, Part IV.

363. See, e.g., de Smith, note 1 above, at 286, 357-76; de Smith, note 2 above, at 352-53 & n.88 (subordinate legislation). See also British Nationality Act 1948, s. 26, preserved by Tribunals and Inquiries Act 1971, s. 14(3), analysed in de Smith, note 1 above, at 370-71; British Nationality Act 1981, s. 44(2), analysed in T. St. J.N. Bates, Judicial Review and Nationality Law (1982) Pub. L. 179, at 179-81.

questions.[364] And, as observed by de Smith,[365] courts ordinarily review the exercise of statutory powers directly affecting individual interests, although on narrow grounds.

There is little uniformity in the courts' descriptions of the grounds on which discretionary administrative decisions can be invalidated, but all the grounds would seem to fall within either or both of two headings: a failure by the repository of the discretion to exercise that power independently; and an abuse or excess of discretionary authority.[366] The remaining discussion will examine those two broad categories in the context of immigration law.

Failure to Exercise Discretion[367]

Several things can happen to prevent the repository of a discretionary power from exercising it. The administrative body might undervalue the scope of its discretionary power.[368]

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364. See de Smith, note 1 above, at 290 & n.70, citing Adegbenro v. Akintola [1963] A.C. 614 (P.C.). See also ch. V, s. D below.
365. de Smith, note 1 above, at 290, 296-97.
366. Ibid., at 285-86 (the two headings overlap); see generally Wade, note 1 above, ch. 11.
367. See generally de Smith, note 1 above, at 298-322; D.J. Galligan, The Nature and Function of Policies Within Discretionary Power (1976) Pub. L. 332; H.L. Molot, The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion (1972) 18 McGill L.J. 310; Wade, note 1 above, ch. 11. On the more general question of legal control of administrative discretion, compare K.C. Davis, Discretionary Justice--A Preliminary Inquiry (1969) with J.L. Jowell, Law and Bureaucracy (1975). See also K.C. Davis (ed.), Discretionary Justice in Europe and America (1976).
368. See generally de Smith, note 1 above, at 320.

In R. v. Peterkin, ex p. Soni,[369] for example, an adjudicator ruled that he could not interfere with the decision of an E.C.O. refusing entry clearance unless the E.C.O. had ignored relevant factors or considered irrelevant ones. The Divisional Court concluded that the statute required the adjudicator to review de novo, and that by misunderstanding the scope of his power the adjudicator had failed to exercise his statutory discretion.

The holder of a discretionary power can also fail to exercise discretion by acting under the dictation of someone else.[370] That other person or body might be an official in another department, as discussed below, or a superior in the same department. The latter possibility has not yet figured prominently in immigration litigation, though potential problems could arise.[371]

Discretion can also be fettered by the adoption of overly rigid rules or policies that inhibit the genuine exercise of discretion.[372] The general principle here is that an authority entrusted with discretionary power may properly adopt a general policy to guide the exercise of its discretion, but only if it considers in individual cases whether departure from

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369. [1972] Imm. A.R. 253 (Div. Ct.).
370. See generally de Smith, note 1 above, at 309-11; Wade, note 1 above, at 329-30.
371. Cf. Sec. of State for the Home Dept. v. Alibhi [1972] Imm. A.R. 127 (I.A.T.)(E.C.O. permitted to consult with immediate superior before refusing entry clearance).
372. See generally de Smith, note 1 above, at 311-17; Galligan, note 367 above; Molot, note 367 above; Wade, note 1 above, at 330-35.

those policies is warranted.[373] Outside the context of immigration, the application of that principle has produced mixed results.[374]

In the immigration cases, the rhetoric expressing that principle has generally not been matched by the results. In R. v. Sup't of Chiswick Police Station, ex p. Sacksteder,[375] the Home Secretary had issued general directions that any person named in a deportation order that was to be enforced immediately should be detained pending the departure of the vessel. Although two of the judgments in the Court of Appeal doubted whether the Home Secretary could detain people without considering 'whether the particular person ought to be detained',[376] the order was upheld on extremely dubious evidence of individualised consideration.

The Schmidt case, discussed earlier,[377] also rejected an argument based on fettering of discretion. Lord Denning M.R. said that the Home Secretary may adopt and announce a general policy, provided he is prepared to listen to reasons why, in an

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373. See especially British Oxygen Co. Ltd. v. Minister of Technology [1970] 3 All E.R. 165 (H.L.); R. v. Port of London Authority, ex p. Kynoch Ltd. [1919] 1 K.B. 176 (C.A.), at 184 (per Bankes L.J.). See also Bromley London B.C. v. Greater London Council [1982] 1 All E.R. 129 (H.L.), at 155 (per Lord Wilberforce), 165 (per Lord Diplock), 182 (per Lord Brandon); A.-G. ex rel. Tilley v. Wandsworth London B.C. [1981] 1 W.L.R. 854 (C.A.); R. v. Flintshire County Council County Licensing (Stage Plays) Comm., ex p. Barrett [1957] 1 Q.B. 350 (C.A.); R. v. Torquay Licensing Justices, ex p. Brockman [1951] 2 K.B. 784 (Div. Ct.).
374. See sources cited in notes 16 and 17 above.
375. [1918] 1 K.B. 578 (C.A.).
376. Ibid., at 585-86 (per Pickford L.J.), 591 (per Scrutton L.J.).
377. See pp. 61-64 above.

exceptional case, the policy should not be applied.[378] Without addressing whether the proviso had been satisfied in the present case, he rejected the alien's argument.[379] Widgery L.J. (as he then was) went further, concluding that the absence of a 'right' to the extension of stay that the student was seeking precluded consideration of this and other arguments.[380]

An administrative body can also fetter its discretion improperly by voluntarily delegating its power to another person or body. As a general proposition, discretion must be exercised by the authority designated in the statute, and only by that authority.[381] Special problems arise, however, in applying that principle to ministers of the central government.[382] Must a minister literally give each case his or her personal attention, or may responsibility be transferred to others?

This issue is of practical importance in the deportation context. The statute provides that the 'Secretary of State'

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378. Ibid., at 349-50.
379. See also the indirect approach to the same ultimate result in Pearson v. I.A.T. [1978] Imm. A.R. 212 (C.A.). Accord, Paet v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 185 (I.A.T.)(also rejecting estoppel argument).
When the Home Secretary refuses an extension of stay on alternative grounds, and the adjudicator makes a contrary finding on one of the grounds, the Home Secretary will not be required to apply his mind anew to the other ground: R. v. I.A.T., ex p. Malik (C.A., unrep'd, 14 Feb. 1983); R. v. I.A.T., ex p. Manilal (Div. Ct., unrep'd, 10 March 1983).
380. [1969] 2 W.L.R. at 352-53.
381. de Smith, note 1 above, at 298; Wade, note 1 above, at 319.
382. See generally de Smith, note 1 above, at 299-300, 307-09; Wade, note 1 above, at 327-29.

may make a deportation order against any person who is 'liable to deportation'.[383] In practice, absent an enquiry from a member of Parliament, both the initial, pre-appeal, decision to deport and the post-appeal decision, made in light of the pertinent factors identified by Home Office personnel and representatives of the immigrant, are taken by subordinate officials in the Immigration and Nationality Department of the Home Office.[384] The question arises whether this practice comports with the Parliamentary intent.

The reported decisions addressing the general question whether a Minister must give each case personal attention have formed two fairly distinct lines of authority. There are those in which a minister authorised a subordinate to act in the minister's name, and those in which a minister relied on policy decisions taken by other departments.

Typical of the first group is a series of cases in which ministers invoked war-related discretionary powers to requisition private property. The leading case is Carltona Ltd. v. Commissioners of Works,[385] where the court unanimously held that a departmental official could validly decide, in the name of the Commissioners of Works, to requisition a privately owned factory pursuant to the defence

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383. Immigration Act 1971, s. 5(1).
384. Letter to author from K.B. Albiston, Home Office, 23 July 1982. Copies are available upon request. See also H.C. 169 (1983), paras. 166, 167. The Home Secretary might also devote personal attention to an unusually notorious case: see p. 425 below.
385. [1943] 2 All E.R. 560 (C.A.).

regulations. The only condition was that the official who actually takes the decision must bring his or her own mind to bear on the individual case. The court reasoned that functions assigned to ministers are so numerous that Parliament could not possibly have intended personal consideration of each case at the ministerial level. It also reasoned that ministers, being constitutionally answerable to Parliament, will ensure that the decisions are taken by capable and trusted officials.[386]

The generality of the holdings in the requisitioning cases was not clear, because in each case several potentially limiting factors were present. The courts were interpreting emergency wartime regulations. An express statutory provision had created a rebuttable presumption that a document purporting to be made by a minister and to be signed by or on behalf of a minister was deemed to be made by that minister.[387] And the high volume of decisions made it impractical to require the minister's personal attention every time.[388]

The significance of all three of those limiting factors was removed, however, in R. v. Skinner.[389] A criminal statute

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386. Ibid., at 563 (per Lord Greene M.R.). Accord, Metropolitan Borough and Town Clerk of Lewisham v. Roberts [1949] 2 K.B. 608 (C.A.); West Riding County Council v. Wilson [1941] 2 All E.R. 827 (Div. Ct.).

387. See Emergency Powers (Defence) Act 1939, s. 7, cited as an alternative justification in Metropolitan Borough and Town Clerk of Lewisham v. Roberts [1949] 2 K.B. 608 (C.A.), at 617 (per Bucknill L.J.), 627-28 (per Jenkins J.).

388. Lord Greene M.R. stressed this factor in his judgment, with which the entire court agreed, in Carltona (see note 32 above). Accord, Metropolitan Borough and Town Clerk of Lewisham v. Roberts [1949] 2 K.B. 608 (C.A.), at 617-18 (per Bucknill L.J.).

389. [1968] 2 Q.B. 700 (C.A.).

made it an offence for a motorist to have a blood alcohol content exceeding a certain level, as measured by a device approved by the Secretary of State. The court held that the requisite approval could be provided by one of the Secretary's assistants in the Secretary's name. No emergency legislation was being interpreted, and the court explicitly rejected arguments attempting to limit the requisitioning cases along either of the other two lines noted above. Moreover, the defendant in Skinner could have argued, but apparently did not, that the invasion of an important personal liberty favours a construction requiring the personal attention of a high-ranking official.

That last argument, expanded to encompass property interests as well as liberty interests, was advanced in In re Golden Chemicals.[390] The Secretary of State for Trade had statutory authority to present a petition to wind up a company if it appeared to him expedient in the public interest to do so. Relying on Skinner, the court held that even a serious invasion of an individual interest will not cause the decision to require the personal attention of a minister.

This line of cases suggests that the Home Secretary may authorise subordinates to make deportation decisions. If even the sanction of a criminal conviction can be allowed to rest on a decision by a departmental subordinate, it seems doubtful that the liberty at stake in deportation proceedings would

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390. [1976] 2 All E.R. 543 (Ch.).

induce the courts to reach a contrary result. Further, the high volume of annual deportation orders[391] would seem to render personal Secretarial consideration at least as impractical as personal consideration of the type of order challenged in Skinner. Perhaps Skinner can be distinguished on the basis that the Home Secretary's deportation powers are couched in broad, subjective language, applicable whenever he deems deportation 'conducive to the public good'.[392] Arguably, the broader and more policy-oriented the discretionary power, the more likely it is that Parliament intended to require a personal decision by the minister. But even if Skinner can be distinguished on that basis, Golden Chemicals cannot be so easily dismissed, for in the latter case the Secretary of State was empowered to wind up a company when it appeared 'expedient in the public interest' to do so. For all those reasons, it is submitted that authorised department officials may issue deportation orders in the name of the Home Secretary.[393]

A related problem is whether a minister may delegate a statutory discretionary power to another department of the central government. That type of arrangement, unlike the situation in which the discretion is exercised by a

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391. The Home Office made more than 6000 deportation orders in calendar years 1980 through 1982, although fewer than half were actually enforced: Letter to author from S.F. Adams, Home Office, Tables 1 and 2, 1 April 1983. Copies are available upon request.

392. Immigration Act 1971, s. 3(5)(b).

393. But cf. A.-G. of Canada v. Brent [1956] S.C.R. 318 (S.Ct. of Canada) (impermissible sub-delegation).

departmental subordinate, has been received with disfavour. When a statute reposes discretion in a particular minister, the general rule has been that that minister -- or at least an authorised official in that minister's department -- may not regard himself as bound by the policy decision of another department.[394]

The issue has arisen only infrequently in the immigration area. When it has, however, a marked contrast with the general rule has been evident. In both Schmidt and Pearson, noted earlier,[395] the arguments were that discretion had been fettered improperly by the Home Secretary's reliance on a fixed rule. Since the rules on which the Home Secretary was alleged to have relied had been promulgated by other ministers, the courts in both cases had to hold sub silentio that the Home Secretary could permit other departments to make policy determinations affecting the admission of immigrants. The holdings are unremarkable if they assume that the Home Secretary retained the discretion to depart from those policy judgments in individual cases. As noted earlier, however, there was no indication in either case that individualised consideration had actually been provided. Thus the results of both cases illustrate relative deference not only on the issue

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394. E.g., R. v. Sec. of State for Trade, ex p. Chris Int'l Foods Ltd. (Div. Ct., unrep'd, 4 March 1983); H. Lavender & Son Ltd. v. Min. of Housing & Local Development [1970] 1 W.L.R. 1231 (Div. Ct.); Ellis v. Dubowski [1921] 3 K.B. 621 (Div. Ct.). See also Jackson Stansfield & Sons Ltd. v. Butterworth [1948] 2 All E.R. 558 (C.A.), at 564-66 (per Scott L.J.).

395. See pp. 126-27 & n. 379 above.

of the extent to which discretion can be constrained by preformulated policies, but also on the issue of the extent to which such policies can be established by departments other than the one named in the statute.[396]

Abuse of Discretion

The second broad group of grounds for invalidating a discretionary administrative action is abuse or excess of discretionary power. Unlike failure to exercise discretion, in which an administrative body has asserted too little of its power to make individual decisions, abuse of discretion occurs when an administrative body goes too far -- i.e., when it exceeds its legal authority.

When the source of the discretionary power is statutory, and the decision is not within any of the categories of unreviewable discretion, there are usually[397] several possible grounds for invalidation: bad faith, ignoring of relevant factors or consideration of irrelevant ones, exercise for an improper purpose, and gross unreasonableness.[398] Those

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396. The Immigration Act 1971 refers consistently to the 'Secretary of State', rather than to the Home Secretary. It might be thought that that feature precludes any objection to the transfer of a policymaking function from one Secretary of State to another: see Wade, note 1 above, at 50, 328. But see Pearson v. I.A.T. [1978] Imm. A.R. 212 (C.A.) (interpreting phrase as referring to Home Secretary).

397. But see de Smith, note 1 above, at 290-98.

398. Ibid., at 285, 322-23; cf. Wraith & Hutchesson, note 2 above, at 334 (grounds for abuse of a tribunal's discretion). See especially the judgment of Lord Greene M.R. in Assoc. Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223, at 228-34 (C.A.).

grounds frequently overlap.[399]

These heads of invalidity are generally regarded as the grounds on which the exercise of statutory discretion can be impugned. When the source of discretionary authority is the royal prerogative, the rules change. Today the prerogative has lost much of its general historical importance.[400] In particular, a series of statutes and subordinate legislation have made it typically unnecessary for the Crown to rely on any prerogative powers it might possess for the exclusion or expulsion of aliens. Nonetheless the prerogative remains relevant as a vehicle for understanding and possibly explaining a fair number of immigration cases -- even some of the cases concerned with the exercise of statutory discretion. For that reason, it will be convenient to consider first the impact of the royal prerogative on judicial review of immigration decisions.

The Royal Prerogative and the Early Immigration Cases

Various formulations, differing principally in their emphasis, have been used to describe the royal prerogative. Under one such definition, the prerogative consists of 'those inherent legal attributes which are unique to the Crown.'[401]

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399. See de Smith, note 1 above, at 286, 323. See also Roberts v. Hopwood [1925] A.C. 578 (H.L.); Assoc. Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223, at 229 (per Lord Greene M.R.)(C.A.); Pickwell v. Camden London B.C. [1983] 1 All E.R. 602 (Div. Ct.).
400. See Wade, note 1 above, at 213.
401. de Smith, note 2 above, at 135. See generally J. Chitty, A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject (1820).

This definition is a useful starting point because it stresses several distinguishing properties: The prerogative is a set of attributes, a term broader than powers.[402] They are legal attributes in the sense that their scope is defined by the courts.[403] These attributes are inherent; i.e., they derive from the common law, not from statute.[404] They are attributes of the Crown, not of its servants.[405] And they are unique to the Crown, not possessed by private individuals.[406]

But other properties of the prerogative also require mention. At least when used as a power, the prerogative is discretionary.[407] The prerogative has also been described as residual, both in the sense that its scope cannot be

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402. Among the attributes of the prerogative are immunities, defences and, in some cases, duties: ibid., at 136. See also Keir & Lawson, note 274 above, at 69-74.
403. See Case of Proclamations (1611) 12 Co. Rep. 74; de Smith, note 2 above, at 135; Keir & Lawson, note 274 above, at 73-74; Wade, note 1 above, at 213.
404. 1 Sir W. Blackstone, Commentaries 239 (8th ed., 1778); de Smith, note 2 above, at 135; Keir & Lawson, note 274 above, at 69; Wade, note 1 above, at 213; see also A.-G. v. DeKeyser's Royal Hotel Ltd. [1920] A.C. 508, at 567-68 (per Lord Parmoor) (H.L.).
405. de Smith, note 2 above, at 135; cf. Laker Airways Ltd. v. Dept. of Trade [1977] 2 W.L.R. 234, at 249 (C.A.).
406. Blackstone, note 404 above, at 239. For this reason, not all non-statutory powers of the Crown emanate from the prerogative. See, e.g., de Smith, note 1 above, at 288, cautioning against treating R. v. Crim. Inj. Comp. Bd., ex p. Lain [1967] 2 Q.B. 864 (Div. Ct.) as a case permitting judicial review of a prerogative power. Accord, Wade, note 1 above, at 214.
407. Laker Airways Ltd. v. Dept. of Trade [1977] 2 W.L.R. 234, at 249 (C.A.)(per Lord Denning M.R.); de Smith, note 2 above, at 136-37.

enlarged,[408] and in the sense that its use can be made subject to statutory conditions.[409]

There is reason to believe that several lines of immigration cases have been influenced, directly or indirectly, by the royal prerogative. The leading decision is Musgrove v. Chun Teeong Toy.[410] A Victorian statute limited the number of Chinese immigrants that could be carried on a single vessel and imposed criminal fines on the master of any vessel exceeding the prescribed limit. A Chinese immigrant on a ship carrying more than the allowed number was refused entry by the Victorian customs collector. Suing the customs collector for money damages, the immigrant argued that the officer had exceeded the authority conferred on him by the colonial government, that the colonial government had exceeded the powers delegated to it by the Crown, and that the Crown had usurped the power of Parliament.[411] After interpreting the Victorian statute as empowering the customs collector to exclude aliens on overloaded vessels, the court said that in any case an alien may not maintain an action in a British court to challenge his or her exclusion from British territory. The latter conclusion is far more sweeping, and is subject to various interpretations.

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408. See de Smith, note 2 above, at 136; Wade, note 1 above, at 213 (prerogative powers atrophy by disuse). At least one early writer took issue with that position: see T.W. Haycraft, Alien Legislation and the Prerogative of the Crown (1897) 13 L.Q. Rev. 165, at 176.
409. See, e.g., A.-G. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.).
410. [1891] A.C. 272 (P.C.).
411. Ibid., at 282-83.

One interpretation is that the court regarded the exclusion as an exercise of the royal prerogative. This interpretation has been assumed by other writers.[412] It is a plausible one, since the court began its analysis by saying that an alien may maintain an action in a British court to challenge his exclusion only if an alien has a 'legal right, enforceable by action, to enter British territory'. The court's rejection of the premise that an alien has a legally enforceable right of entry is tantamount to a conclusion that there is a legal power to exclude aliens. The source of that power would seem to be the prerogative, since the prerogative was explicitly argued,[413] and since no alternative source consistent with the breadth of the court's language is immediately apparent.[414] Viewed in that light, Musgrove would support the proposition that a court will not examine the grounds for exercising the prerogative.[415]

A second possible interpretation is that the court viewed the exclusion as an act of state. This theory was asserted by the defendant as an independent argument.[416] The court

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412. See de Smith, note 1 above, at 289 & n.61; Grant & Martin, note 75 above, at 1-2; Macdonald, note 75 above, at 9-10; Thornberry, note 167 above, at 424.
413. [1891] A.C. at 273.
414. It must be assumed that the court did not mean merely that the particular statute removed any legally enforceable right the alien would otherwise have had to enter the colony of Victoria. The language, referring to the absence of a right to enter British territory, is too broad to be confined to one particular colony.
415. See pp. 141-43 below.
416. [1891] A.C. at 273-74.

stressed the presence of 'delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies'.[417] That statement, when combined with the court's earlier observation that an alien's exclusion might so disrupt international comity as to result in diplomatic protests, suggests that the court sensed the presence of foreign affairs elements rendering the power unreviewable.[418] Other characterisations of Musgrove are possible,[419] but the end result under any of them is the same: the court held that an alien has no right to sue the Crown in a British court to contest exclusion on the basis of alleged violations of municipal law.

Musgrove was followed by Poll v. Lord Advocate.[420] Scottish officials excluded the master of a foreign fishing vessel on the ground that the fish he was attempting to land had been caught in violation of the fisheries statute. He sued to enjoin his future exclusion. The Court of Session held that, even if the Crown had violated either international or municipal law, an alien would have no right to complain of the

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417. Ibid., at 283.
418. This interpretation is adopted by Haycraft, note 408 above, at 173. See also Thornberry, note 167 above, at 424-25 (Poll, discussed below, treated Musgrove as example of act of state doctrine).
419. E.g., the court might have been holding that the alien lacked locus standi. Courts occasionally have held that, to be legally 'aggrieved' for locus standi purposes, a person must have been refused something to which he or she was legally entitled: see de Smith, note 1 above, at 412; see generally ibid., at 409-21.
420. [1899] 1 F. 823 (Ct. of Sess.).

violation in a British court, at least when the alleged wrong was an act done in the national interest.[421] The court reasoned that an alien may not plead a limitation of the royal prerogative, since British constitutional principles have been established only for the benefit of British subjects, who may be presumed to have acquiesced to those principles.[422]

The last case in the trilogy is A.-G. for Canada v. Cain.[423] Under a statute passed by the Canadian Parliament, two aliens were deported to the United States. The issue was whether the Canadian statute was ultra vires because it could be enforced only through constraints exercised on foreign soil. The Privy Council upheld the statute. It reasoned that the Crown had delegated to the Canadian Parliament the power to deport aliens, and that that power necessarily included the power to enforce the deportation order even though some measure of international constraint resulted. Since the court did not invoke any British statute authorising the Crown to expel aliens from Canada, it must have assumed that the source of the Crown's power was the royal prerogative.

Thus the necessary premise in both Poll and Cain, and arguably also in Musgrove, was that the prerogative encompassed the particular powers asserted in those cases. In Poll and arguably in Musgrove, the court relied on a prerogative power

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421. To the extent that this language covers actions other than exclusion and expulsion, it is too broad: Johnstone v. Pedlar [1921] 2 A.C. 262, at 289 (per Lord Sumner) (H.L.).
422. Ibid., at 827-28. The court went on to say that, in any case, the Crown had committed no violation: ibid., at 828-29.
423. [1906] A.C. 542 (P.C.).

to exclude friendly aliens to reach its conclusion that the aliens lacked even the right to maintain the action. In Cain, although the court did not imply that the action could not be brought, it used the prerogative to conclude on the merits that the Crown had a delegable power to expel friendly aliens.

As an historical matter, the premise that the Crown had a prerogative power to exclude or expel friendly aliens had been far from clear before these three cases were decided. Thornberry demonstrates that, with rare exceptions, such prerogative powers had not been asserted since the Revolution. He contends that during the nineteenth century, at least until Musgrove, those prerogative powers had been assumed no longer to exist.[424] He proceeds to observe that in Musgrove no authority for the prerogative was cited, and that in Poll and Cain the courts relied on authority demonstrating only that as a matter of international law a sovereign state may exclude and expel friendly aliens. As Thornberry notes, it does not follow that as a matter of British municipal law the Crown, which is not the supreme authority, has a prerogative power to exclude or expel friendly aliens.[425]

Haycraft, in an article written after Musgrove but before Poll and Cain, took a different historical view.[426] Tracing the history from the Magna Carta, he found more frequent indicators that there had existed a prerogative power to

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424. Thornberry, note 167 above, at 422-24. See also W.F. Craies, The Right of Aliens to Enter British Territory (1890) 6 L.Q. Rev. 27.
425. Ibid., at 424-28.
426. Haycraft, note 408 above.

exclude, and possibly expel, friendly aliens.[427] Haycraft did not claim that such prerogative powers had actually been used in modern times; rather, he argued that non-use does not imply abandonment.[428]

The conflicting evidence proffered by these writers suggests that, before Musgrove, there was disagreement over whether the Crown had a prerogative power to exclude or to expel friendly aliens. Thus it was open to the courts in Musgrove, Poll, and Cain to refuse to recognise such exercises of the prerogative. They elected not to take that course.

Assuming the existence of such a prerogative power, there remains the question of its effect. Apart from legitimising an action that might otherwise have been ultra vires, to what extent does the invocation of the prerogative insulate the action from judicial review? It has been clear since the Case of Proclamations[429] that the existence and scope of the prerogative are defined by the courts. Modern writers can add that courts may also review the exercise of the prerogative for formal defects and for compliance with any applicable statutory limitations.[430] But, at least until recently, courts have generally disavowed any power to review the grounds on which the prerogative has been exercised.[431] Thus, once they had

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427. Ibid., at 175-84.
428. Ibid., at 176.
429. (1611) 12 Co. Rep. 74.
430. de Smith, note 1 above, at 286; Wade, note 1 above, at 351.
431. See, e.g., de Smith, note 1 above, at 286; Keir & Lawson, note 274 above, at 103-04; Wade, note 1 above, at 351. See especially Gouriet v. A.-G. [1978] A.C. 435 (H.L.); Blackburn v. A.-G. [1971] 1 W.L.R. 1037 (C.A.); Hanratty v. Lord Butler of Saffron Walden (1971) 115 Sol. J. 386 (C.A.); China Navigation Co. Ltd. v. A.-G. [1932] 2 K.B. 197 (C.A.).

located the asserted powers within the prerogative, the courts in Musgrove, Poll, and Cain had no occasion to intervene.

Several writers argue that the passive judicial role in the royal prerogative cases has resulted not from the fact that the power was claimed to rest on the prerogative, but from the courts' sense that the particular issues typically presented by those cases have been unsuitable for judicial resolution.[432] If that is the true explanation for the judicial nonintervention, then the results of the early immigration cases involving prerogative powers suggest that the courts are simply convinced that for policy reasons the exclusion and expulsion powers require wide executive latitude. The soundness of that assumption is considered in the final chapter. It is also possible that the early immigration cases, despite the language in Musgrove and Poll seeming to reject a right to bring the actions, actually rejected the aliens' claims on the merits after having concluded that the prerogative conferred the asserted powers.

Finally, there are recent cases raising the question whether the assumption of nonreviewability of prerogative

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432. See P. Cane, Prerogative Acts, Acts of State and Justiciability (1980) 29 Int'l & Comp. L.Q. 680; de Smith, note 1 above, at 287-88; Wade, note 1 above, at 350; D.G.T. Williams, The Prerogative and Preventive Justice (1977) 36 Camb. L.J. 201, at 204. See especially Gouriet v. A.-G. [1978] A.C. 435, at 482 (per Lord Wilberforce), 524 (per Lord Fraser of Tullybelton)(H.L.); Blackburn v. A.-G. [1971] 1 W.L.R. 1037 (C.A.).

powers is being reexamined.[433] That suggestion has been received with approval by several writers, who have argued persuasively that the reviewability of a Crown action should hinge on the nature of the subject matter and not on the historical source of the power.[434]

A second aspect of these early cases deserves mention. As noted earlier,[435] both Musgrove and Poll contain language evidencing possible reliance on the act of state doctrine. The term 'act of state' has been used both as a defence to an action in tort and as a principle of nonjusticiability, although at least one writer argues that the former can be

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433. The obiter of Lord Denning M.R. in A.-G. ex rel. McWhirter v. I.B.A. [1973] 1 All E.R. 689, at 698-99 (C.A.), to the effect that courts may review the Attorney-General's decision refusing relator status (a prerogative power) has been disapproved by subsequent obiter: see Gouriet v. A.-G. [1978] A.C. 435, at 487-88, 495 (per Viscount Dilhorne), 505-06 (per Lord Edmund-Davies), 524 (per Lord Fraser of Tullybelton). But see dicta in Chandler v. D.P.P. [1964] A.C. 763, at 790 (per Lord Reid), 809-10 (per Lord Devlin) (H.L.); Laker Airways Ltd. v. Dept. of Trade [1977] 2 All E.R. 182 (C.A.), at 193 (per Lord Denning M.R.); R. v. Crim. Injuries Comp. Bd., ex p. Lain (1967] 2 Q.B. 864 (Div. Ct.)(court reviewed Crown's exercise of non-statutory power). Wade argues that the power exercised in Lain is not truly a prerogative power because it is one that a private individual can exercise: note 1 above, at 214. The point here, however, is that the court, rightly or wrongly regarding the power as prerogative (ibid., at 881 (per Lord Parker C.J.), 883 (per Diplock L.J.)), made a conscious decision to review the grounds for exercising it. Cf. the cases rejecting a prerogative to seize property without compensation: A.-G. v. Nissan [1970] A.C. 179 (H.L.); Burmah Oil Co. v. Lord Advocate [1965] A.C. 75 (H.L.); A.-G. v. DeKeyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.).

434. de Smith, note 1 above, at 287; Wade, note 1 above, at 350-51; Williams, note 432 above, at 204; cf. Cane, note 432 above, at 694 (courts should be guided by nature of act, rather than by status of plaintiff or place of act).

435. See pp. 137-39 above.

thought of as a specific application of the latter.[436] Thus, the act of state doctrine provides only that in certain categories of cases, courts will not review the grounds on which the Crown has acted.[437] Review is refused not because the act was lawful, but because judicial intervention would be improper.[438]

The two broad categories of Crown actions in which the act of state doctrine has been applied have been those done in the conduct of foreign affairs[439] and those done in relation to aliens outside the realm.[440] The latter prong is of immediate concern. The rationales advanced on its behalf have been that an alien does not need a judicial remedy because his or her nation can protest through diplomatic channels[441] and

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436. See Cane, note 432 above.
437. E.g., Cook v. Spriggs [1899] A.C. 572 (P.C.); Salaman v. Sec. of State in Council of India [1906] 1 K.B. 613 (C.A.); Netz v. Ede [1946] Ch. 224 (Ch.); Buron v. Denman (1848) 154 Eng. Rep. 450 (Ct. of Ex.). See also de Smith, note 1 above, at 289-90; Keir & Lawson, note 274 above, at 144.
438. See, e.g., Johnstone v. Pedlar [1921] 2 A.C. 262 (H.L.), at 278 (per Viscount Cave). See generally Cane, note 432 above.
439. de Smith, note 1 above, at 289-90; Keir & Lawson, note 274 above, at 144, 149, 165; Wade, note 1 above, at 717.
440. Johnstone v. Pedlar [1921] 2 A.C. 262 (H.L.), at 271 (per Viscount Finlay); Buron v. Denman (1848) 154 Eng. Rep. 450 (Ct. of Ex.), so interpreted in A.-G. v. Nissan [1970] A.C. 179 (H.L.), at 207 (per Lord Reid). See also de Smith, note 1 above, at 289-90; Lord A. McNair & A.D. Watts, The Legal Effects of War (1966), at 73.
The act of state doctrine cannot be asserted, for acts done within the realm, against either a British subject (Walker v. Baird [1892] A.C. 491 (P.C.)) or a friendly alien (Johnstone v. Pedlar [1921] 2 A.C. 262 (H.L.)). See also Keir & Lawson, note 274 above, at 146. The applicability of the doctrine to alien enemies within the realm is considered at pp. 159-60 below.
441. de Smith, note 2 above, at 155; Keir & Lawson, note 274 above, at 147.

that an alien outside the realm is not entitled to judicial protection because he or she lacks even temporary allegiance to the Crown.[442]

One question this raises is the relationship between the royal prerogative and the act of state doctrine, at least as applied to the immigration cases. It is clear that not every exercise of the prerogative is an act of state.[443] Whether every act of state is a prerogative act is a matter of some dispute.[444] That problem need not be of concern here, however, because the distinction between these two doctrines, though crucial to the outcome of other cases,[445] is not crucial to the problems presented in Musgrove and Poll. The application of either doctrine would have been expected to

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442. Cane, note 432 above, at 690-92; de Smith, note 2 above, at 155; see generally G.L. Williams, The Correlation of Allegiance and Protection (1948) 10 Camb. L.J. 54.
443. de Smith, note 2 above, at 152.
444. Some argue that acts of state are a sub-category of prerogative acts: e.g., Cane, note 432 above, at 682; D.R. Gilmour, British Forces Abroad and the Responsibility for Their Actions [1970] Pub. L. 120, at 145. Contra, de Smith, note 2 above, at 153-54 (acts of state are usually, but not always, prerogative acts; possible examples of non-prerogative acts of state given). Quaere also whether an act of state based on a factual or legal determination, rather than a discretionary determination, can properly be classified as a prerogative act.
445. E.g., cases in which acts are done abroad in relation to British subjects. If the prerogative is inapplicable, then the availability of a defence by the Crown to an action in tort might hinge on the question left undecided in A.-G. v. Nissan [1970] A.C. 179 (H.L.). Only Lord Reid (ibid., at 213) addressed the question whether the act of state defence could lie against a British subject (at least a U.K. and Colonies citizen); he concluded it could not. But see ibid., at 221 (per Lord Morris of Borth-y-Gest), 235 (per Lord Wilberforce) (there might be circumstances in which act of state would lie against British subject).

result in nonreviewability at the time those cases were decided.[446] Consequently, it is enough to conclude that the courts in both cases found the aliens' claims unreviewable, and that either the royal prerogative or the act of state doctrine or both contributed to those results.

A final possible interpretation of Musgrove and Poll, though not of Cain where the court addressed the merits, is that the results were based on locus standi grounds. Those courts might have meant that, even if the asserted power exceeded the scope of the prerogative, an excluded alien lacks locus standi to challenge the way in which the U.K. allocates its power internally. That interpretation would raise the question of who does have locus standi to launch such a challenge. If no one else has a sufficient personal interest,[447] there would be no apparent means of challenging a violation of law by the Crown. That result is not unheard of.[448] But when a plaintiff who has been adversely affected by a decision is held to lack locus standi, a weighty policy justification should be provided, especially when the practical result is that there remains no one else with enough of a legal interest to initiate proceedings. No such justification was provided by Musgrove and Poll, apart from the oblique reference

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446. See pp. 141-43 above. Today that conclusion is less clear: ibid.
447. Perhaps a U.K. relative of the alien, or even a prospective employer, would be held to have locus standi to challenge an alien's exclusion, though the issue does not appear to have been raised by the reported cases.
448. de Smith, note 1 above, at 286.

in Musgrove to the constitutional questions being 'delicate and difficult'. Once again, however characterised, the decisions rest ultimately on the courts' assumptions that the subject matter involved in exclusion cases is inherently nonjusticiable, a premise that will be critiqued in the final chapter.[449]

The 'Public Good' Cases

Since 1905 the Crown has had statutory authority both to exclude and to deport aliens and, more recently, certain categories of British subjects.[450] Consequently, direct resort to the prerogative has seldom been necessary since then. Nonetheless, the impact of the prerogative and of the related act of state doctrine has not been confined to the pre-statutory cases just discussed. There is a long line of cases in which either exclusion or deportation was based on a

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449. Still another possible explanation is that the aliens were not legally aggrieved, and therefore lacked locus standi, because they were not deprived of any legal entitlement. Cf. de Smith, note 1 above, at 412.

450. Aliens Act 1905, ss. 1 (exclusion), 3 (expulsion). The Aliens Restriction Act 1914, enacted as emergency legislation, broadened the Crown's authority to issue Orders in Council providing for the exclusion and deportation of aliens (see ss. 1(1)(a,c)). The wartime limitations on these powers were removed by the Aliens Restriction (Amendment) Act 1919, s. 1(1), which also (s. 16(2)) repealed the 1905 Act. The Aliens Order 1919, No. 1077, issued pursuant to the 1914 and 1919 Acts, permitted exclusion on both specified and unspecified grounds (see art. 1(3), especially 1(3)(h)), and deportation when the Secretary of State deemed it 'conducive to the public good' (art. 12(1)). The 1919 Order was replaced by the Aliens Order 1920, No. 448, which in turn was replaced by the Aliens Order 1953, No. 1671. The latter continued those powers: see ss. 1(1), 4, 20(2)(b). Today, the Immigration Act 1971, s. 3(5)(b), retains the 'public good' clause for deportation. For a similar exclusion provision, see H.C. 169 (1983), para. 85.

statutory provision or subordinate legislation conferring broad, subjectively worded, powers to exclude or deport aliens. At least two such cases, Soblen and Schmidt, strongly suggest that when such decisions are challenged, the scope of judicial review can still occasionally be influenced by the prerogative in ways that will be discussed below.[451]

In R. v. Governor of Brixton Prison, ex p. Sarno,[452] the Home Secretary ordered the deportation of an alien who was suspected to have committed various criminal acts. The statute and the Order in Council, both adopted upon the outbreak of war, specifically empowered the Secretary of State to deport aliens but made no reference to the grounds on which that power could be exercised. Although recognising obiter a court's authority to intervene when the Secretary's power has been abused,[453] the court relied on the wartime conditions to find that there had been no abuse in the present case. Thus, unlike Musgrove and Poll, where the courts held that the alien could not obtain judicial review of their exclusion orders, and like Cain, where a deportation order was being challenged, the court in Sarno acknowledged its power to review a deportation order but displayed great deference to the Crown in exercising that power.

Less than a year later, however, the Court of Appeal rejected even the possibility of review. In R. v. Secretary of State for Home Affairs, ex p. Duke of Chateau Thierry,[454] the

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451. See pp. 153-54 below.
452. [1916] 2 K.B. 742 (Div. Ct.).
453. Ibid., at 749, 752.
454. [1917] 1 K.B. 922 (C.A.).

Home Secretary acted pursuant to the same statutory provision and a similarly worded Order in Council, in ordering the deportation of a friendly alien. All three judgments made clear that the Home Secretary had an absolute discretion, not reviewable in court, to deport any alien.[455] It had been argued that the Secretary of State had ordered the deportation for the purpose, assertedly illegal, of returning the alien to France for military service pursuant to an agreement between France and the U.K. The court acknowledged that the statute did not authorise the Home Secretary to choose the destination of the deportee.[456] Although the Home Secretary had apparently admitted that the purpose of the deportation had been to return the alien to France for military service,[457] a purpose that would seem illegal in light of the court's acknowledgment, the court explicitly held that even an illegal purpose would not invalidate the order.[458]

The court's refusal to review a deportation order marks a major extension of both Cain and Sarno. It is not clear to what extent the decision was shaped by the prerogative. Swinfen Eady and Pickford, L.JJ., made no mention of the prerogative. Bankes L.J. expressly confined his analysis to

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455. Ibid., at 930 (per Swinfen Eady L.J.), 932-33 (per Pickford L.J.), 935 (per Bankes L.J.).
456. The court then said, however, that the Home Secretary could select the vessel on which the alien was to be removed, conceding that the practical consequence would be the same as selecting the destination: ibid., at 931, 933-34, 937.
457. Ibid., at 927.
458. See also R. v. Gov'r of Brixton Prison, ex p. Sliwa [1952] 1 K.B. 169 (C.A.); R. v. Sup't of Chiswick Police Station, ex p. Sacksteder [1918] 1 K.B. 578 (C.A.).

statutory interpretation, holding consideration of the prerogative immaterial.[459] Yet the Crown, citing Cain, had argued that there was a prerogative power to deport aliens and, more important, that that was a factor to consider in interpreting the legislation.[460] Thus, despite the lack of express reliance on the prerogative, it remains possible that the court was simply hesitant to adopt an interpretation arguably derogating from the common law.

Since 1919,[461] various Orders in Council and now the 1971 Act have given the Home Secretary the authority to deport an alien whenever he 'deems it conducive to the public good'. Building on the cases discussed above, subsequent court decisions held that the grounds for the Home Secretary's determination that deportation would be conducive to the public good are not reviewable.[462]

The issue came to a head in Soblen, discussed earlier.[463] One of Dr. Soblen's arguments was that the true purpose of the

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459. [1917] 1 K.B. at 935-36.
460. Ibid., at 924-25.
461. See note 113 above.
462. See R. v. Home Sec., ex p. Bressler [1924] All E.R. 668 (C.A.); R. v. Gov'r of Brixton Prison, ex p. Bloom [1920] All E.R. 153 (Div. Ct.); cf. R. v. Inspector of Leman Street Police Station, ex p. Venicoff [1920] 3 K.B. 72 (Div. Ct.). In Bressler, the deportation order did not specify even that the 'public good' clause was being invoked; the court read in such an intent.
463. See pp. 55-57 above. On this issue, see generally O'Higgins, note 167 above; Thornberry, note 167 above. See also Csenyi v. Sec. of State for the Home Dept. [1975] Imm. A.R. 92 (I.A.T.) (same result on analogous facts). For treatment of analogous issues in criminal cases, compare R. v. Bow St. Magistrates, ex p. Mackeson (1982) 75 Crim. App. R. 24 (Div. Ct.) with R. v. Guildford Magistrates Court, ex p. Healy [1983] 1 W.L.R. 108 (Div. Ct.).

deportation order was to return him to the United States so that he could be imprisoned for his espionage conviction. Such a purpose would have been improper because espionage was not an extraditable offence. Lord Denning M.R. accepted that, if the order was a sham, the court could intervene. This concession theoretically expanded the scope of judicial protection, since several of the decisions noted previously[464] had declared that the grounds for a deportation order could not be questioned at all. Indeed, Lord Denning M.R. added that, 'if there is evidence on which it can reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order'.[465]

The boldness of that rhetoric did not match its application to the facts. The evidence established that the U.S. had requested Dr. Soblen's return. Dr. Soblen sought only to go voluntarily to Czechoslovakia, a country willing to receive him, rather than to be placed on a flight bound for the United States. That evidence alone would seem to be enough on which 'it can reasonably be supposed' that the true purpose of the order was to return a convicted offender to the U.S., and not merely to rid the U.K. of his presence. Lord Denning M.R. concluded, however, that 'there was reasonable ground on which

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464. E.g., Duke of Chateau Thierry, Sacksteder, Bloom, and Bressler, pp. 148-50 above.
465. [1962] 3 All E.R. at 661.

the Home Secretary could consider that the applicant's presence was not conducive to the public good'.[466] The latter test is less demanding than the one originally postulated, since, unlike the original formulation, the latter would be satisfied in the case where reasonable minds might differ.

All three judgments suggested possible purposes the Home Secretary might have considered in concluding that deportation would be conducive to the public good. It was pointed out that the United States was Dr. Soblen's home country and thus the only country bound by international law to receive him,[467] although that fact seems unimportant when another country is willing to receive the alien voluntarily. It was also suggested that the Home Secretary might simply have wished to help an ally,[468] but that purpose would be served only by returning a convicted offender, and thus comes perilously close to the purpose Lord Denning M.R. conceded would be improper. Another suggested purpose was a desire to deter the type of conduct that enabled Dr. Soblen to enter,[469] although the extreme lengths to which Dr. Soblen resorted would seem to make it unlikely that others would mimic his strategy, and therefore unlikely that that objective was the true basis for the order. It is submitted that the court's application of its test to the

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466. Ibid.
467. Ibid., at 662 (per Lord Denning M.R.), 665 (per Donovan L.J., 'home country'), 668 (per Pearson L.J.).
468. Ibid., at 666 (per Donovan L.J.), 668 (per Pearson L.J.).
469. Ibid., at 662 (per Lord Denning M.R.), 666 (per Donovan L.J.), 668 (per Pearson L.J.).

facts of the case illustrates the enormity of the burden facing an alien who wishes to establish an ulterior purpose.

One last aspect of Soblen should be noted. Lord Denning M.R. stated that the Crown had a prerogative power to deport an alien when doing so was conducive to the public good.[470] He then concluded that consideration of that point was unnecessary because in any case the same power was provided by the Order in Council, which he viewed as 'supplant[ing]' the royal prerogative.[471] His view thus appears to be that the 'public good' clause simply codified the common law prerogative power. It therefore seems plausible that this restrictive view of the judicial role in reviewing the exercise of the powers conferred by the 'public good' clause can be traced at least partly to the precedent imposing similar limitations on review of the prerogative. More generally, the implication could be that legislation codifying a common law power should be interpreted as acquiring the judicial gloss accompanying that common law power.

Lord Denning M.R. continued that theme in Schmidt v. Secretary of State for Home Affairs, discussed earlier.[472] The alien scientology students argued, in addition to the points analysed earlier, that the Home Secretary had refused their extension applications for the improper purpose of heaping disrespect on a legal religious sect. Lord Denning

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470. Ibid., at 660. As noted earlier (see pp. 140-41 above), there is a difference of opinion on this historical point.
471. Ibid.
472. [1969] 2 W.L.R. 337 (C.A.). See pp. 61-64 above.

M.R. repeated the Soblen dictum that an act professedly done for an authorised purpose but in fact done for an improper one would be invalid. He then held, however, that the Home Secretary may refuse an extension 'for any purpose which he considers to be for the public good' (emphasis added).[473] When the propriety of the purpose is assessed subjectively, it is difficult to conceive of any purpose, short of personal corruption, that would bring the Soblen dictum into operation.

Widgery L.J. (as he then was), although purporting to agree with Lord Denning M.R.,[474] seems to have rejected the obiter even in theory. Like Lord Denning M.R., he believed that there was a prerogative power to exclude aliens and that that power had by then been codified.[475] Unlike Lord Denning M.R., however, Widgery L.J. relied on the absence of a 'right' of entry in concluding that the Home Secretary could exclude an alien on even arbitrary grounds or no grounds at all. The effect was to resurrect the right/privilege distinction and to apply it to review for abuse of discretion.

The rhetoric of the recent cases espouses a judicial role clearly more assertive than that adopted in the cases considered above. Whereas the older cases had treated 'public good' and comparable decisions either as unreviewable or as reviewable only for good faith, at least one recent case explicitly reviewed such a decision for reasonableness,

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473. Ibid., at 349.
474. Ibid., at 351.
475. Ibid., at 351-53; cf. ibid., at 349 (per Lord Denning M.R.).

although ultimately upholding it.[476] Several cases have contained language to the effect that the power to deport on 'public good' grounds should not be exercised lightly, though again the deportation decisions were upheld.[477] In one such case,[478] Lord Lane L.C.J. said the power was reserved for 'rare use', but that the existence of a marriage of convenience was a valid ground for invoking it.

Despite the rhetoric, the actual results of the 'public good' cases have been generally unfavourable to the immigrants involved, regardless whether they were aliens or Commonwealth citizens.[479] But there have been some notable exceptions. In R. v. I.A.T., ex p. Khan (Mahmud),[480] the Court of Appeal invalidated a deportation order because the I.A.T. had failed to provide reasons for its conclusion that the immigrant's marriage had been one of convenience. The court held that, in order for a reviewing court to perform its supervisory function, the I.A.T. must show that it considered the immigrant's arguments and must indicate the evidence on which its conclusions

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476. R. v. I.A.T., ex p. Singh (Ajaib) [1978] Imm. A.R. 59 (Div. Ct.).
477. R. v. I.A.T., ex p. Cheema, The Times (C.A., 14 Jan. 1983); R. v. I.A.T., ex p. Singh (Ajaib) [1978] Imm. A.R. 59 (Div. Ct.); Scheele v. I.O., Harwich [1976] Imm. A.R. 1 (I.A.T.); cf. Khawaja & Khera v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.), at 773-74.
478. R. v. I.A.T., ex p. Cheema, The Times, 14 Jan. 1983 (C.A.).
479. In addition to the cases cited in note 477 above, see, e.g., R. v. Sec. of State for the Home Dept., ex p. Hassan, The Times, 20 July 1981 (C.A.); Villone v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 23 (I.A.T.); Bashir v. Sec. of State for the Home Dept. [1978] Imm. A.R. 150 (I.A.T.); Osama v. I.O. [1978] Imm. A.R. 8 (I.A.T.); Csenyi v. Sec. of State for the Home Dept. [1975] Imm. A.R. 92 (I.A.T.). But see R. v. I.A.T., ex p. Palacio [1979] Imm. A.R. 178 (Div. Ct.).
480. [1983] 2 All E.R. 420 (C.A.).

were based, unless the basis is obvious. The court also circumscribed the substantive discretion of the Home Secretary, holding that a marriage of convenience can be found only if the marriage was contracted for the purpose of evading the immigration laws, and the parties did not intend to live together as husband and wife. The latter holding was later applied by the Divisional Court, in a close case, to the benefit of the immigrant.[481]

There is, in addition, the decision of the House of Lords in Khawaja, noted earlier.[482] Although not directly in point, the case is pertinent here because all five of their Lordships explicitly invoked the principle that broad judicial review is appropriate when an important liberty is at stake.[483] That rationale would seem equally applicable to deportations on 'public good' grounds,[484] and might indeed translate eventually into broader judicial review of all discretionary immigration decisions.

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481. R. v. I.A.T., ex p. Khan (Div. Ct., unrep'd, 18 May 1983).
482. Khawaja v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.). See pp. 26-27 above.
483. Ibid., at 772 (per Lord Fraser of Tullybelton), 774 (per Lord Wilberforce), 780-82 (per Lord Scarman), 792-93 (per Lord Bridge of Harwich), 793 (per Lord Templeman, agreeing with Lord Bridge).
484. Lord Bridge of Harwich also concluded that the power to deport on "public good" grounds did not apply when the only objection to a particular immigrant was based on his or her initial entry (ibid., at 787). Although he used this conclusion as an argument for allowing the Home Secretary to remove such an immigrant as an illegal entrant, the conclusion was later adopted in a 'public good' case: R. v. I.A.T., ex p. Khan (Div. Ct., unrep'd, 18 May 1983).

The various provisions that have empowered the Home Secretary to deport selected classes of individuals when he 'deems' it 'conducive to the public good' can be described as conferring discretionary power in subjective terms.[485] The traditional view, even outside the immigration context, was that such subjective language generally limited judicial review to the single ground of bad faith.[486] In the last twenty years, however, there have been numerous reported decisions reviewing the exercise of subjectively worded discretionary powers to assure that improper purposes were not considered, that all relevant considerations and no irrelevant ones were taken into account, and that the decision was not grossly unreasonable.[487] Further, for several decades, the courts have engaged in objective judicial review of subjectively worded discretionary powers when the exercise of those powers infringed important individual interests.[488]

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485. On the distinction between subjectively and objectively worded discretionary powers, see generally Austin, note 10 above.
486. See de Smith, note 1 above, at 291-94.
487. See especially Padfield v. Min. of Agriculture, Fisheries and Food [1968] A.C. 997 (H.L.); Sec. of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014 (H.L.). See also Daymond v. South West Water Authority [1976] A.C. 609 (H.L.); Bd. of Trustees of the Maradana Mosque v. Mahmud [1967] A.C. 13 (P.C.); Laker Airways Ltd. v. Dept. of Trade [1977] 2 All E.R. 182 (C.A.); Congreve v. Home Office [1976] Q.B. 629 (C.A.), praised in R. Cordara, Abuse of Ministerial Discretion: The Offer You Can Refuse (1976) 39 Mod. L. Rev. 592; Comm'rs of Customs and Excise v. Cure & Deeley Ltd. [1962] 1 Q.B. 340 (Div. Ct.); Prescott v. Birmingham Corp. [1955] Ch. 210 (Ch.).
488. See generally de Smith, note 1 above, at 295-98; Wade, note 1 above, at 393-403.

An example will illustrate the contrast between the virtually uniform deference displayed in the 'public good' cases and the striking assertiveness evident at least on occasion when equally subjective language used in other statutes is being reviewed. In R. v. London Borough of Hillingdon, ex p. Royco Homes Ltd.,[489] a local planning authority granted a developer permission to build several blocks of flats, but only on several conditions. One requirement was that the tenants be people eligible for local authority housing. The developer, arguing that the conditions were ultra vires, sought to quash the entire decision. The pertinent statutory language authorised the local planning authority to 'grant planning permission, either unconditionally or subject to such conditions as they think fit' (emphasis added).[490] This language is both as broad and as subjective as the language authorising the Home Secretary to issue a deportation order when he 'deems' it 'conducive to the public good.' Rather than confine the scope of its review to that exercised in the immigration cases, however, the court held that 'those words are clearly too wide to be given their literal meaning', and that the conditions 'must fairly and reasonably relate to the permitted development.'[491] Finding they did not, the court held the conditions ultra vires despite

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489. [1974] 2 All E.R. 643 (Div. Ct.).
490. Town and Country Planning Act 1971, s. 29(1).
491. [1974] 2 All E.R. at 649, citing an obiter in Pyx Granite Co. Ltd. v. Min. of Housing and Local Gov't [1958] 1 All E.R. 625, at 633 (C.A.).

the subjective language[492] -- a result far more assertive than those of the immigration cases decided up to that time.

Alien Enemies and the Royal Prerogative

The impact of the prerogative has been especially pronounced in the alien enemy cases. As a general rule, the subject of an enemy State is not barred from bringing an action in a British court while he or she has a licence to remain in the U.K.[493] This is true even if the alien has been interned.[494] However, when such an alien challenges either the internment itself or a deportation order, problems arise. Three leading cases illustrate both the degree of judicial restraint and the influence of the prerogative.

In R. v. Superintendent of Vine St. Police Station, ex p. Liebmann,[495] the Divisional Court relied explicitly on the prerogative in holding itself powerless to review the Government's decision interning an alien enemy. The alien had argued that, since Parliament had expressly delegated several emergency powers to the King but had omitted any reference to internment powers, the intent must have been not to authorise such internment. Bailhache J., though acknowledging his

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492. For a similar approach, see Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 All E.R. 1 (C.A.); see also Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1947] 2 All E.R. 680, at 684-85 (C.A.). Having found two of the conditions ultra vires, the court in Royco Homes proceeded to hold two otherwise valid conditions similarly ultra vires: [1974] 2 All E.R. at 651.

493. Porter v. Freudenberg [1915] 1 K.B. 857 (C.A.); Princess Thurn and Taxis v. Moffitt [1915] 1 Ch. 58 (Ch.); cf. In re Ferdinand [1921] 1 Ch. 107 (C.A.).

494. Schaffenius v. Goldberg [1916] 1 K.B. 284 (C.A.).

495. [1916] 1 K.B. 268 (Div. Ct.).

inability to explain the statutory omission, noted that the statute reserved all powers to the Crown and concluded that the power to intern enemy aliens was part of the prerogative.[496] The same principle was applied to deportation in Netz v. Ede, where the Chancery Division relied both on the act of state doctrine and on the idea that an alien enemy is present in the country only under 'licence'.[497]

Finally, in R. v. Bottrill, ex p. Kuechenmeister,[498] an interned German subject applied for habeas corpus. He argued that he was not an alien enemy because, by the time of his application, armed hostilities had ceased and Germany had surrendered. The court held conclusive a certificate from the Crown that a state of war formally continued to exist. Consequently it was compelled to treat the applicant as an alien enemy. Having reached that conclusion, the court then approved the holding in Liebmann that such an alien could not bring an action in a British court to challenge his internment. All three judgments expressly recognised a prerogative power to intern alien enemies.[499]

Modern Invocation of the Prerogative in Immigration Cases

Section 33(5) of the Immigration Act 1971 provides that the Act does not 'supersede or impair any power exercisable by

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496. Ibid., at 276. To the extent that the opinion of Low J. suggests that an interned alien enemy may not sue in British court (ibid., at 277), it has been overruled: Schaffenius v. Goldberg [1916] 1 K.B. 284 (C.A.), at 300-01.
497. [1946] Ch. 224, at 232-36 (Ch.). Cf. Co-Operative Comm. on Japanese Canadians v. A.-G. for Canada [1947] A.C. 87 (P.C.).
498. [1947] 1 K.B. 41 (C.A.).
499. Ibid., at 51-53 (per Scott, L.J.), 54-55 (per Tucker L.J.), 56-57 (per Asquith L.J.).

Her Majesty in relation to aliens by virtue of Her prerogative'. The broad powers conferred by the 1971 Act raise the question of what practical effect this section might have.

As noted earlier, Lord Denning M.R. suggested in Soblen that the then existing statutory powers, similar in pertinent part to the powers now contained in the 1971 Act, supplanted the prerogative. It has been held that, if a statute confers powers formerly provided by the prerogative, but subjects those statutory powers to conditions, the Crown cannot avoid the conditions by invoking the prerogative.[500] Two principal rationales have been offered: A contrary rule would (a) render the statutory limitations superfluous;[501] and (b) permit the Crown to discriminate among subjects by making selective use of the prerogative.[502]

In the cited cases, however, the particular statutes did not contain clauses explicitly preserving or extinguishing the prerogative. On principle, the same rationales would seem to apply even when a preservation clause is present, for such a clause does not eliminate the potential for either form of abuse. The preservation clause does, however, give rise to a countervailing consideration: by analogy to the first

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500. See Burmah Oil Co. v. Lord Advocate [1965] A.C. 75 (H.L.); A.-G. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.); Laker Airways Ltd. v. Dept. of Trade [1977] 2 All E.R. 182 (C.A.) (per Roskill and Lawton L.JJ.).

501. A.-G. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.), at 521 (per Lord Dunedin); Laker Airways Ltd. v. Dept. of Trade [1977] 2 All E.R. 182 (C.A.), at 204-05 (per Lawton L.J.).

502. A.-G. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.), at 561-62 (per Lord Sumner).

rationale, the statute should not be interpreted so as to render the preservation clause itself superfluous. Thus, there remains the question of what powers the Crown might wish to assert that the statute does not already provide.

Although no clear answers are possible yet, several[503] potential uses can be conceived. One such use is suggested by the unreported decision of the Court of Appeal in In re Bhatti.[504] The Home Secretary had established a programme for issuing special vouchers to certain East African Asians otherwise ineligible for admission under the Commonwealth Immigrants Act 1968 then in force. The issue was whether overseas offices could limit the vouchers to people who lack British citizenship.

Lawton L.J., in a judgment with which the other Lords Justices agreed, characterised the special voucher scheme as an exercise of the prerogative, since it did not arise under any statutory source. He then held that it follows that the court lacked jurisdiction to interfere with either the terms of the scheme or its administration overseas. All three judgments assumed, either expressly or implicitly, that the prerogative source of the power made it unreviewable. The possibilities raised recently to the contrary, and discussed above,[505] were not considered. The decision is analogous to Amin,

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503. In addition to the possibilities discussed below, see Macdonald, note 75 above, at 24 (expulsion of foreign diplomats).
504. C.A., 7 Sept. 1981.
505. See pp. 142-43 above.

discussed earlier,[506] in which the House of Lords relied on the nonstatutory discretionary nature of the special voucher scheme in concluding that appeal to a statutory tribunal would be unworkable.

Thus, Bhatti and Amin suggest a possible modern use of the prerogative in immigration cases. First, the prerogative authorises the Home Secretary to admit people who do not fit any of the statutory entry criteria. Second, when an individual is denied the benefit of such a scheme, the prerogative source of the power can then be the basis for refusing judicial review.

A second possible use of the prerogative would be to intern alien enemies in the event of future war. The decisions in Liebmann, Netz, and Bottrill have not been overruled, and nothing in the statute appears to supersede them.[507]

Conclusions

As a general proposition, the courts have been extremely reluctant to interfere with the exercise of discretionary powers by immigration authorities. On the issue of retention of discretion, the pattern has been one of liberal rhetoric requiring the exercise of discretion in the individual case, followed with great restraint in applying the requirement. This pattern has been especially evident in the cases concerning fettering by fixed rules and delegation of power to

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506. See pp. 117-19 above.
507. A prerogative power to deport alien enemies is probably unnecessary in light of the 'public good' clause.

other departments. The Soni case, invalidating a decision by an adjudicator who had viewed his own role too narrowly, is a noteworthy exception to this pattern.

Review for abuse of discretion has been equally restrained. At times, particularly in the early cases but also in some of the modern ones, discretionary powers have been held wholly unreviewable or at least unreviewable on bases other than bad faith. Even when broader review has been suggested, its actual application has revealed an abiding hesitance to find a purpose improper or a considered factor irrelevant. A few recent cases point toward a partial lifting of this restraint; the rhetoric has become slightly more assertive, and the results have occasionally kept pace, particularly when a misdirection of law caused an immigration official to ignore a relevant factor.[508]

The royal prerogative has been both evidence of, and one contributor to, the deference predominating in this area. It has been evidence of the deference in the sense that the courts deciding the early immigration cases -- Musgrove, Poll, and

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508. For further examples of deference in reviewing the exercise of discretion under the immigration laws, see, e.g., R. v. I.A.T., ex p. Vashist (C.A., unrep'd, 18 Jan. 1983); R. v. I.A.T., ex p. Mehta (V.M.) [1976] Imm. A.R. 174 (C.A.); Ali (D.M.) v. I.A.T. [1973] Imm. A.R. 33 (C.A.); R. v. I.A.T., ex p. Nathwani [1979-80] Imm. A.R. 9 (Div. Ct.); R. v. Gov'r of Brixton Prison, ex p. Bloom [1920] All E.R. 153 (Div. Ct.).

For occasional liberal results on discretionary questions, see R. v. I.A.T., ex p. Mehta (R.P.) [1975] 2 All E.R. 1084 (C.A.); R. v. I.A.T., ex p. Bastiampillai [1983] 2 All E.R. 844 (Div. Ct.); R. v. I.A.T., ex p. Palacio [1979-80] Imm. A.R. 178 (Div. Ct.); R. v. C.I.O., Lympne Airport, ex p. Singh (Amrik) [1969] 1 Q.B. 333 (Div. Ct.).

Cain -- voluntarily elected to recognise prerogative powers to exclude and deport aliens at a time when the existence of those prerogative powers was very much an open question.

Conversely, it has contributed to the deference in several ways. In the early pre-statutory cases, the prerogative appears to have been invoked not only as a substantive principle making the exclusion or deportation decisions lawful, but also as a doctrine that was felt to render the exercise of those powers unreviewable in court. Yet, as noted previously, the early cases also contained reference to the presence of foreign affairs elements. Whether the perceptions of those elements caused the courts automatically to withhold review on the theory that the decision was either an exercise of the prerogative or an act of state or both, or whether the court simply believed that the particular subject matter was nonjusticiable, is not clear.

The analysis of Lord Denning M.R. in Soblen[509] raised the possibility that the impact of the prerogative has been felt not only in the pre-statutory cases but also in the 'public good' cases.[510] The results of the latter cases contrast vividly with a number of cases reviewing assertively the exercise of discretion under statutes worded as broadly and as subjectively as the 'public good' clause.

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509. See p. 153 above.
510. Cf. Evans, note 1 above, at 422-23 (prerogative might be influencing courts in cases reviewing exercise of statutory powers affecting national security).

The alien enemy cases are a third category of decisions potentially influenced by the prerogative. In those cases the courts' reliance on the prerogative and on the act of state doctrine has been clearer and more explicit, and the deference to the executive has been more extreme. The cases illustrate also the powerful effect of wartime conditions on judicial review of executive action.

Finally, there remains the question of the future influence of the prerogative in immigration law. Aside from the lingering effect of past judicial decisions on future ones, the preservation of the prerogative by the 1971 Act opens up the possibility of a wide range of executive action that the statute itself does not specifically authorise. These possibilities include the use of the prerogative to establish a statutory scheme for the admission of immigrants not fitting the statutory criteria; its accompanying use as a device for precluding judicial review of decisions denying individuals the benefits of such a scheme; the expulsion of foreign diplomats; and the internment of alien enemies in time of war.

G. Presumptions of Regularity and Constitutionality

In each of the cases discussed in this chapter, the ultimate question has been the validity of an administrative decision operating on an individual. In some of those cases that determination has rested in turn on whether a more general

subordinate law or policy is substantively[511] ultra vires. The question might be whether an administrative rule is beyond the scope of the enabling statute. Or the question might be whether a statute passed by the legislature of a particular country violates that country's constitution, a document that might itself be a British statute or Order in Council. In either case, the question is whether the powers asserted in the subordinate rule or policy are in keeping with the authority conferred by a superior instrument.

In resolving such issues, the courts will often apply a presumption of regularity and, as one specific application, a presumption of constitutionality. This section will briefly summarise the courts' general use of those presumptions. It will then compare those general approaches with the courts' handling of analogous issues in immigration cases.[512]

The so-called 'presumption of regularity' is well illustrated by McEldowney v. Forde.[513] A statute enacted by the Parliament of Northern Ireland authorised the Minister of

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511. Regulations can be ultra vires for substantive reasons (e.g., A.-G. v. Smethwick Corp. [1932] 1 Ch. 562 (C.A.); A.-G. v. Fulham Corp. [1921] 1 Ch. 440 (Div. Ct.)), or for procedural reasons (e.g., Vine v. Nat'l Dock Labour Bd. [1957] A.C. 488 (H.L.)(unauthorised subdelegation); Bradbury v. London Borough of Enfield [1967] 3 All E.R. 434 (C.A.); Chapman v. Earl [1968] 1 W.L.R. 1315 (Div. Ct.); Rayner v. Corp. of Stepney [1911] 2 Ch. 312 (Ch.)). See also the Statutory Instruments Act 1946, which requires specified publication procedures for statutory instruments and Orders in Council.

512. The more general problem of burden of proof in challenges to administrative action is discussed in Craig, note 2 above, at 411-17. There are special problems in habeas corpus cases: see pp. 26-27 above.

513. [1969] 2 All E.R. 1039 (H.L.).

Home Affairs to 'make regulations ... for the preservation of the peace and maintenance of order'. A combination of regulations prohibited membership in certain organisations, including any organisation that described itself as a Republican club. The issue was whether the regulation adding the latter group, and applicable even in the absence of evidence that the particular Republican club was a threat to peace, was ultra vires. By a 3-2 margin, the House of Lords upheld the regulation.

Lord Pearson, who was in the majority, invoked the 'presumption of regularity'.[514] Applying that presumption, he observed that the regulation recited that it was being issued for the statutory purpose of preserving peace and order. The recital was taken as evidence that the regulation was issued for that purpose. His Lordship then said that the Minister 'presumably' had information on the basis of which he had determined that the clubs in question threatened the peace -- a decision that a judge, lacking such information, could not make. Evidence that the particular Republican club did not pose a threat was relevant, but it was not sufficient to prove that the regulation was issued for some purpose other than to promote peace.

Lord Pearson's speech has three features pertinent here: First, despite the absence of statutory language conferring power in subjective terms, he applied a subjective test.

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514. Ibid., at 1066, 1067.

Lords Hodson and Guest similarly employed a subjective test and reached the same result; Lords Pearce and Diplock applied an objective test and reached the opposite result. Second, since the subjective test raised the factual question of whether the Minister had issued the regulation for the stated purpose, it became necessary to decide who would have the burden of proof. The effect of the presumption was to impose on the complainant the burden of proving that the regulation 'was made otherwise than for the specified purposes.'[515] The third feature was the stringent standard of proof. To meet his burden, the complainant had offered evidence that the police knew of nothing seditious in the activities of the particular club or its members. Lord Pearson found the evidence insufficient, though he did not state the standard explicitly. Lords Hodson and Guest held that the regulation was 'capable of being related' to the purposes prescribed by the statute.[516]

The presumption of regularity has other effects as well. In Hoffman-La Roche & Co. v. Secretary of State for Trade and Industry,[517] the Crown sought an interim injunction against a company that had announced its intention to ignore a statutory instrument that it claimed was invalid. The Crown was unwilling to give an undertaking that it would pay damages if

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515. Ibid., at 1067. Lord Diplock also recognised a presumption of regularity (see ibid., at 1070), but interpreted it to mean only that the challenger had the burden of meeting an objective test.
516. Ibid., at 1058 (per Lord Hodson), 1061 (per Lord Guest). The test was taken from Hallet & Carey, discussed below.
517. [1975] A.C. 295 (H.L.).

the interim injunction were granted and the company were ultimately to prevail. Reasoning that a statutory instrument is presumed to be valid, the House of Lords held that an interim injunction could issue without a Crown undertaking.[518]

The presumption of regularity is especially strong when the superior instrument confers discretionary powers in subjective terms. In A.-G. for Canada v. Hallet & Carey Ltd.,[519] where a Canadian statute authorised the Governor in Council to make whatever wartime orders he deemed necessary or advisable for regulating supplies, the Privy Council upheld an Order in Council compulsorily acquiring most of the country's oats and barley. The court declined to review the Governor's grounds for deeming the acquisition advisable. In Belfast Corp. v. O.D. Cars Ltd.,[520] the Parliament of Northern Ireland had enacted a statute permitting the Ministry to impose certain restrictions on property when the Ministry 'considers [the restrictions] reasonable for the purpose.' Presuming that the statute did not violate the constitutional prohibition on taking property without compensation, the House of Lords applied a subjective test--whether the Ministry in fact considered the restrictions reasonable. And in Ningkan v. Gov't of Malaysia,[521] the Privy Council had to interpret a provision of the Malaysian Constitution authorising the head of state to issue a proclamation of emergency when 'satisfied that

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518. See Craig, note 2 above, at 414-16.
519. [1952] A.C. 427 (P.C.).
520. [1960] 1 All E.R. 65 (H.L.).
521. [1970] A.C. 379 (P.C.).

a grave emergency exists...'. Applying a subjective test, the Privy Council presumed the constitutionality of a proclamation issued under that provision, stating that the burden of proof lay on the party claiming the absence of emergency.[522]

In potential conflict with the presumption of regularity is the maxim that a provision will not be interpreted to derogate from fundamental freedoms, absent clear language to that effect.[523] When a subordinate instrument appears to infringe a fundamental interest, a court might be forced to choose between declaring the instrument ultra vires and sanctioning the invasion of an important interest. The conflict is not inevitable, because in some cases it will be possible for the court to construe the subordinate instrument itself as not authorising the challenged act.[524]

But the conflict materialises when the subordinate instrument, whether a statute claimed to be unconstitutional or an administrative rule or policy claimed to exceed the authority of the enabling statute, is not susceptible to a sufficiently narrow interpretation. On some occasions, the

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522. Ibid., at 390. The disputed issue might be termed one of 'constitutional fact': see generally J.E. Magnet, Jurisdictional Fact, Constitutional Fact, and the Presumption of Constitutionality (1980) 11 Manitoba L.J. 21, at 24-32.
523. See de Smith, note 2 above, at 350; Wade, note 1 above, at 750; cf. Craig, note 2 above, at 209 (constitutional principles influence construction of delegated legislation).
524. See, e.g., A.-G. v. Wilts United Dairies Ltd. (1921-22) 38 T.L.R. 781 (H.L.); cf. McEldowney v. Forde [1969] 2 All E.R. 1039, at 1068 (obiter of Lord Pearson purporting to adopt narrow interpretation of subordinate legislation to eliminate vagueness problem). See also pp. 243-44 below (court should construe statute to avoid constitutional doubts).

courts have resolved the conflict in favour of the presumption of regularity, and against recognition of important individual interests.[525] That course has been especially common in wartime.[526]

At other times, however, the courts have invalidated subordinate instruments infringing important freedoms that the superior instruments, absent clear language to the contrary, would not be read to eliminate.[527] In at least one such case, that result was accomplished even in the face of a superior instrument that conferred discretionary legislative powers in broad subjective terms.[528] Precisely when the presumption against transgressing important liberties will control the disposition of a case can be difficult to predict.[529]

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525. In addition to the cases discussed above, see, e.g., Runyowa v. R. [1966] 1 All E.R. 633 (P.C.), Kabaka's Gov't v. A.-G. of Uganda [1966] 1 A.C. 1 (P.C.); cf. Chokolingo v. A.-G. [1981] 1 W.L.R. 106 (P.C.) (constitutional challenge to individual decision rejected). For a critique of the Privy Council's performance in constitutional adjudication, see C. Palley, The Judicial Committee of the Privy Council as Appellate Court--The Southern Rhodesian Experience (1967) Pub. L. 8.

526. See, e.g., Liversidge v. Anderson [1942] A.C. 206 (H.L.); R. v. Halliday [1917] A.C. 260 (H.L.). But see Inland Revenue Comm'rs v. Rossminster [1980] A.C. 952, at 1011 (per Lord Diplock, Liversidge 'perhaps, excusably, wrong') (H.L.).

527. E.g., Olivier v. Buttigieg [1966] 2 All E.R. 459 (P.C.); Liyanage v. R. [1966] 1 All E.R. 650 (P.C.); Newcastle Breweries Ltd. v. R. [1920] 1 K.B. 854 (Div. Ct.); Chester v. Bateson [1920] 1 K.B. 829 (Div. Ct.); cf. Maharaj v. A.-G. of Trinidad & Tobago (No. 2) [1979] A.C. 385 (P.C.) (finding due process violation and allowing damages).

528. Commr's of Customs & Excise v. Cure & Deeley Ltd. [1962] 1 Q.B. 340 (Div. Ct.).

529. de Smith, note 2 above, at 350.

A few of the immigration cases presented the question of whether subordinate rules, in some instances official delegated legislation and in other instances not, were ultra vires. In almost all those cases, the subordinate policies were upheld. The results might be explained partly by the presumption of regularity. In some of the cases the courts read statutory powers broadly to avoid holding subordinate legislation violative of the enabling statutes.[530] In other cases, subordinate instruments or policies of legislative character were upheld as within the prerogative.[531] Contrary immigration decisions are hard to find, although Phansopkar, discussed above,[532] is arguably such an example. Thus, although immigration cases in which issues as to the validity of subordinate legislative action have arisen are relatively few, they do tend to reflect a degree of restraint somewhat greater than that observed in the mixed results of the non-immigration cases noted in this section.

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530. See Jeyaveerasingam, p. 138 n.328; Sarno, p. 148 above; see also Kassam v. I.A.T. [1980] 2 All E.R. 330 (C.A.); R. v. I.A.T., ex p. Mehmet [1977] 2 All E.R. 602 (Div. Ct.).
531. See Cain, pp. 139-41 above; Bhatti, pp. 162-63 above; cf. Schmidt, pp. 153-54 above (Minister's general announcement concerning alien scientologists indirectly approved; decision based primarily on that announcement upheld).
532. See pp. 119-21 above (not clear whether court invalidated rule or construed rule so as not to violate statute); cf. Ryan, p. 58 above (provision of Bahamian statute governing acquisition of nationality held to violate Bahamian Constitution).

H. Selected Decisions of the Immigration Appeal Tribunal

The preceding discussion illustrates the deference of the British courts in immigration cases. This section will focus on the Immigration Appeal Tribunal (I.A.T.), and in particular on two groups of cases: those dealing with returning residents, and those dealing with the entry of children of U.K. residents. Both areas fit the criteria for case selection discussed earlier.[533] After examining the decisions in those two areas, the section will consider a few miscellaneous decisions providing special glimpses into the I.A.T.'s own perception of its role.

Returning Residents

The I.A.T. has generally,[534] though not always,[535] placed a narrow interpretation on provisions benefitting returning residents. In Hashim v. E.C.O., Dacca,[536] the I.A.T. had to interpret paragraph 48 of the old Instructions to Immigration Officers.[537] Under that provision, any Commonwealth citizen not the subject of a deportation order was 'entitled to admission if he satisfies the immigration officer that he is ordinarily resident in the United Kingdom or has

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533. See p. 8 above.
534. In addition to the cases discussed below, see, e.g., Bashir v. I.O., Dover [1976] Imm. A.R. 96 (I.A.T.); Khan (Tosir) v. E.C.O., Dacca [1974] Imm. A.R. 55 (I.A.T.).
535. See, e.g., Khan (Shahbaz) v. Sec. of State for the Home Dept. [1972] Imm. A.R. 172 (I.A.T.)(though immigrant's argument quite strong). See also Joshi, p. 177 below.
536. [1974] Imm. A.R. 75 (I.A.T.).
537. Cmnd. 4298 (1970), para. 48.

been so resident at any time during the previous two years'. The I.A.T. rejected the immigrant's argument that the two-year period specified in paragraph 48 was elastic, holding that the rules conferred no discretion to extend that period.[538] In Taneja v. E.C.O., Chicago,[539] the I.A.T. placed a similar interpretation on the successor provision to paragraph 48.

In Secretary of State for the Home Dept. v. Patel,[540] a Commonwealth citizen who was settled in the U.K. went to India and returned just before the end of the two-year period, at which time he was admitted as a returning resident with leave to remain indefinitely. After staying in the U.K. for two months, he again went to India, and again sought to return less than two years later. The issue was whether his previous return to the U.K. was sufficient to render him 'settled' at that time. Although he had then been given leave to remain indefinitely, the I.A.T. incorporated the reasoning of the adjudicator, who had relied on the fact that Patel's previous return had been made solely to preserve his status. It was open to the I.A.T., however, to hold that a trip made for the purpose of preserving one's residence status evidences, if anything, an intent to remain a U.K. resident.

The I.A.T.'s disposition of Patel's alternative argument is also instructive. Section 1(2) of the Immigration Act 1971

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538. There is discretion outside the Immigration Rules, but the failure to exercise that discretion is not appealable: see Khan (Tosir) v. E.C.O., Dacca [1974] Imm. A.R. 55 (I.A.T.).
539. [1977] Imm. A.R. 9 (I.A.T.).
540. [1979-80] Imm. A.R. 106 (I.A.T.).

provides: '. . . [I]ndefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there . . .' The issue was whether a person admittedly covered by this provision has the right to leave the U.K. and return. The I.A.T. observed that the statute does not say such a person shall be treated as <u>having</u> leave; it says only that such a person shall be treated as <u>having been given</u> leave. The I.A.T. inferred from this language that a person who has left the country, even temporarily, once again becomes subject to immigration control.

In purporting to base its decision on the literal language of the statute,[541] the I.A.T. encountered one snag. As Patel pointed out, the statute refers to 'indefinite leave to <u>enter</u> or remain' (emphasis added). The word 'enter' seems superfluous under the I.A.T. interpretation. The I.A.T. admitted to being 'somewhat worried' about this problem, but ultimately concluded that Parliament had included the word 'enter' in order to regularise the status of the affected persons as if they had been admitted with indefinite leave. It is not clear, however, how the word 'enter' provides any degree of regularity beyond that already provided by the word 'remain'.

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541. The I.A.T. prefaced its discussion of this point by stating that 'a purpose of s. 1(2) is to deal with the immigration status of persons in this country when the Act came into force': [1979-80] Imm. A.R. at 109. That general statement of the legislative purpose is inconclusive, since the question presented is <u>how</u> Parliament intended to deal with those persons.

One departure from the strict reading of the returning resident provisions is E.C.O., Bombay v. Joshi.[542] A Commonwealth citizen with leave to remain indefinitely in the U.K. made several long business trips to India as an overseas sales representative for a British company. Being physically absent for slightly more than two years, Joshi did not maintain a home in the U.K. The question was whether he retained 'ordinary residence'. Language in old paragraph 48 provided that ordinary residence 'is compatible with lengthy absences abroad on business or in the employment of a firm based in the United Kingdom'. The I.A.T. held that ordinary residence does not require physical presence, at least when the applicant had been admitted without time restrictions and had gone abroad to work for a firm based in the U.K. Thus Joshi was entitled to return. The I.A.T. could have held that, although the long absence did not per se preclude ordinary residence, the combination of the absence and the lack of a home had that result. That it did not so hold reflected an unusual willingness to reject the objections of the Home Office.

Until now, the issues discussed have stemmed from provisions entitling returning residents to enter. Companion provisions have provided discretionary power to admit applicants who have been away too long to qualify as returning residents under the entitlement provisions. The I.A.T. has

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542. [1975] Imm. A.R. 1 (I.A.T.).

generally construed these discretionary powers narrowly.[543] One especially striking case is Francis v. Secretary of State for the Home Dept.[544] A woman who had lived in the U.K. for eleven years returned to Jamaica with her husband, who then deserted her. After an absence from the U.K. of four years, she applied for entry clearance to resettle in the U.K., where both her son and her niece were living. The pertinent provision authorised her admission 'if, for example, [she] has strong family ties here and has previously lived in the United Kingdom for some considerable time'. The I.A.T. accepted that eleven years was a considerable time, and did not question that her son and niece were still here. Because her daughter-in-law and granddaughter were now in Jamaica, however, the I.A.T. held that Mrs. Francis lacked 'strong family ties' in the U.K. and therefore should not receive an entry certificate.

Her alternative submission was based on paragraph 43(a) of the Instructions, which authorised the issuance of entry

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543. In addition to the cases discussed below, see, e.g., Sec. of State for the Home Dept. v. Bashir Sheikh [1972] Imm. A.R. 143 (I.A.T.). See also Goodison v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 122 (I.A.T.)(one who entered as temporary visitor ineligible to obtain variation of leave as returning resident, because Rules governing variation do not specifically mention returning residents--'chief' categories interpreted as 'exclusive' categories). Accord, Sec. of State for the Home Dept. v. Facey, TH/32001/78 (1638) d 26.10.79 (same; facts summarised in Goodison), followed in R. v. I.A.T., ex p. Ali (Aisha Khatoon) [1979-80] Imm. A.R. 195 (Div. Ct.). For similar results in cases where the Home Office position concededly seemed much stronger than that of the immigrant, see Sec. of State for the Home Dept. v. Aluko [1974] Imm. A.R. 90 (I.A.T.); Cheng v. Sec. of State for the Home Dept. [1972] Imm. A.R. 5 (I.A.T.).

544. [1972] Imm. A.R. 162 (I.A.T.).

certificates to certain elderly relatives, including aunts, of people in the U.K. who have the means and accommodation to support them if 'they form part of a family unit whose other members are in the United Kingdom.' The I.A.T. held paragraph 43(a) inapplicable because the applicant's estranged husband, her daughter-in-law, and her granddaughter remained in Jamaica. The I.A.T. reasoned that, without those people, Mrs. Francis could not be said to be joining the 'family unit.' The I.A.T. could have considered whether, for purposes of paragraph 43(a), the composition of the family unit should reflect the consequences of a separation. Instead, it assigned the term a narrow and literal meaning at odds with the practical realities of a marital separation.[545]

In Costa v. Secretary of State for the Home Dept.,[546] the I.A.T. found that the applicant's 'very strong' family ties in the U.K., together with her previous residence in the U.K., made her a borderline case for discretionary relief. Tipping the balance against her, however, was the fact that she had overstayed a previous visa. Because Costa was applying for variation of leave, she was subject to a provision of the Immigration Rules specifying that decisions on applications for variation of leave must take into account all relevant facts,

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545. The general conservatism in cases involving dependent parents and distressed relatives has been equally apparent outside the returning resident context. See, e.g., Nisa v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 20 (I.A.T.); Mukhopadhyay v. E.C.O., Calcutta [1975] Imm. A.R. 42 (I.A.T.). And see especially E.C.O., Nairobi v. Seth [1979-80] Imm. A.R. 63 (I.A.T.)(unusually harsh reading).
546. [1974] Imm. A.R. 69 (I.A.T.).

including whether the person has observed the time limit on his or her leave to remain. The I.A.T. expressed its sympathy for Costa, but concluded 'it is not our task to take into account compassionate grounds in reaching our decision'.[547]

Narrow construction was taken to an extreme in E.C.O., Kingston v. Peart.[548] A Jamaican citizen, born in 1920, was settled in the U.K. from 1935 until 1955, when he returned to Jamaica to help his widowed mother, who was ill. There he farmed the family land for two years and nine months. Unable to make an adequate living from that land, he applied for entry clearance as a returning resident. The pertinent rule required that he have lived in the U.K. 'most of his life'. The I.A.T. held that that phrase was to be applied literally, by a mathematical test; since Peart had lived here only 20 years out of 57, this test was not met.

Other options were open to the I.A.T. It could have held that the phrase 'most of his life' was not to be interpreted literally, and that a very long residence in the U.K. would suffice even if not quite half the person's lifetime. Alternatively, the I.A.T. could have adopted the adjudicator's view that a majority of one's adult lifetime would be enough. Despite the ameliorative purpose of the provision, the I.A.T. adopted the most literal interpretation possible. A similarly literal approach was taken on a statutory interpretation issue in O'Connor v. Secretary of State for the Home Dept.[549]

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547. See ibid., at 74-75.
548. [1979-80] Imm. A.R. 41 (I.A.T.).
549. [1972] Imm. A.R. 5 (I.A.T.).

Entry of Children

The flavour of the returning resident cases carries over into another representative area: applications of children to join their parents in the U.K. Under paragraph 38 of the old Instructions to Immigration Officers, a child between ages 16 and 18 could be admitted 'if at least one parent is a Commonwealth citizen . . . and both parents are resident in the United Kingdom . . .' In Pinnock v. E.C.O., Kingston,[550] a 16-year-old Jamaican boy applied for an entry certificate to join his mother, a Commonwealth citizen resident in the U.K. The boy's father had migrated to the U.K. when the child was one week old. The father's current whereabouts were unknown. The E.C.O. refused the application, and the adjudicator dismissed the applicant's appeal.

The I.A.T. first addressed the factual question whether the father still resided in the U.K. On the one hand, there was evidence that the father had lived in the U.K. fifteen years earlier. On the other hand, it was noted that many West Indians leave the U.K. The I.A.T. concluded 'there is no evidence on which one could properly conclude that [the father] is resident in this country'.[551] The appeal was dismissed on that ground.

The I.A.T. added, however, that even if the evidence had established the father's continued residence in the U.K., the application would fail because entry cannot be granted under

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550. [1974] Imm. A.R. 22 (I.A.T.).
551. Ibid., at 25.

paragraph 38 when the parents are separated. To reach the latter conclusion, the I.A.T. adopted the reasoning of the adjudicator: Several provisions of the Instructions authorised the admission of a child whose parent or parents lived in the U.K. The intent of these provisions was to enable children to join their parents. Paragraph 38, which required that both parents reside in the U.K., therefore contemplated a child who would be joining both parents here. This is impossible when the parents are separated.[552]

The rationale given by the adjudicator and adopted by the I.A.T. is subject to question. When a father has deserted a mother and child, it is true that the desire to reunite the child with both parents together cannot be achieved. But it does not follow that separation from both parents was intended to be preferred to reunion with only one. In Pinnock, the I.A.T. departed from the clear language of paragraph 38, which required only that both parents be 'resident' in the U.K., reading into the rule an additional requirement open to considerable doubt.

A similar approach was employed in E.C.O., Madras v. Nadarajan.[553] Two brothers -- Haridas, aged 27, and Mohandas, aged 19 -- applied for entry certificates to accompany their mother and younger sister, who were joining their father in the U.K. The Immigration Rules provided: ". . . an unmarried and fully dependent son [between ages 18

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552. Ibid., at 26 n.6. See also Ibrahim v. Visa Officer, Islamabad [1978] Imm. A.R. 18 (I.A.T.).
553. [1976] Imm. A.R. 144 (I.A.T.).

and 21] . . . who formed part of the family unit overseas may be admitted if the whole family are settled in the United Kingdom or are being admitted for settlement" (emphasis added).[554]

Haridas, being over age 21, was not within the above rule.[555] Having refused his application on that basis, the E.C.O. then refused Mohandas's application as well, reasoning that because Haridas would be denied entry, Mohandas would not be joining the 'whole family'. The I.A.T. upheld the E.C.O.'s decision, relying heavily on the fact that the brothers' joint counsel had argued that Haridas should be admitted as part of the family unit.

The effect of the I.A.T.'s holding is to exclude an unmarried, fully dependent son under age 21, solely because another unmarried son, also fully dependent but too old to qualify for admission, is excluded. It would seem difficult to ascribe to the Home Secretary an intent to effect such a result. In this case, the I.A.T. could have avoided the result without doing violence to either the letter or the spirit of the Rule. The question was whether an adult son is part of the family unit for purposes of this provision. Since the purpose

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554. H.C. 79 (1973), para. 44.

555. Under the old Instructions (Cmnd. 4298 (1970), para. 40), age was not an absolute bar: Singh (Tarsem) v. Sec. of State for the Home Dept. [1972] Imm. A.R. 265, at 268 (I.A.T.)(but admission refused on ground applicant not fully dependent on parents); Pereira v. Sec. of State for the Home Dept. [1972] Imm. A.R. 224, at 226 (I.A.T.)(admission granted); Patel v. Sec. of State for the Home Dept. [1972] Imm. A.R. 59, at 62 (I.A.T.)(but admission refused on ground applicant was not part of family unit).

of the Rule is presumably to reunite members of the family unit, and since the Rule does not authorise the admission of an adult son, a reasonable inference would be that the Rule does not regard an adult son as an integral part of the family unit. If that inference is correct, then a minor son should not be excluded solely because the adult son has been.

Similar conservatism was displayed in Arshad v. Immigration Officer.[556] The Immigration Rules required the admission of children under age 18 when their parents were both 'settled in' the U.K.[557] Two boys obtained entry clearance pursuant to that provision. Upon their arrival at Heathrow, an immigration officer excluded both boys on the ground that, at the time the certificate was issued, their mother had been temporarily absent from the country and thus not 'settled' here. The Rules then in force provided that a person possessing a current entry certificate could not be excluded unless

> (a) false representations were employed or material facts were concealed, whether or not to the holder's knowledge, for the purpose of obtaining the clearance, or
> (b) a change of circumstances since it was issued has removed the basis of the holder's claim to admission . . .[558]

The E.C.O. had not asked about the whereabouts of the boys' mother, and the boys had not mentioned her temporary absence from the U.K. The I.A.T. first addressed the question whether that omission constituted the concealment of a material

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556. [1977] Imm. A.R. 19 (I.A.T.).
557. H.C. 81 (1973), para. 38.
558. Ibid., para. 10.

fact.[559] Reasoning that the purpose of the rule authorising the boys' admission was to reunite them with both parents, the I.A.T. held that for purposes of the rule parents could not be 'settled in' the U.K. at a particular time unless they were physically present here at that time.[560] The I.A.T. did not consider whether such a purpose would be significantly hampered when the absence of the one parent was only temporary.

The I.A.T. therefore concluded that the omitted fact was material. There was no evidence, however, that at the time of the boys' applications for entry certificates they had known that their mother's temporary absence from the U.K. was a fact they were expected to volunteer. The I.A.T. was thus unable to find 'concealment', a requirement of clause (a) above. Consequently, the I.A.T. had to rely on clause (b), which permitted exclusion of one possessing entry clearance when there has been a 'change of circumstances since [entry clearance] was issued'. That clause presented a further obstacle, however, since the mother had been absent from the U.K. at the time the entry clearance was issued. To escape

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559. The I.A.T. noted preliminarily that the mother's return to the U.K. shortly after her sons' exclusion was irrelevant: [1977] Imm. A.R. at 21. See also R. v. C.I.O., ex p. Shaikh, The Times L. Rep., 21 July 1976 (C.A.); Sec. of State for the Home Dept. v. Thaker [1976] Imm. A.R. 114 (I.A.T.); Huda v. E.C.O., Dacca [1976] Imm. A.R. 109 (I.A.T.); E.C.O., Bombay v. Thakerar [1974] Imm. A.R. 60 (I.A.T.); E.C.O., Lahore v. Abdullah [1973] Imm. A.R. 57 (I.A.T.).

560. [1977] Imm. A.R. at 23. Accord, Sec. of State for the Home Dept. v. Manek, TH/4790/74 (596) (I.A.T., unrep'd, 13 Jan. 1976); Nessa v. I.O., TH/2196/75 (524) (I.A.T.)(unrep'd decision, 10 Oct. 1975).

that difficulty, the I.A.T. reasoned that the mother's absence 'was a change of circumstances which constituted a continuing state of affairs', and that since she had remained away until after their arrival, 'the change of circumstances subsisted from the time of the issue until the appellants' arrival at Heathrow'. The refusal of leave to enter was therefore upheld. The I.A.T. did not explain how the continuation of particular circumstances can constitute a change in those same circumstances.

Several I.A.T. decisions relate to the rules governing the admission of a child to join only one of two surviving parents. Under provisions in force at various times, a child under age 18 could be admitted to join one parent if family or other considerations 'make exclusion undesirable'. The I.A.T. has routinely construed these provisions restrictively. Thus, the I.A.T. has refused relief by reading 'undesirable' to mean 'intolerable',[561] or by requiring 'serious and compelling reasons',[562] although relief is not entirely unknown even under those standards.[563]

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561. Howard v. Sec. of State for the Home Dept. [1972] Imm. A.R. 93 (I.A.T.); Rennie v. E.C.O., Kingston [1979-80] Imm. A.R. 117 (I.A.T.)(adding that conditions must be intolerable even by the standards of the child's home country). See also Williams v. Sec. of State for the Home Dept. [1972] Imm. A.R. 207 (I.A.T.).
562. E.C.O., Kingston v. Thompson [1981] Imm. A.R. 148 (I.A.T.).
563. E.C.O. Kingston v. Holmes [1975] Imm. A.R. 20 (I.A.T.)(E.C.O. erred in finding conditions tolerable when seven people lived in single room).

Miscellaneous

On occasion the I.A.T. will deliver an unusually assertive decision. One example is Visa Officer, Aden v. Thabet.[564] An alien from Yemen applied for a visa to visit his father in the U.K. for five months. The application was refused because the Home Office was not satisfied the applicant would leave within five months. On appeal, the adjudicator found on the balance of probabilities that Thabet would honour the time restrictions on his stay, and for that reason ordered that entry clearance be granted. Because the adjudicator's finding was 'by a very narrow margin indeed',[565] he decided to impose various conditions designed to assure that Thabet would not overstay. The adjudicator added that, without the sponsor's agreement to these conditions, he would have refused the appeal.

The Visa Officer appealed to the I.A.T., arguing that the adjudicator had no power to impose such conditions, and no power to order entry clearance only because of the sponsor's willingness to accept such conditions. Section 19(3) of the Immigration Act 1971 provides:

> Where an appeal is allowed, the adjudicator shall give such directions for giving effect to the determination as the adjudicator thinks requisite, and may also make recommendations with respect to any other action which the adjudicator considers should be taken in the case under this Act; . . .

The I.A.T. concluded that the conditions imposed by the adjudicator were not requisite for giving effect to his

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564. [1977] Imm. A.R. 75 (I.A.T.).

565. Ibid., at 77. For a description of the opposing evidence, see ibid., at 76-77.

determination, and therefore outside the powers conferred by section 19(3). The I.A.T. found on the balance of probabilities that Thabet was a genuine visitor, and directed that entry clearance be granted free of the conditions imposed by the adjudicator.

The I.A.T. decision in Thabet can be compared with the decision of the Court of Appeal in Royco Homes, discussed earlier.[566] In each case a lower authority had been authorised in broad statutory terms to grant an application subject to conditions -- in Royco Homes, 'subject to such conditions as they think fit', and in Thabet, 'such directions for giving effect to the determination as the adjudicator thinks requisite'. In each case, the conditions imposed were held to fall outside the statutory grant of power -- in Royco Homes because they were not reasonably related to the grant of planning permission, and in Thabet because they were not requisite for giving effect to the order that entry clearance be granted. Thus, both decisions limited a grant of discretionary power that had been conferred by broad, subjectively worded, statutory language.

At the same time, two essential differences between the two cases should be noted. The I.A.T. in Thabet was able to rely on the express statutory language 'for giving effect to the determination', a limiting phrase not contained in the corresponding statute in Royco Homes. Second, although the I.A.T. decision to place limits on the adjudicator might be

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566. See pp. 158-59 above.

thought to suggest a broad view of I.A.T. power, it must be noted that the I.A.T.'s statutory powers are defined in terms of the adjudicators' powers. When a party appeals to the I.A.T. against the decision of the adjudicator, 'the Tribunal may affirm the determination or make any other determination which could have been made by the adjudicator.'[567] As a result, the I.A.T. in Thabet limited not only the powers of the adjudicator, but also its own powers.[568]

In Sudhakaran v. E.C.O., Madras,[569] a doctor applied for an entry certificate to work for the National Health Service for three years. The Immigration Rules provided:

> Where the Medical Inspector advises that for medical reasons it is undesirable to admit the passenger the Immigration Officer should refuse leave to enter [absent strong compassionate reasons].[570]

The medical inspector who examined Sudhakaran detected a heart abnormality and reported: 'In view of the heart disease, candidate is medically unfit. Entry not recommended.' The E.C.O. accordingly refused the application, and the adjudicator dismissed the appeal despite evidence of Sudhakaran's ability to lead a normal life.

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567. Immigration Act 1971, s. 20(1).
568. In another sense, Thabet was even more assertive than Royco Homes. In Royco Homes, after holding the conditions invalid, the court left for the planning authority the decision whether to grant planning permission without the conditions: [1974] 2 All E.R. at 651-52. In Thabet, after discarding the conditions, the I.A.T. affirmed the adjudicator's decision granting entry clearance. This difference, however, can be ascribed to the broader statutory power of the I.A.T. to decide appeals and, in particular, to make any determination the adjudicator could have made (see Immigration Act 1971, s. 20(1)).
569. [1976] Imm. A.R. 3 (I.A.T.).
570. H.C. 79 (1973), para. 59.

The I.A.T. quoted approvingly a maxim of statutory interpretation to the effect that, when a highly technical statute encroaches on private rights, a 'court must insist on strict and rigid adherence to formalities.'[571] Since the Immigration Rules required advice that the applicant's admission would be 'undesirable', and since the medical inspector had said only that the applicant was 'medically unfit' and that entry was 'not recommended', the I.A.T. held that the report did not comport with the Rules. On that basis the appeal was allowed.

The two requirements for invocation of the maxim on which the I.A.T. relied -- a high degree of technicality and encroachment on private rights -- are arguably present, to at least as great an extent as they were in Sudhakaran, in every case that comes before the I.A.T. Thus, by implication, the I.A.T. suggested in that case that its decisions should generally be characterised by rigid adherence to formalities. Since the formality to which the I.A.T. required adherence was literal compliance with the language of the Rule, Sudhakaran tends to suggest that the I.A.T. views its own role as one of literally interpreting immigration statutes and rules.

A final I.A.T. decision to consider is Secretary of State for the Home Dept. v. Lakdawalla.[572] The applicant possessed a U.K. passport issued in Kenya prior to independence. She

571. Ibid., at 6, quoting East Riding County Council v. Park Estate (Bridlington) Ltd. [1957] A.C. 223, at 233 (H.L.). But see Munnich v. Godstone Rural District Council [1966] 1 W.L.R. 427, at 435 (C.A.).
572. [1972] Imm. A.R. 26 (I.A.T.).

entered the U.K. with leave to remain temporarily, and subsequently applied to the Home Office to remove the conditions of her stay. The pertinent rule provided:

> If the applicant establishes that he is eligible to hold a United Kingdom passport exempting him from control . . . any condition of admission should also be revoked.[573]

The question was whether the applicant was 'eligible' to hold a U.K. passport exempting her from control. No statute or rule specified who could obtain U.K. passports and who could not, and the applicant argued that as a U.K. citizen living in the U.K., she was 'eligible'. The Passport Office, however, had taken the position that passport issuance is part of the royal prerogative, exercised in the U.K. by the Secretary of State for Foreign and Commonwealth Affairs, who has discretion whether to issue a passport. The Secretary had instructed all Passport Offices in the U.K. to refuse a new passport to anyone falling within designated categories. Under that instruction, Lakdawalla would not have been issued a passport. Thus, the issue became whether 'eligible' meant legally eligible, as Lakdawalla maintained, or within the categories of people to whom the Passport Office was currently issuing passports, as the Home Office contended.

The I.A.T., relying on the fact that the power to issue passports emanated from the royal prerogative rather than from statutory grant,[574] held that the Secretary of State for Foreign and Commonwealth Affairs does indeed have discretion

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573. Cmnd. 4295 (1970), para. 27.
574. Accord, R. v. Sec. of State for the Home Dept., ex p. Bhurosah [1967] 3 All E.R. 831, at 833, 834 (C.A.).

whether to issue a passport, and that Lakdawalla, who under Home Office practice would not receive a passport, was therefore not 'eligible' within the meaning of the Immigration Rules. Accordingly, variation of leave was refused. Lakdawalla might suggest that the I.A.T. will display special deference to the Home Office when the exercise of the royal prerogative is implicated, even indirectly.

In each of the cases analysed in this section, the I.A.T. had open to it at least one reasonable avenue favourable to the immigrant and at least one reasonable avenue favourable to the Home Office. The first and most general observation to be made is that in such cases the I.A.T. has much more often than not opted for the latter.

There have been occasional deviations. In Joshi the I.A.T. rendered an assertive decision inuring to the benefit of returning residents. In Thabet, where the visa officer had appealed from the decision of the adjudicator, the I.A.T. decision was even more favourable to the applicant than the adjudicator's decision was. And in Sudhakaran, the I.A.T. had to strain to find a technical basis for a result favourable to the applicant. These cases, however, are a clear minority, overshadowed by those in which the I.A.T. appeared to strain to uphold a Home Office decision.

A more specific pattern concerns the use of literal interpretation. Although literality worked to the advantage of the applicant in Sudhakaran, several other cases illustrate how extreme literality can operate adversely on the applicant. In

Patel, the I.A.T. seized on the statutory phrase 'having been given' indefinite leave to enter or remain, holding that the affected people do not 'have' indefinite leave, and thus cannot leave and return. In Francis, the I.A.T. interpreted the term 'family' to include estranged spouses, with the result that the absence of the applicant's estranged husband, daughter-in-law, and grandchild, all of whom had separated from the family, made it impossible for the applicant to join her only child. In Peart, the phrase 'most of his life' was construed with mathematical precision. And in O'Connor, a literal interpretation resulted in deportation.

Standing alone, the above cases might support the notion that the common thread running through the I.A.T. cases is literality,[575] and that literality is simply more likely than not to operate in favour of the Home Office. But those cases do not stand alone. In several decisions in which a literal interpretation would have benefitted the immigrant, the I.A.T. departed from the clear language of the statute or rule to reach a result favourable to the Home Office. In Pinnock, where a child invoked a provision requiring that both parents be 'resident in' the U.K., the I.A.T. read in the additional requirement that the parents not be separated. In Arshad, by holding that a 'change in circumstances' included a 'continuing state of affairs', the I.A.T. prevented two boys from joining

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575. See Macdonald, note 75 above, at 4. The Divisional Court has occasionally reversed I.A.T. decisions resting on interpretations that have ignored the purposes of the provisions: e.g., R. v. I.A.T., ex p. Peikazadi [1979-80] Imm. A.R. 191 (Div. Ct.); R. v. I.A.T., ex p. Joseph [1977] Imm.

their mother in the U.K. And in Rennie, by reading 'undesirable' as 'intolerable', the I.A.T. made it extremely difficult for children to join single parents in the U.K.[576]

The cases discussed here often reflect the I.A.T.'s restrictive view of its role. The literality inherent in many of its decisions is one aspect of this, since literality results in the I.A.T. confining itself to scrutinising the language of the provision involved, rather than searching more broadly for other indicators of legislative intent. This restrictive view is also suggested by Costa, where the I.A.T. reasoned that it was not its task to consider compassionate grounds, even though the pertinent provision of the rules required consideration of 'all the relevant facts.' Similarly, in Thabet, by placing limits on the adjudicator's power to attach conditions to the granting of entry clearance, the I.A.T. was effectively limiting its own power to do the same.

No discernible difference appears between the approaches of the I.A.T. and those of the British courts in immigration cases. As the discussion in the previous sections of this chapter demonstrated, the courts have also tended to defer to the Home Office in immigration cases. Many such decisions have been characterised by heavy reliance on the literal language of the provision in question. Finally, it should be repeated that both the courts and the I.A.T. have departed on occasion from the generalisations described above.

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576. See also Chavda v. E.C.O., Bombay [1973] Imm. A.R. 40 (I.A.T.)(purposive interpretation favouring Home Office, though particular immigrants were found to qualify nonetheless).

I. Immigration Decisions of the Court of Justice of the European Communities

The preceding sections of this chapter have analysed selected groups of immigration cases decided by the British courts and by the Immigration Appeal Tribunal. As discussed below, however, British immigration law is shaped also by several institutions of the European Economic Community (E.E.C.). In this section, attention will be focused on one such institution: the Court of Justice of the European Communities (hereafter the European Court).

Much has been written about the general legal principles of the European Communities and, in particular, the E.E.C.[577] The literature on what might be termed E.E.C. immigration law has been especially vast.[578] No attempt will be made here to duplicate those efforts. Rather, the goal will be to examine

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577. E.g., T.C. Hartley, The Foundations of European Community Law (1981); D. Lasok & J.W. Bridge, An Introduction to the Law and Institutions of the European Communities (2d ed., 1976); K. Lipstein, The Law of the European Economic Community (1974); A. Parry & S. Hardy, EEC Law (2d ed., by Parry & J. Dinnage, 1981); R. Plender, A Practical Introduction to European Community Law (1980); B. Rudden & D. Wyatt (eds.), Basic Community Laws (1980) (collection of primary source materials on all three European Communities); H. Smit & P. Herzog, The Law of the European Economic Community (1983); D. Wyatt & A. Dashwood, The Substantive Law of the EEC (1980).

Several additional works have dealt more specifically with the European Court: e.g., G. Bebr, Development of Judicial Control of the European Communities (1981); L.N. Brown & F.G. Jacobs, The Court of Justice of the European Communities (1977); C.J. Mann, The Function of Judicial Decision in European Economic Integration (1972); H.G. Schermers, Judicial Protection in the European Communities (2d ed., 1979); H.G. Schermers, The European Court of Justice: Promoter of European Integration (1974) 22 Amer. J. Comp. L. 444; J.A. Usher, European Court Practice (1983) (practical guide to procedure before European Court).

578. See note 593 below.

the processes by which the European Court has reached its decisions in the immigration cases, to isolate patterns, to compare the patterns to those reflected in the decisions of the British national courts and tribunals, and to advance plausible explanations for the differences. The section will begin by sketching very briefly those general principles that are essential to an understanding of the European Court decisions on immigration matters. The major immigration decisions of the European Court will then be surveyed, and contrasted with approaches employed by the British national courts and tribunals. From that discussion, more specific patterns will be observed, and the philosophical assumptions influencing the European Court in this area of the law will be considered.

General Principles

There are three European Communities: the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community.[579] The three Communities share several common institutions, including the Parliament, the Commission, the Council, and the Court.[580]

The Community most relevant here is the E.E.C. The E.E.C. treaty lays out the broad principles governing, inter alia,

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579. The ECSC was established in 1951; the latter two were established in 1957: see generally Parry & Hardy, note 577 above, at 3-5. The U.K. acceded to all three Communities by treaty executed in 1972: ibid.

580. For detailed descriptions of the powers exercised by these and ancillary institutions, see Lasok & Bridge, note 577 above, at 107-85.

migration between member States.[581] The treaty provisions are implemented by secondary legislation in the form of regulations and directives, either of which may derive from either the Commission or the Council.[582] Provisions of the treaty and the implementing legislation are interpreted by the European Court of Justice, and its rulings are themselves important sources of Community law.[583]

The European Court has jurisdiction over a wide variety of cases.[584] One source of jurisdiction is article 177 of the E.E.C. Treaty, under which national courts may, and in some circumstances must, refer issues of Community law to the European Court for preliminary rulings.[585] Article 177 authorises the European Court only to provide abstract legal interpretations, and not to apply those interpretations to the facts of particular cases.[586] Nonetheless, it has been by

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581. E.E.C. Treaty, arts. 48-66.
582. E.E.C. Treaty, art. 189. See generally T.C. Hartley, EEC Immigration Law (1978), at 6-9, 13-17.
583. The composition and structure of the Court are described in Bebr, note 577 above, s. 1.4; Brown and Jacobs, note 577 above, part one; Lasok & Bridge, note 577 above, at 157-65; Schermers (1979 book), note 577 above, ch. 5.
584. E.E.C. Treaty, arts. 169-188. See generally Bebr, note 577 above, chs. 2-12; Brown & Jacobs, note 577 above, chs. 5-9; Lasok & Bridge, note 577 above, at 165-85; Mann, note 577 above, ch. II; Schermers (1979 book), note 577 above, chs. 2,3; A.G. Toth, The Individual and European Law (1975) 24 I.C.L.Q. 659, at 669-96.
585. See generally, L. Collins, European Community Law in the United Kingdom (2d ed., 1980), at 83-129; P.D. Dagtoglov, The English Judges and European Community Law (1978) 37 Camb. L.J. 76; A.C. Evans, United Kingdom Courts and European Community Law Governing the Exclusion or Expulsion of Migrants (1981) Pub. L. 497; M. Lagrange, The Theory of the Acte Clair: A Bone of Contention or a Source of Unity? (1971) 8 C.M.L. Rev. 313.
586. Bebr, note 577 above, at 391-96; Brown & Jacobs, note 577 above, at 193; E. Freeman, Deportation and Community Law (1982) 41 Camb. L.J. 15, at 15-16; Lasok & Bridge, note 577 above, at 213.

far the most important source of jurisdiction in the immigration cases.

Two additional observations are pertinent here. First, Community law treats itself as prevailing over national law when there is a conflict.[587] Second, certain provisions of the Treaty and secondary legislation have been held to have 'direct effect' in the national courts; i.e., they can be enforced by individuals even in the absence of national implementing legislation. This point will be taken up later.[588]

The European Communities Act 1972 incorporates into the law of the United Kingdom all directly effective provisions of the Community Treaties and secondary Community legislation.[589] Further, European Court decisions interpreting the treaties or secondary Community legislation are binding.[590] The British courts appear to recognise the supremacy of Community law,[591]

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587. The leading case is Costa v. ENEL [1964] 3 C.M.L.R. 425 (E.C.J.). See generally G. Bebr, How Supreme is Community Law in the National Courts? (1974) 11 C.M.L. Rev. 3; Toth, note 584 above, at 661 & n.10; J.A. Usher, European Community Law and National Law (1981), at 30-38.

588. See pp. 200-04 below.

589. European Communities Act, s. 2(1). The technique of conditioning national recognition of Community law on the particular provision having direct effect is discussed in P. Pescatore, The Doctrine of Direct Effect: An Infant Disease of Community Law (1983) 8 Euro. L. Rev. 155, at 157.

590. See European Communities Act 1972, s. 3(1).

591. E.g., Macarthys Ltd. v. Smith [1981] 1 All E.R. 111, at 120-21 (C.A.); Bulmer (H.P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401 (C.A.), at 419-20 (per Lord Denning M.R.)(but taking broad view of national courts' discretion not to refer issue of Community law). Cf. Blackburn v. A.-G. [1971] 1 W.L.R. 1037 (C.A.), at 1039 (per Lord Denning M.R., before British accession).

and it seems also that Community law is binding on the immigration appellate authorities.[592]

The European Court of Justice and Immigration Law

One of the cornerstones of the E.E.C. treaty is the section governing the migration of certain persons between member States.[593] Those provisions are traditionally grouped into three categories: freedom of movement for workers, the right of establishment, and the supplying of services.[594] The decisions interpreting those treaty provisions[595] and the

592. See generally Evans, note 1 above, at 222, 231.
593. The leading work devoted specifically to this area of E.E.C. law is Hartley, note 582 above. See also A. Barav, Court Recommendation to Deport and the Free Movement of Workers in EEC Law (1981) 6 Euro. L. Rev. 139; Evans, note 1 above, ch. 4; G.S. Goodwin-Gill, International Law and the Movement of Persons Between States (1978), at 169-86, 299-306; Grant & Martin, note 75 above, at 33-34, 41-43, 132-40, 145, 252-57, 319; P. Leleux, Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services, in F.G. Jacobs (ed.), European Law and the Individual (1976), at 79 and passim; Macdonald, note 75 above, ch. 5; D. O'Keeffe, Practical Difficulties in the Application of Article 48 of the EEC Treaty (1982) 19 C.M.L. Rev. 35; Parry & Hardy, note 577 above, chs. 16, 17; Plender, note 577 above, chs. 5, 6; J.C. Séché, Free Movement of Workers under Community Law (1977) 14 C.M.L. Rev. 385; K.R. Simmonds, Immigration Control and the Free Movement of Labour: A Problem of Harmonisation (1972) 21 I.C.L.Q. 307; Smit & Herzog, note 577 above, title III, chs. 1, 2, 3; B. Strachan, Deportation and EEC Nationals (1980) 130 New L.J. 798; Wyatt & Dashwood, note 577 above, chs. 13, 14, 15; Note, Political Integration through Jurisprudence: An Analysis of the European Court of Justice's Rulings on Freedom of Movement for Workers (1983) 6 Bsn. Coll. I.C.L.Q. 273.
594. See EEC Treaty, arts. 48-51, 52-58, 59-66, respectively. The territorial scope of the free movement provisions is discussed in T.C. Hartley, The International Scope of the Community Provisions Concerning Free Movement of Workers, in Jacobs, note 593 above, at 19-24.
595. Supplementing the migration provisions are those prohibiting, within the scope of the treaty, discrimination on grounds of nationality. See especially article 7. For non-discrimination provisions relating specifically to

implementing legislation are the subject of the remaining discussion.

One particular line of cases spawning prolific commentary[596] is concerned with whether particular Community provisions have 'direct effect'.[597] The leading decision, outside the migration context but useful here for the light it casts on the philosophy of the European Court, is Van Gend en Loos v. Nederlandse Administratie der Belastingen.[598] Article 12 of the E.E.C. Treaty prohibits member States from increasing between themselves the customs duties charged on imports and exports. The issue was whether article 12 created individual rights enforceable in national courts or, instead, merely imposed obligations on the member States to implement

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595. (continued) employment, establishment, and services, see arts. 48(2), 52, and 65, respectively. See generally B. Sundberg-Weitman, Discrimination on the Ground of Nationality (1977).

596. E.g., G. Bebr, Directly Applicable Provisions of Community Law (1970) 19 I.C.L.Q. 257; Collins, note 585 above; A.J. Easson, The 'Direct Effect' of EEC Directives (1979) 28 I.C.L.Q. 319; Hartley, note 577 above, ch. 7; Pescatore, note 589 above; K.R. Simmonds, Van Duyn v. The Home Office: The Direct Effectiveness of Directives (1975) 24 I.C.L.Q. 419; J. Steiner, Direct Applicability in EEC Law -- A Chameleon Concept (1982) 98 L.Q. Rev. 229; Usher, note 587 above, at 17-30; J.A. Winter, Direct Applicability and Direct Effects -- Two Distinct and Different Concepts in Community Law (1972) 9 C.M.L. Rev. 425.

597. Some distinguish direct 'applicability', a term used to describe the incorporation of Community law into national law, from direct 'effect', understood to mean the capacity of a provision to create rights enforceable by individuals in national courts: see, e.g., Winter, note 596 above. But cf. Pescatore, note 589 above, at 164 (questioning utility of distinction). In this discussion, 'direct effect' is used in the latter sense.

598. [1963] E.C.R. 1 (E.C.J.). See also Becker v. Finanzamt Münster-Innenstadt [1982] E.C.R. 53 (E.C.J.).

its command. The text of the provision is inconclusive on that point.[599]

The language of the European Court was extremely instructive. It was 'necessary to consider the spirit, the general scheme and the wording'. The 'objective' of the treaty was to 'establish a Common Market', which would affect not only the member States, but also individuals. The preamble of the treaty refers both to the governments and to the 'peoples' of Europe. The very purpose of the Court's referral jurisdiction under article 177 'is to secure uniform interpretation of the Treaty by national courts and tribunals'. The Community thus 'constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[600] The Court further reasoned that holding article 12 directly effective would be consistent with the overall scheme of those treaty provisions governing customs duties and would, in addition, supply a vehicle for guaranteeing that the principle underlying article 12 is honoured.[601] For all the stated reasons, the Court interpreted article 12 as having direct effect.

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599. Article 12 provides that member states 'shall refrain' from doing certain things, but does not specify the consequences of violating that injunction.
600. Ibid., at 12.
601. Ibid., at 13.

The opinion in Van Gend en Loos reveals a great deal about the European Court's conception of its own role. The Court's emphasis on the objective of the drafters reveals a purposive approach to interpretation. The reference to 'spirit' suggests that purpose is to be viewed in a broad sense. When the Court later adverted to the member States having limited their sovereign powers, it displayed its conception that the Court should play a role in fostering European integration and in protecting the Community rights of individuals. One way in which to fulfill that role is to 'secure uniform interpretation'. By considering the treaty provisions that interact with article 12, the Court employed a systematic approach to interpretation. Finally, by adopting a construction calculated to give practical effect to the substantive guarantees embodied in the disputed language, the Court applied the doctrine of 'effet utile'.[602]

The philosophy of Van Gend en Loos has carried over to the migration cases. In Commission v. French Republic,[603] the Court gave direct effect to article 48, which guarantees 'freedom of movement for workers'. An analogous result was reached in Reyners v. Belgian State,[604] where article 52, which mandates the abolition of restrictions on freedom of establishment, was held directly effective.

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602. See p. 215 below.
603. [1974] E.C.R. 359 (E.C.J.)
604. [1974] E.C.R. 631 (E.C.J.)

The Reyners decision is especially noteworthy. The Court again distilled from other provisions of the treaty the broad objectives that, in its view, should guide its interpretation. The Court discerned two such purposes of the pertinent articles: to eliminate the obstacles to freedom of establishment; and to introduce into national law the means to make the exercise of that freedom effective. Finally, it described the principle of equal treatment as a 'fundamental' legal provision of the E.E.C.[605] As in Van Gend en Loos, the method was purposive, and the purposes, identified by a systematic technique of examining related provisions, were found to be the promotion of freedom of establishment and the development of procedures for making the Community rights practically effective.

In Van Duyn v. Home Office,[606] the Court confirmed the direct effectiveness of article 48 and held, in addition, that a Council directive implementing article 48 also had direct effect. Article 189 of the treaty provides that a regulation 'shall be binding in its entirety', whereas a directive 'shall be binding, as to the result to be achieved, . . ., but shall leave to the national authorities the choice of form and methods'. The contrast created doubts about whether directives were intended to be directly effective. Thus it was open to the Court, for that and other reasons,[607] to hold that

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605. Ibid., at 650-52.
606. [1974] E.C.R. 1337 (E.C.J.).
607. For arguments against holding directives directly effective, see ibid., at 13-17.

directives lack direct effect. Yet the Court, reasoning that such a holding would weaken the usefulness of directives, rejected it. The particular directive at issue in Van Duyn provided in pertinent part that any measures taken on grounds of public policy or public security[608] must be based solely on the individual's personal conduct and not on more general policies.[609] Observing that implementation of the clause that the directive was refining derogated from 'one of the fundamental principles of the Treaty in favour of individuals', the Court reasoned that direct effect was essential to legal certainty.[610] Thus, reliance was again placed on 'effet utile', on the Court's perception that the individual rights at stake were fundamental within the context of the Community, and on the view that obstacles to fundamental rights should be narrowly construed.

These and similarly assertive decisions on issues of direct effect[611] contrast sharply with the immigration decisions of the British courts.[612] The same assertiveness is present in

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608. See E.E.C. Treaty, art. 48(3).
609. Council Dir. 64/221, art. 3(1).
610. [1974] E.C.R. at 1348.
611. See, e.g., R. v. Sec. of State for Home Affairs, ex p. Santillo [1980] E.C.R. 1585, at 1598-1600; Watson & Belmann [1976] E.C.R. 1185 (E.C.J.); Royer [1976] E.C.R. 497 (E.C.J.).
612. A crude analogy might be drawn between the European Court decisions holding various provisions of the treaty and subordinate legislation directly effective, and the British court decisions holding that the Immigration Rules are not delegated legislation. In both types of cases, the courts interpreted language that made no explicit reference to individual rights; the text of the Community provisions described restraints on member States, and the text of the U.K. statute merely made the Immigration Rules binding on the appellate authorities. In both cases, the specific provisions

the cases interpreting the substantive scope of the free movement[613] provisions. Many of the latter cases presented the problem of determining which individuals are covered by the provisions. Those cases have tended to reach liberal results by emphasising the treaty objective of promoting free movement, by describing that purpose as fundamental, by reading that purpose broadly, and by evaluating the practical impact that its interpretation would have on the fulfillment of that purpose.[614]

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612. (continued) would be made more effective, but would more greatly hamper the national authorities, if read to create rights enforceable by individuals. Yet the results of the cases are quite different: see pp. 76-103 above. It is recognised, however, that the unique structure of the E.E.C. makes this type of comparison especially difficult.

613. The illustrations below will stay fairly close to the subject of migration in its strict sense -- i.e., to the problems of entry, residence, and deportation. Other forms of discrimination can also generate issues of Community law, however (see E.E.C. Treaty, art. 7), and can indirectly chill the exercise of one's free movement rights. The European Court decisions in this area have exhibited the same generally liberal patterns as those displayed in the cases discussed below. For a comprehensive treatment of this subject, see Sundberg-Weitman, note 595 above. See also Evans, note 1 above, at 212-16; Forcheri v. Belgian State, Case 152/82 (E.C.J., 13 July 1983); Casagrande v. Landeshauptstadt München [1974] E.C.R. 773 (E.C.J.); Württembergische Milchverwertung-Südmilch-AG v. Ugliola [1969] E.C.R. 363 (E.C.J.); cf. Defrenne v. Sabena [1976] E.C.R. 455 (E.C.J.), limited in Defrenne v. Sabena [1978] E.C.R. 1365 (E.C.J.).

One specific application of the non-discrimination principle is E.E.C. Treaty, art. 51 (social security). See generally Wyatt & Dashwood, note 577 above, ch. 14. See also Baccini v. Office National de L'Emploi [1983] 3 C.M.L.R. 572 (E.C.J.); Robards v. Insurance Officer [1983] 2 C.M.L.R. 537 (E.C.J.); Coppola v. Insurance Officer [1983] E.C.R. 43 (E.C.J.); Comm'n v. Belgium (Re Benefits for Ex-Colonial Workers) [1981] 1 C.M.L.R. 418 (E.C.J.); Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] E.C.R. 177 (E.C.J.).

614. E.g., Levin v. Sec. of State for Justice [1982] 2 C.M.L.R. 454 (E.C.J.); Comm'n v. French Republic [1974] E.C.R. 359

The liberality of those holdings can be compared with approaches British courts have taken in ascertaining the scope of the free movement provisions. In R. v. Secchi,[615] for example, a British magistrate recommended the deportation of an Italian national who had been convicted of shoplifting and indecent exposure. The magistrate, declining to refer the issue to the European Court, held that one who had done 'casual work of the washing-up-in-restaurants type'[616] was not a worker, and thus not entitled to freedom of movement. The magistrate reasoned that the purpose of the E.E.C. was economic, and that affording rights to one whose work is casual does not further those economic goals. He further held that, even if Secchi were a worker, he could be deported under the public policy proviso (discussed below), since his criminal acts evidenced dishonesty, impropriety, an alien 'attitude to personal behaviour', and 'general irresponsibility'.[617] The I.A.T. has reached similarly conservative results in cases where E.E.C. nationals were considered likely to become public charges.[618]

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614. (continued) (E.C.J.); Hoekstra (neé Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] E.C.R. 177 (E.C.J.). See also B.E. Sufrin, When is a Worker a Worker? [1983] 46 M.L.R. 495.
615. [1975] 1 C.M.L.R. 383 (U.K. magistrate). See R. Plender, Deportation and E.E.C. Law (1976) Crim. L. Rev. 676.
616. [1975] 1 C.M.L.R. at 392-93.
617. Ibid., at 394.
618. E.g., Nijssen v. I.O., London (Heathrow) Airport [1978] Imm. A.R. 226 (I.A.T.); Giovanni v. Sec. of State for the Home Dept. [1977] Imm. A.R. 85 (I.A.T.).

The general conservatism of the British courts in this area has not, however, been absolute. In R. v Immigration Adjudicator, ex p. Sandhu,[619] the Divisional Court held that the non-E.E.C. spouse of an E.E.C. worker could not be denied permanent residence on the sole basis that the couple had divorced. The court reasoned that to hold otherwise would 'add a new terror to marriage'.

Some cases have concerned the applicability of the free movement provisions to nationals of the host country. These cases demonstrate the same mission of promoting European integration, but reveal also the importance of distinguishing that mission from the protection of individual rights. Individuals seeking to return home after working in other member States have sometimes encountered laws that have effectively restricted their employment opportunities. Stressing the deterrent effect of such laws on freedom of movement, the Court has been receptive to challenges brought by affected individuals.[620] Occasionally, however, actions of member States have restricted the internal free movement of their own nationals, or have restricted the immigration of non-E.E.C. relatives of their own nationals under circumstances in which the same States would have admitted non-E.E.C.

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619. The Times, 10 June 1982. The court disapproved Grewal v. Sec. of State for the Home Dept. [1979-80] Imm. A.R. 119 (I.A.T.).
620. Knoors v. Sec. of State for Economic Affairs [1979] E.C.R. 399 (E.C.J.); Brockmuellen v. Huisarts Registratie Commissie [1982] 1 C.M.L.R. 91, at 114 (E.C.J.).

relatives of other E.E.C. nationals.[621] In those cases, the Court has reached conservative results, reasoning that broad constructions would not advance the goal of removing obstacles to free movement of workers between member States. The comparison shows that, without some inter-State component, the goal of achieving European integration does not necessarily coincide with that of protecting the individual interests of the nationals of member States. It shows also that, in situations where the integration goal is not at stake, the Court's concern with individual rights can be lessened. The British courts have been equally unwilling to apply Community law to cases not affecting migration between member States.[622]

The immediately preceding cases raised issues as to which individuals may invoke the free movement provisions.[623] Other cases have required the Court to determine the consequences of invoking them. A particularly revealing

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621. Morson & Jhanjan v. State of the Netherlands [1983] 2 C.M.L.R. 221 (E.C.J.); R. v. Saunders [1979] E.C.R. 1129 (E.C.J.). See also P. Watson, Free Movement of Workers and Social Security (1979) 4 Euro. L. Rev. 195, at 197-98.

622. See, e.g., Bulmer Ltd. v. Bollinger S.A. [1974] Ch. 401, at 418 (per Lord Denning M.R.)(C.A.); Re the Habeas Corpus Application of Virdee [1980] 1 C.M.L.R. 709 (Div. Ct.); R. v. Gov'r of Pentonville Prison, ex p. Budlong [and Kember] [1980] 1 All E.R. 701 (Div. Ct.). In one case, the Divisional Court held Community law inapplicable even when inter-State migration was involved: see R. v. Sec. of State for the Home Dept., ex p. Ayub [1983] 3 C.M.L.R. 140 (U.K. spouse held not to be a 'worker').

623. Another question relating to coverage is the definition of the term 'national'. That question poses special problems in the case of the U.K. See, e.g., W.R. Böhning, The Migration of Workers in the United Kingdom and the European Community (1972), at 130-36, 153-58; Evans, note 1 above, at 203-06; Hartley, note 594 above, at 27-33; I.A. Macdonald & N. Blake, The New Nationality Law (1982), at 75-77.

subcategory of the latter cases has concerned the so-called 'public policy proviso'. Under article 48(3) of the E.E.C. Treaty, the free movement provisions are 'subject to limitations justified on grounds of public policy, public security or public health'.[624] The open-ended character of that language can be likened to those provisions of British immigration law that authorise designated action against immigrants when such action is 'conducive to the public good'. The extreme conservatism manifest in the British decisions applying the public good clauses[625] contrasts, however, with the very pronounced liberalism characterising the European Court decisions interpreting the public policy proviso.

The first European Court decision to consider the proviso did not display the same type of liberalism that was to dominate subsequent cases. In Van Duyn, discussed earlier,[626] the Court held directly effective a Council directive limiting the public policy proviso to personal conduct. Having so held, however, the Court then ruled that an intention to take a job with the Church of Scientology could constitute the type of personal conduct encompassed by the directive, even if the State's own nationals remained free to

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624. See generally A.C. Evans, Ordre Public, Public Policy and United Kingdom Immigration Law (1978) 3 Euro. L. Rev. 370; Hartley, note 582 above, ch. 5; F. Wooldridge, Free Movement of E.E.C. Nationals: The Limitation Based on Public Policy and Public Security (1977) 2 Euro. L. Rev. 190.
625. See pp. 147-59 above.
626. See pp. 203-04 above. For critiques of Van Duyn, see, e.g., Hartley, note 582 above, at 158-62; Simmonds, note 596 above; Wooldridge, note 624 above, at 193-96.

hold such jobs. The Court stated that the proviso 'must be interpreted strictly', especially when 'used as a justification for derogating from the fundamental principle of freedom of movement for workers',[627] but concluded that the particular action in question was within the area of discretion reserved for the member States.

Later cases, however, gave effect to the Van Duyn rhetoric calling for a narrow interpretation of the proviso. In Bonsignore v. Oberstadtdirektor der Stadt Koln,[628] for example, the Court held that general deterrence --i.e., the goal of discouraging others from engaging in proscribed conduct[629] -- was not a sufficient ground for invoking the proviso. The Court went further in Rutili v. Minister for the Interior,[630] holding that the threat on which the invocation of the proviso is based must be 'genuine and sufficiently serious'; that the person's potential involvement in trade union activities could not be regarded as such a threat; and that, in any case, the proviso could not be used to exclude a covered individual from only certain regions of a member State.

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627. [1974] E.C.R. at 1350. Quaere whether application of the proviso would not always derogate from freedom of movement.
628. [1975] E.C.R. 297 (E.C.J.). See generally Wooldridge, note 624 above, at 196-98.
629. See, e.g., J. Andenaes, The General Preventive Effects of Punishment (1966) 114 U. Pa. L. Rev. 949; W.R. LaFave & A.W. Scott, Criminal Law (1972), at 23.
630. [1975] E.C.R. 1219 (E.C.J.). For critiques of Rutili, see T.C. Hartley, Public Policy and Internal Free Movement: A Critical Comment on the Rutili Decision (1976) 1 Euro L. Rev. 473; Wooldridge, note 624 above, at 198-201; D. Wyatt, Article 48(3) E.E.C.: The 'Public Policy' Proviso (1976) 1 Euro. L. Rev. 217.

In R. v. Bouchereau,[631] the Court held that the Directive limiting the public policy proviso to personal conduct applied to judicial recommendations of deportation, that the individual circumstances giving rise to the criminal conduct must constitute a present threat before the proviso can be invoked, that the threat must be genuine and serious, that it must be to a fundamental societal interest, and that it must be evaluated in light of the fundamental nature of the free movement rights. And in Adoui v. Belgian State,[632] the Court applied assertively the guidelines adopted in Bouchereau. Other European Court decisions have given similarly restrictive readings to the proviso.[633]

All these decisions emphasised the practical effects their interpretations would have on freedom of movement. In Bouchereau the Court additionally noted the differences among the various language versions of the provision in question. Reasoning that these differing versions required a uniform interpretation, the Court found it necessary to place less weight on literality than on general purpose.[634] These cases can be contrasted with the broad interpretation placed on the proviso by a British magistrate in R. v. Secchi, analysed above.[635]

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631. [1977] E.C.R. 1999 (E.C.J.). See Barav, note 593 above, at 144-46.
632. [1982] 3 C.M.L.R. 631 (E.C.J.).
633. E.g., R. v. Sec. of State for Home Affairs, ex p. Santillo [1980] E.C.R. 1585 (E.C.J.) (discussed on pp. 212-14 below); Royer [1976] E.C.R. 497 (E.C.J.) (discussed on p. 212 below).
634. [1977] E.C.R. at 2010.
635. See p. 206 above.

The European Court decisions addressing procedural questions have similarly taken a liberal line. Several cases have held that, although member States may impose documentary requirements, the punishment for violating such requirements may not include deportation or any other sanction severe enough to deter the exercise of free movement rights.[636] Implicit in that principle is the application, once again, of 'effet utile'.

The Court has also been liberal in its approach to issues of procedural fairness. A Council directive prohibits member States from refusing residence permits or ordering expulsion, absent urgency, 'until an opinion has been obtained from a competent authority of the host country'.[637] In Royer,[638] the Court held that the Directive confers a right to remain in the member State while the proceedings before the 'competent authority' are pending. The Court reasoned that the safeguard provided by the Directive would become illusory without suspensory effect[639] -- still another application of 'effet utile'.

The same concern for giving practical effect to the procedural safeguards afforded by the Directive underlay the Court's analysis in R. v. Secretary of State for Home Affairs,

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636. See especially Royer [1976] E.C.R. 497 (E.C.J.). See also R. v. Pieck [1980] E.C.R. 2171 (E.C.J.); Sagulo, Brenca, & Bakhouche [1977] E.C.R. 1495 (E.C.J.); Watson & Belmann [1976] E.C.R. 1185 (E.C.J.). See also Barav, note 593 above, at 146-48; Macdonald, note 75 above, at 99-100; O'Keeffe, note 593 above, at 47-52; Wooldridge, note 624 above, at 201-06.
637. Council Directive 64/221, arts. 8, 9(1).
638. [1976] E.C.R. 497 (E.C.J.).
639. Ibid., at 516. See also Pecastaing v. Belgian State [1980] E.C.R. 691 (E.C.J.).

ex p. Santillo.[640] An Italian national convicted of violent sex offences received, from a British court, a sentence of eight years in prison and a judicial recommendation of deportation. Santillo was released after serving several years of his sentence, and the Home Secretary made a decision to deport. The issue was whether a lapse of several years deprives a judicial recommendation of its function as an opinion of a competent authority. Since the issue reached the Court by way of an article 177 referral from a national court, the European Court could give only an abstract interpretation. The Court said such a lapse is 'liable' to have that effect because the social danger requisite to expulsion of a covered E.E.C. national must be assessed at the time of the expulsion order, the circumstances being likely to change. It added that the opinion 'must be sufficiently proximate in time to the decision ordering expulsion to ensure that there are no new factors' to be considered.[641]

It was now up to the Divisional Court to apply that interpretation. The court acknowledged that the recommendation was 'stale', but held it would suffice because there was no evidence of changed circumstances.[642] The Court of Appeal dismissed Santillo's appeal.[643] Given the absence of a hearing on the question of whether Santillo then posed a social danger, it seems questionable whether the British courts'

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640. [1980] E.C.R. 1585 (E.C.J.).
641. [1980] E.C.R. at 1601.
642. [1981] 2 W.L.R. at 367 (Div. Ct.).
643. Ibid., at 371-79.

disposition of the case is in keeping with the spirit of the European Court's decision.[644]

A final procedural ruling to note is that in Adoui.[645] The Court held that the competent authority must be 'absolutely independent' of the body taking the challenged measure, and that that independent body must examine not only the law, but also the facts and any discretionary factors.[646] Both the tone and the specific holdings of Adoui and the other procedural cases discussed above can be juxtaposed with the restraint manifest in the natural justice decisions of the British courts on immigration matters, discussed earlier.[647]

In summary, the liberalism of the preceding cases and others[648] contrasts, first, with the few British court decisions addressing issues of E.E.C. immigration law. It contrasts also with the approaches the British courts have taken on roughly analogous issues of national law. It is now necessary to extract more specific patterns and to proffer possible explanations.

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644. On this point, see Barav, note 593 above, at 150-61; E. Ellis, Deportation of a Community National After Imprisonment (1981) 97 L.Q. Rev. 533; Evans, note 1 above, at 257 nn. 80, 81; Freeman, note 586 above; O'Keeffe, note 593 above, at 42-47. See also R. v. Nazari [1980] 1 W.L.R. 1366 (C.A.) (guidelines on judicial recommendations of deportation).
645. [1982] 3 C.M.L.R. 631 (E.C.J.).
646. Ibid., at 663-64.
647. See pp. 53-67 above.
648. E.g., E.E.C. Treaty article 48(4) provides that the free movement provisions of article 48 do not apply to 'employment in the public service'. The Court has frequently given that restriction a narrow reading: see, e.g., Re Public Employees (No. 2): Comm'n v. Belgium [1982] 3 C.M.L.R. 539 (E.C.J.); Reyners v. Belgian State [1974] E.C.R. 631 (E.C.J.); Sotgiu v. Deutsche Bundespost [1974] E.C.R. 153 (E.C.J.).

Patterns and Explanations[649]

Most observers of the European Court seem to agree on at least three broad propositions: First, the general trend during the Court's admittedly brief lifetime has been away from the literal approach, and toward a purposive, or teleological, approach.[650] Second, apart from historical direction, the purposive approach to interpretation has dominated the Court's decisions over the last several years.[651] Third, a corollary of the purposive approach has been the Court's frequent resort to the doctrine of 'effet utile'. Under that doctrine, the Court adopts an interpretation that will give practical effect to the purpose it has identified.[652] The immigration cases discussed in this section are consistent with those propositions.

The immigration cases also reveal the Court's tendency to articulate the purpose in broad, general terms. Rather than confine itself to the narrow purpose of the particular provision it must interpret, the Court is more prone to seek

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649. For general discussions of the interpretation methods employed by the European Court, see A. Bredimas, Methods of Interpretation and Community Law (1978); Brown & Jacobs, note 577 above, ch. 12; Hartley, note 582 above, at 19-22; Lord MacKenzie Stuart, The European Communities and the Rule of Law (1977); Mann, note 577 above; Schermers (1979 book), note 577 above.

650. Bredimas, note 649 above, at 47-48; Brown & Jacobs, note 577 above, at 213-14; Schermers (1979 book), note 577 above, at 14, 15-16. But see Mann, note 577 above, at 378-83 (giving examples of purposive approaches adopted even in the early cases).

651. Bredimas, note 649 above, at 48; Brown & Jacobs, note 577 above, at 196, 209; Collins, note 585 above, at 142; Hartley, note 582 above, at 20-21; Lord Mackenzie Stuart, note 649 above, at 76; Mann, note 577 above, at 316-17; Schermers (1979 book), note 577 above, at 15-23.

652. See, e.g., Brown & Jacobs, note 577 above, at 212-13; Pescatore, note 589 above, at 177.

what has been called the 'spirit' of the treaty.[653] Further, in ascertaining that spirit, the Court has become less inclined to search for the subjective intent of the drafters, and more inclined to consider modern developments.[654] In the immigration cases, the overriding purpose identified by the Court has been the removal of obstacles to the free movement of covered E.E.C. nationals. To locate that purpose, the Court has adopted what has been described as a 'systematic', or 'contextual', approach to interpretation; i.e., the Court has examined the instrument as a whole, with special emphasis on relationships between provisions, including recitals in preambles.[655] The net result has been a series of predominantly liberal decisions, favourable to the individual, so long as free movement between member States is affected.

Why has the European Court, unlike the British national courts, opted for so assertive a judicial role? Certainly it

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653. See, e.g., Bredimas, note 649 above, at 70; Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] E.C.R. 1 (E.C.J.), at 12.
654. See Bredimas, note 649 above, at 70. See also Collins, note 585 above, at 142 (Court assumes role of contributing to development of Communities).
655. See Brown & Jacobs, note 577 above, at 203-09; Hartley, note 582 above, at 19; Schermers (1979 book), note 577 above, at 15.
Continental courts frequently examine 'travaux preparatoires' (prepared work) as a guide to the subjective intent of the drafters: Brown & Jacobs, note 577 above, at 200-03. Such documents, and in particular legislative history, are seldom used by British courts: ibid. For treaties, travaux preparatoires are typically secret (Schermers (1979 book), note 577 above, at 14); even for secondary legislation, the European Court uses these papers only occasionally (ibid.; Hartley, note 582 above, at 19-20); Bredimas, note 649 above, at 64-65.

has been open to the Court in many cases to interpret disputed provisions literally. Even when the literal language has been ambiguous, and consideration of purpose necessary, the Court could have adopted a narrow reading of the particular purpose. And, rather than focus solely on the purpose of facilitating free movement, the Court could have emphasised the tension between that purpose and the aim of reserving some measure of national sovereignty.

As several writers have noted, however, the E.E.C. is a special type of legal order; it occupies a middle ground somewhere between a federated state and an ordinary international arrangement.[656] That characterisation leads naturally to one of the most frequently cited explanations for the liberalism of the European Court. The Court views its role to be the promotion of European integration,[657] and it sees

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656. Bredimas, note 649 above, at xvi; Political Integration Through Jurisprudence, note 593 above, at 281.

657. See, e.g., Bredimas, note 649 above, at 177; Mann, note 577 above, at 515; Wooldridge, note 624 above, at 207; cf. Hartley, note 582 above, at 20 (Court tries to advance interests of Community).

On the distinction between economic integration and a broader social or political integration, see Wyatt & Dashwood, note 577 above, at 127; Political Integration Through Jurisprudence, note 593 above.

On the concept of a European citizenship, see A. Durand, European Citizenship (1979) 4 Euro. L. Rev. 3; A.C. Evans, European Citizenship (1982) 45 Mod. L. Rev. 497; O'Keeffe, note 593 above, at 501; R. Plender, 'An Incipient Form of European Citizenship', in Jacobs, note 593 above, at 39 and passim; cf. G. White, The European Citizen under Community Law and International Law (1977) 30 Current Legal Problems 141 (impact on individuals of overlap between Community law and international law).

On the question of whether integration is merely the personal objective of the judges or their conception of the intent of the drafters, see Lord Mackenzie Stuart, note 649 above, at 77-79. But see Hartley, note 582 above, at 21 (Court occasionally crosses line).

the free movement provisions as essential to the performance of that role.[658] As the immigration cases discussed in this section demonstrate, the Court has been constricting the sphere of national sovereignty, and increasingly subjecting provisions to uniform[659] Community interpretations, with the object of reducing the barriers to free movement. Since these concerns are pragmatic,[660] resort to the doctrine of effet utile is not surprising.

In the free movement cases, the dispute is ordinarily between an individual and a member State. Therefore one side-effect of a policy favouring European integration is that individual interests will often prevail over national interests. But the promotion of integration does not necessarily coincide with the protection of individual rights. The liberalism of the Court has been far less solid in cases pitting E.E.C. nationals against their own countries in wholly domestic matters than in cases affecting migration between

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658. As to the practical impact of the E.E.C. treaty on migration between member States, see Plender, note 577 above, at 59 (noting decrease in ratio of E.E.C. migrants to non-E.E.C. migrants, and hypothesising that decrease resulted because non-discrimination provisions made hiring of E.E.C. workers less economical). But see Evans, note 656 above, at 498-99 (other factors might explain the alteration of the migration patterns). For tables showing levels of migration from each member State to every other member State, see Hartley, note 582 above, at viii-ix. See generally Böhning, note 623 above, at 10-86.

659. See, e.g., Bebr, note 577 above, at 5; Evans, note 1 above, at 207.

660. Bredimas, note 649 above, at 119; Pescatore, note 589 above, at 177.

member States.[661] In addition, as one prominent writer has observed, the liberalism has been less evident when individuals have asserted rights against the Community than it has when individuals have asserted rights against member States.[662]

The preceding discussion has focused on integration as an explanation for the differences between the approaches of the European Court and the U.K. national courts on immigration matters. But a number of other factors must also be considered. British immigration law rests on the assumption that entry is a privilege rather than a right, a distinction that has been shown to have influenced a number of judicial decisions.[663] Community law, in contrast, recognises a right of entry, subject to certain qualifications.[664] Further, the right has been viewed as 'fundamental', as a 'foundation' of the Community. Several of the cases discussed above -- particularly those interpreting the public policy proviso[665] -- reveal the Court's reluctance to interpret broadly a provision derogating from a fundamental right.

Still another explanation for the Court's liberalism might be the positive reinforcement provided by the other Community

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661. See pp. 207-08 above. But see Defrenne v. Sabena [1976] E.C.R. 455 (E.C.J.), cut back in Defrenne v. Sabena [1978] E.C.R. 1365 (E.C.J.).
662. Hartley, note 582 above, at 20-21.
663. See pp. 415-16 below. See also Evans, note 55 above, at 380.
664. See Evans, note 624 above, at 375; Hartley, note 582 above, at 20-21; Macdonald, note 75 above, at 88; R. Plender, International Migration Law (1972), at 126.
665. See pp. 208-11 above; see also note 648 above (cases interpreting the 'public service' exception).

institutions. The preamble to Council Regulation 1612/68 states that 'freedom of movement constitutes a fundamental right of workers and their families'. Other Council actions, as well as actions of the Commission and the Parliament, similarly reflect a keen enthusiasm for fostering freedom of movement.[666]

The above possibilities might be thought of as 'pull' factors. They represent positive attractions of judicial creativity. There are, in addition, several 'push' factors -- i.e., negative effects that would have accompanied judicial restraint. These latter factors are offered as explanations not for the liberal results, but for the Court's creative lawmaking, which in theory could have taken either a liberal or a conservative course.

First, the Court has had a number of gaps to fill. Other Community organs, though generally producing liberal legislation, have not produced large quantities of it. As a result, the Court has had little choice but to develop the content of the legal rules.[667] Compounding the relative inactivity of the other Community organs is the simple fact that the whole Community system is still relatively immature. Lord Mackenzie Stuart, a judge on the European Court, has

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666. The various actions, which include regulations, directives, a Commission argument to the European Court, and a resolution of the European Parliament, are assembled by Evans, note 656 above, at 498-510.
667. This point has been made by several writers: e.g., Mann, note 577 above, at xiv-xv; O'Keeffe, note 593 above, at 35; Schermers (1979 book), note 577 above, at 453.

argued that this immaturity, which gives rise to numerous questions of first impression, is one reason for the tendency of the European Court to emphasise purpose over literality.[668] In contrast, the detail provided by the Immigration Act 1971 and by the Immigration Rules, together with the age of the British legal system and the many decades of immigration control in particular, give British judges less need than their European Court counterparts to fill lacunae in the law.

Finally, the form of the documents being construed must affect the method of interpretation. First, as a purely practical matter, the existence of multiple authoritative texts in different languages makes it dangerous to rely heavily on the literal wording.[669] Second, as many others have noted, the wording of the provisions tends to be broad and general, in the Continental fashion.[670] Part of the generality might result from the need to draft the provisions in several languages;[671] part might simply reflect the compromises inherent in achieving a consensus.[672]

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668. Note 649 above, at 75-76.
669. Ibid., at 72-74; Hartley, note 582 above, at 19; Schermers (1979 book), note 577 above, at 12-13. See especially R. v. Bouchereau [1977] E.C.R. 1999, at 2010 (E.C.J.).
670. E.g., Lord Denning M.R., What Next in the Law (1982), at 293; Hartley, note 582 above, at 19.
671. Bredimas, note 649 above, at 16; Hartley, note 582 above, at 19.
672. Bredimas, note 649 above, at 18; Hartley, note 582 above, at 19; Lord Mackenzie Stuart, note 649 above, at 76.

Whatever the reason for the generality of the provisions, it has been seen by many as an explanation of the European Court's adventurousness.[673] In contrast, the generality of certain British provisions -- particularly the 'public good' provisions -- has induced restraint in the British court decisions.[674] In the case of the European Court, similar deference would allow member States more latitude to adopt differing rules. The desire for uniformity and the related aim of encouraging free movement again serve as possible explanations for the contrasting judicial reactions to broad language.

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673. Bredimas, note 649 above, at 178; Brown & Jacobs, note 577 above, at 209, 213-14; Mann, note 577 above, at xiv-xv; Lord Mackenzie Stuart, note 649 above, at 74-76. Other potential influences of Continental practice seem minor. Continental courts use 'travaux preparatoires', for example, but the European Court makes infrequent use of such sources: Brown & Jacobs, note 577 above, at 200-03. Similarly, although the European Court follows the Continental practice of not treating its decisions as formally binding precedent, the Court typically does follow its own decisions in practice: see Bebr, note 577 above, at 12.

674. See pp. 147-59 above.

CHAPTER II

JUDICIAL REVIEW OF IMMIGRATION DECISIONS IN THE UNITED STATES[1]

Both the making and the review of federal administrative decisions in the United States are governed by the Administrative Procedure Act (A.P.A.).[2] Under that Act, final administrative decisions are generally subject to judicial review 'except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law'.[3] If a decision is reviewable, the scope of review depends on whether the decision is classifiable as one of fact, law, or discretion. If the question is one of fact, the applicable test is generally whether it is supported by 'substantial evidence'.[4] If the question is one of law, the court will normally make its own independent determination.[5] A discretionary decision will ordinarily be set aside

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1. See also C. Gordon & H.N. Rosenfield, Immigration Law & Procedure, ch. 8 (1984); C. Gordon, Recent Developments in Judicial Review of Immigration Cases (1977) 15 San Diego L. Rev. 9.
2. Act of 11 June, 1946, c. 324, 60 Stat. 237. The provisions of the A.P.A. are scattered throughout 5 U.S.C. See P.L. 89-554, s. 1, 80 Stat. 378 (1966). The provisions relating to judicial review appear at 5 U.S.C. ss. 701-706.
3. 5 U.S.C. s. 701(a). See also ibid., s. 704; H. Saferstein, Non-Reviewability: A Functional Analysis of "Committed to Agency Discretion" (1968) 82 Harv. L. Rev. 367; Laird v. Tatum, 408 U.S. 1 (1972); Vaca v. Sipes, 386 U.S. 171 (1967); United States v. Cox, 342 F.2d 167 (5th Cir. 1965).
4. 5 U.S.C. s. 706(2)(E). But see ibid., s. 706(2)(F).
5. See ibid., s. 706 and subsections 2(A, B, C, D).

if it is 'arbitrary, capricious, or an abuse of discretion'.[6] More detailed discussion of the various standards is provided in the succeeding sections as needed.

This chapter and the next one will examine the American immigration cases. The present chapter will begin by discussing the reviewability of administrative decisions made under the immigration laws. The remaining sections will deal more specifically with review of factfinding, interpretation of regulations, interpretation of statutes, and review of the exercise of discretion. Constitutional review will be studied in Chapter III.

A. Reviewability of Immigration Decisions

Today almost every final[7] administrative decision made under the immigration laws is reviewable in court.[8] The sole procedure for challenging a final administrative order of exclusion is to petition for a writ of habeas corpus,[9] in federal district court. An alien may challenge a final deportation order only by filing a petition for review in the U.S. Court of Appeals[10] or by applying for

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6. Ibid., s. 706(2)(A).
7. See 8 U.S.C. s. 1252(b); Brownell v. Tom We Shung, 352 U.S. 180 (1956).
8. Gordon & Rosenfield, note 1 above, s. 8.2.
9. 8 U.S.C. s. 1105a(b). For further details on habeas corpus procedure, see 28 U.S.C. ss. 2241 and passim.
10. 8 U.S.C. s. 1105a(a) incorporates provisions that have been recodified by P.L. 89-554, s. 8(a), 80 Stat. 631 (1966), and that now appear at 28 U.S.C. ss. 2341 and passim. See especially s. 2344, altered with respect to venue in review of deportation orders by 8 U.S.C. s. 1105a(a)(2). This procedure also governs orders ancillary to the deportation proceeding: see, e.g., I.N.S. v. Chadha, 103 S.Ct. 2764, at 2777-78 (1983);

habeas corpus.[11]

In addition to orders of exclusion and deportation there are a host of miscellaneous orders authorised by the 1952 Act. Almost all of these, if final, are also reviewable. Examples include denials of labor certification,[12] visa petitions,[13] applications for voluntary departure,[14] and motions to reopen deportation proceedings.[15]

There is still one important immigration decision that, as the following discussion will show, is not reviewable in court: the decision by a consular officer denying an application for a visa. Because an immigrant visa is ordinarily a prerequisite to admission for permanent residence,[16] the many statutory procedural safeguards protecting an applicant for admission

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10. (continued) Giova v. Rosenberg, 379 U.S. 18 (1964); Foti v. I.N.S., 375 U.S. 217 (1963). But cf. Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968).

11. 8 U.S.C. s. 1105a(a)(9). Whether Congress could constitutionally withhold habeas corpus relief is doubtful: see U.S. Const. art. I, s. 9, cl. 2. The Supreme Court has held that the requirement of a restraint on liberty can be satisfied without actual physical custody: Hensley v. Municipal Ct., 411 U.S. 345 (1973); Jones v. Cunningham, 371 U.S. 236 (1963).

12. Yong v. Regional Manpower Administrator, 509 F.2d 243 (9th Cir. 1975); Pesikoff v. Sec. of Labor, 501 F.2d 757 (D.C. Cir. 1974); Reddy v. Sec. of Labor, 492 F.2d 538 (5th Cir. 1974).

13. Denial of a visa petition, which is filed with the I.N.S. by the American sponsor, is reviewable in court: see, e.g., Mamengo v. I.N.S., 446 F.2d 51 (9th Cir. 1971); Butterfield v. A.-G., 442 F.2d 874 (D.C. Cir. 1971); Hsing v. Usery, 419 F. Supp. 1066 (W.D. Pa. 1976); Bitang v. Regional Manpower Administrator, 351 F. Supp. 1342 (N.D. Ill. 1972). In contrast, a denial of a visa application, which is filed by the alien with the consulate, is not judicially reviewable: see pp. 225-35 below.

14. Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968); Foti v. I.N.S., 375 U.S. 217, 218 n.1 (1963).

15. Giova v. I.N.S., 379 U.S. 18 (1964).

16. 8 U.S.C. ss. 1181(a), 1182(a)(20).

will therefore be worthless in those cases in which an alien is prevented from advancing to the admission stage by a consular officer's erroneous denial of his or her visa application. In this respect judicial protection is far less comprehensive than that under British law.[17]

The process by which the courts have concluded that consular decisions denying visas are unreviewable has not been entirely clear. In the absence of a Supreme Court decision on the question,[18] the lower federal courts have invoked various doctrinal approaches leading eventually to a common conclusion.

The foundation for the modern decisions holding visa denials unreviewable is a pair of appellate court opinions rendered in the late 1920's. The first such case was United States ex rel. London v. Phelps.[19] The court refused to review the denial of a visa, holding that it lacked 'jurisdiction' to do so.[20] There was no indication whether the court was referring to jurisdiction over the parties or to that over the subject matter.

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17. In the U.K., a visa denial would first be administratively appealable: Immigration Act 1971, ss. 13(2), 33(1). The decisions of the administrative tribunals are then subject to the courts' supervisory jurisdiction: see pp. 11-12 above.
18. But cf. Brownell v. Tom We Shung, 352 U.S. 180, at 184 n.3 (1956), where the Supreme Court said: 'We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad.' But the comment was obiter; the reference was confined to actions for declaratory judgments; and the Court, though refraining from suggesting that such an alien could obtain review, equally refrained from suggesting the contrary. Thus little guidance can be extracted from the Supreme Court on this issue.
19. 22 F.2d 288 (2d Cir. 1927).
20. Ibid., at 290.

London was soon followed by United States ex rel. Ulrich v. Kellogg,[21] in which the same issue was raised. There the court consulted the immigration statute. It emphasised the statutory language prohibiting visa issuance 'if it appears to the consular officer' that the alien is excludable. Though it did not elaborate on the significance of the quoted language, it is possible the court felt the existence of such broad discretionary power was inconsistent with an intent to authorise judicial intervention.

The Ulrich court further relied, however, on the fact that it could find no provision of the immigration laws calling for either administrative or judicial review. The clear implication was that, in the absence of affirmative Congressional authorisation, non-reviewability was to be presumed.

Thus three reasons emerge from London and Ulrich for holding consular visa denials unreviewable: a lack of jurisdiction, the existence of wide administrative discretion, and the absence of affirmative legislative authorisation for review. As will be seen, those themes form the bases for the more modern decisions passing on the same issue.

The jurisdictional suggestion of London appears to have been taken up by at least one court. In Hermina-Sague v. United States,[22] where the court refused to review a visa denial, the court emphasised that the alien was outside

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21. 30 F.2d 984 (D.C. Cir. 1929).
22. 416 F. Supp. 217 (D.P.R. 1976). Cf. In re Russo, 255 F.2d 97 (1st Cir. 1958).

American territory[23] and cited cases not remotely related to the question before it.[24]

The territorial hurdle is especially puzzling in light of many previous cases in which the Supreme Court has reviewed administrative decisions despite the fact that both the aggrieved party and the administrative official were outside the United States, and despite the fact that the cause of action arose outside the country. Those cases are noted below.[25]

Examination of the A.P.A. language confirms that application of its judicial review provisions is not limited to review of administrative actions occurring within American territory. Review is provided in the case of 'agency action'.[26] 'Agency' is defined as 'each authority of the Government of the United States', no geographic limitation having been added.[27] Finally, as noted earlier, all the review provisions are made to apply to all such action unless either a statute precludes review or review is 'committed to agency discretion by law'.[28] The applicability of those exceptions is examined below.[29]

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23. Ibid., at 219, 221.
24. E.g., Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968) (no review by Court of Appeals of denial of stay of deportation); Kan Kam Lin v. Rinaldi, 361 F. Supp. 177 (D.N.J. 1973) (deportable alien not eligible for political asylum within terms of treaty).
25. See p. 506 n. 273 below.
26. 5 U.S.C. ss. 702, 704.
27. Ibid., s. 701(b)(1) (with exceptions not pertinent here).
28. See p. 223 above.
29. See pp. 230-33 below.

Nor do any general principles of civil procedure preclude a court from asserting jurisdiction because of the absence of the plaintiff from American territory. Jurisdiction over the parties would be satisfied in the case of the plaintiff by his consent implicit in bringing the action,[30] and in the case of the government in any of several ways.[31] Jurisdiction over the subject matter is provided by 28 U.S.C. § 1331, which establishes jurisdiction without regard to amount in controversy when the suit is brought against an agency of the United States. Alternatively, the Immigration and Nationality Act provides for district court jurisdiction over causes of action arising under the immigration provisions of the Act.[32] Nor does the fact that the cause of action arose outside the territorial jurisdiction of the particular court preclude jurisdiction.[33] There thus appears to be no territorial obstacle to judicial review of a consular officer's decision denying a visa.

The Ulrich court also cited the abundance of discretion conferred upon consular officers to decide visa applications. As discussed earlier, a similar argument was later accepted by Lord Denning M.R. in the Schmidt decision, where broad

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30. Adam v. Saenger, 303 U.S. 59 (1938).
31. See generally Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
32. 8 U.S.C. s. 1329. The A.P.A., however, is not an independent source of jurisdiction: Califano v. Sanders, 430 U.S. 99 (1977).
33. That factor generally bears, rather, on the choice of law to be applied, a question not at issue in the present context. See generally R.C. Cramton, D.P. Currie, & H.H. Kay, Conflict of Laws Cases - Comments - Questions (3d ed., 1981), at 15-18.

statutory discretion was held to prevent judicial imposition on the British Home Secretary of a duty to act fairly in deciding applications for variation of leave.[34] The analysis of that decision contained several criticisms equally applicable here.

Moreover, consular discretion is not as great as the statutory language 'if it appears to the consular officer' (that the alien is ineligible to receive a visa)[35] would indicate by itself. Another statutory provision bars consular officers from discriminating on specified bases when deciding visa applications.[36] The discretion is further restricted by the State Department regulations, which limit the permissible grounds for visa denials to those set out in the statute or regulations.[37] The limited discretion of the consular officers does not support the idea that the courts cannot review visa denials.

More important, the A.P.A. should now eliminate that argument. The 'committed to agency discretion' exception to the judicial review requirement implies much more than the mere existence of a discretionary element. It requires either a statutory intent to withhold review or a judicial determination that review would be impractical or improper.[38]

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34. See pp. 61-64 above.
35. 8 U.S.C. s. 1201(g).
36. Ibid., s. 1152(a). See Hermina-Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).
37. 22 C.F.R. s. 42.90.
38. See K.C. Davis, Administrative Law Text (3d ed., 1972), s. 28.05 and cases cited therein; see also Saferstein, note 3 above.

Whether the legislative intent was to bar judicial review is examined below. With respect to practicality, it can fairly be said that no problems are immediately apparent.[39] Certainly neither the practicality nor the propriety of reviewing visa denials would seem to differ from that of reviewing exclusion orders. In the United Kingdom, the statutory tribunals hear appeals against overseas denials of visa applications.[40] No reason is perceived for preventing American courts from doing the same.[41]

The final theme underlying the older cases on non-reviewability was the lack of a statutory immigration provision affirmatively authorising review of visa denials. That was the rationale on which the court in Ulrich had placed principal reliance. The approach is equivalent to a presumption of non-reviewability, and as such would seem to be out of step even with the then applicable law of judicial review.[42] Today, with the A.P.A. requiring review unless there is a reason to withhold it, the lack of affirmative authorisation in the immigration provisions is inconclusive. Nonetheless, at least one post-A.P.A. court decision has quoted the Ulrich

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39. The State Dept. regulations already require consular officers to state reasons for visa denials: 22 C.F.R. s. 42.130(a). Those reasons could be supplied to the reviewing court.
40. See Immigration Act 1971, ss. 13(2), 33(1).
41. One leading commentator has recommended creation of a Board of Visa Appeals to hear such cases: C. Gordon, The Need to Modernize our Immigration Laws (1975) 13 San Diego L. Rev. 1, at 9-10. See also L. Wildes, Review of Denial of Visa (1959) 142 N.Y.L.J., Nos. 96-98; H. Rosenfield, Consular Nonreviewability (1955) 41 A.B.A.J. 1109.
42. See Davis, note 38 above, s. 28.02.

'no provision' comment approvingly,[43] and several others have cited Ulrich without elaboration.[44]

The modern analogue of the lack of statutory authority argument accepted in Ulrich would therefore be the A.P.A. exception concerning statutes that 'preclude review'.[45] The Supreme Court has frequently said that exceptions to the A.P.A. review provisions would not be 'lightly presumed',[46] and that the 'broadly remedial' provisions of the A.P.A. would not be held inapplicable to immigration and nationality decisions without 'clear and convincing evidence' of a Congressional intent to bar review.[47]

Only two provisions of the Immigration and Nationality Act have been cited by the courts to hold visa denials unreviewable. In Loza-Bedoya v. I.N.S.,[48] the I.N.S. had advised the consular officer that the alien was ineligible to receive a visa. The consul, acting on that advice, denied the visa. The court acknowledged that the advice had been legally erroneous but held that it lacked 'jurisdiction' to review a visa denial. The court cited 8 U.S.C. § 1201(a), together with the Ulrich and London decisions. But section 1201(a) provides

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43. Hermina-Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).
44. E.g., Loza-Bedoya v. I.N.S., 410 F.2d 343 (9th Cir. 1969); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960).
45. 5 U.S.C. s. 701(a).
46. E.g., Brownell v. Tom We Shung, 352 U.S. 180, at 185 (1956); Marcello v. Bonds, 349 U.S. 302, at 310 (1955).
47. Rusk v. Cort, 369 U.S. 367, at 379-80 (1962). Accord, Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).
48. 410 F.2d 343 (9th Cir. 1969).

only that, with certain exceptions, a consular officer may issue visas to aliens who have properly applied for them. The section says nothing about the finality of the officer's decision or the availability of judicial review.

A different statutory provision was cited in Licea-Gomez v. Pilliod.[49] The court there cited 8 U.S.C. § 1104(a), which provides, in pertinent part, that the Secretary of State is to administer all the immigration and nationality laws relating to the powers of consular officers, except those pertaining to visa issuance or denial. That provision prevents the Secretary of State from reviewing the visa decisions of the consular officers, thus affecting the allocation of internal power within the State Department. Its relevance to permissibility of judicial review, however, is not evident.

Two courts have cited legislative history for the purpose of showing a Congressional intent to bar review. In both Loza-Bedoya and Hermina-Sague, the courts cited a paragraph of the House Committee Report preceding passage of the 1952 Act. The cited paragraph, however, said merely that the committee had considered and rejected the idea of providing for administrative review of visa denials by either the Secretary of State or a new, specially created board similar to the Board of Immigration Appeals.[50] Again, the Committee made no reference to the issue of judicial review.

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49. 193 F. Supp. 577 (N.D. Ill. 1960).
50. H.R. 1365, 82d Cong., 2d Sess. (1952), U.S. Code Cong. & Admin. News, at 1688.

Another decision, Burrafato v. United States Dept. of State, simply assumed in a footnote that visa denials were unreviewable, citing London and providing no rationale for its conclusion.[51] Burrafato has in turn been cited to bolster similar holdings.[52]

Equally questionable was the rationale of Pena v. Kissinger,[53] another decision holding visa denials unreviewable. The court first cited several of the cases discussed above. It then stated the general rule that exceptions to the A.P.A. review provisions would be recognised only when clear and convincing evidence was available. That rule was said to be inapplicable, however, because previous Supreme Court decisions had held that Congress' plenary power over immigration[54] permitted it to entrust admission decisions exclusively to executive officers. The court went on to hold that barring judicial review in the present case would therefore be constitutional. Its decision was soon followed by Rivera de Gomez v. Kissinger,[55] which expressly approved the reasoning applied in Pena.

It is submitted that the courts in Pena and Rivera de Gomez misinterpreted the nature of the issue. That Congress has the power to withhold judicial review does not mean it has done so.

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51. 523 F.2d 554, at 555-56 n.2 (2d Cir. 1975).
52. E.g., Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir. 1976); Hermina-Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).
53. 409 F. Supp. 1182 (S.D.N.Y. 1976).
54. See ch. III below.
55. 534 F.2d 518 (2d Cir. 1976).

The ultimate question should have been whether Congress had intended to preclude judicial review of visa denials, an issue that neither court attempted to resolve.

The preceding discussion makes it fair to suggest that the judicial departure from the normal review procedures provided by the A.P.A. has never been adequately explained. Some courts have attempted to supply rationales, such as the lack of affirmative authorisation, or broad discretion, or territorial jurisdiction theories put forward by the early decisions. Those rationales have been shown to be weak at the time they were advanced, and superseded by the A.P.A. today.

Other courts have not even purported to explain the bases of their decisions. Some have merely cited statutory provisions concerning administrative review within the State Department. Others have cited a House Committee report also addressed to the question of administrative review. At least one case has assumed nonreviewability without citing any statutory authority or advancing any rationales. Still others have merely cited other cases taking the above approaches.

The net result has been one of snowballing. Although the courts have unanimously concluded that the consular decision denying an immigrant visa is not reviewable in court, none has pointed to pertinent statutory language or other evidence of Congressional intent to justify its decision. Far from searching for <u>clear and convincing</u> evidence of an intended exception to the A.P.A., the courts have thus far turned up <u>no</u> evidence to support nonreviewability.

Apart from the area of visa denials, the reviewability of an immigration decision can be affected by a wartime setting. In Ludecke v. Watkins,[56] a case analogous to the British decision in Bottrill,[57] the Supreme Court interpreted wartime legislation authorising the President to deport alien enemies. Although the statute was silent on the question, the Supreme Court construed it as precluding judicial review of the President's decision. It also held that, even if armed hostilities had ceased, the Act applied until Congress or the President had formally terminated the state of war. The effect of a wartime setting on review of claims by both alien enemies and alien friends is evident in other Supreme Court decisions as well.[58]

B. Scope of Review of Findings of Fact

The A.P.A. provides that the reviewing court must set aside agency findings 'unsupported by substantial evidence'.[59] That test requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'[60] The significance of the qualifier 'reasonable' has been made

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56. 335 U.S. 160 (1948).
57. See p. 160 above.
58. E.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Johnson v. Eisentrager, 339 U.S. 763 (1950). But cf. Ex p. Kawato, 317 U.S. 69 (1942) (resident alien enemy ordinarily possesses standing to sue in federal court).
59. 5 U.S.C. s. 706(2)(E).
60. Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, at 620 (1966) (post-A.P.A.); Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, at 229 (1938) (pre-A.P.A.); Lattig v. Pilliod, 289 F.2d 478, at 479 (7th Cir. 1961).

clearer by enactment of the A.P.A. provision that the reviewing court must base its determination on 'the whole record'.[61] Courts are therefore precluded from restricting their enquiry to the evidence offered in support of the administrative decision.[62] Thus the fact there is some evidence to support the finding does not guarantee that the finding will be upheld; the contrary evidence might be sufficiently strong to prevent a reasonable mind from accepting the former evidence as adequate. It is primarily in this respect that the scope of review under the 'substantial evidence' rule is more sweeping than that under the 'no evidence'[63] rule in the U.K.

Although the A.P.A. review provisions generally apply to administrative decisions under the Immigration and Nationality Act,[64] the latter Act sets a specific standard for deportation decisions: '[T]he Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.'[65] In Woodby v. I.N.S.[66] the Supreme Court held that that provision refers to the scope of judicial review of the administrative decision, as distinguished from the separate question of the level of proof to be applied by the

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61. 5 U.S.C. s. 706 (or at least on those parts of the record cited by the parties).
62. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, at 489 (1951); Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, at 280 (1946). See generally Davis, note 38 above, s. 29.03.
63. See p. 24 above.
64. See Gordon & Rosenfield, note 1 above, s. 8.8.
65. 8 U.S.C. s. 1105a(a)(4).
66. 385 U.S. 276 (1966).

administrative officials. With respect to the latter issue, the government argued that because deportation is technically a civil proceeding, the preponderance of the evidence standard, ordinarily applicable in civil cases, should apply. The aliens, noting the harsh effects of deportation, argued for the criminal standard of proof beyond reasonable doubt.[67] The court took a middle position. Emphasising the bonds formed by resident aliens and the hardship resulting from severance of those bonds, it held that the standard of proof applicable in deportation proceedings is that of 'clear, unequivocal, and convincing evidence'.[68] The Woodby rule has now been reflected in many judicial decisions.[69]

Whether the 'reasonable, substantial, and probative evidence' standard applicable to the judicial review of

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67. For a similar argument, see Sherman v. I.N.S., 350 F.2d 894 (2d Cir. 1965). See also L.L. Jaffe, Administrative Law: Burden of Proof and Scope of Review (1966) 79 Harv. L. Rev. 914.
68. Ibid., at 286. See also Rowoldt v. Perfetto, 355 U.S. 115, at 120 (1957) (referring to the 'solidity of proof').
69. See, e.g., Berahmand v. I.N.S., 549 F.2d 1343, at 1345 (9th Cir. 1977); Trias-Hernandez v. I.N.S., 528 F.2d 366, at 368 (9th Cir. 1975); Rassano v. I.N.S., 492 F.2d 220 (7th Cir. 1974). See also J.P. McBaine, Burden of Proof: Degrees of Belief (1944) 32 Cal. L. Rev. 242; Note, Standard of Proof in Deportation Proceedings (1966) 18 Stan. L. Rev. 1237. The rule also applies in proceedings to rescind adjustment of status (Rassano v. I.N.S., 492 F.2d 220 (7th Cir. 1974); Wazini v. I.N.S., 392 F.2d 55 (9th Cir. 1968); Rodriguez v. I.N.S., 389 F.2d 129 (3d Cir. 1968); In re Vilanova-Gonzalez, 13 I. & N. Dec. 399 (B.I.A., 1969)) and in denaturalization cases (Fedorenko v. United States, 449 U.S. 490, at 505 (1981); Chaunt v. United States, 364 U.S. 350 (1960); Nowak v. United States, 356 U.S. 660 (1958); Baumgartner v. United States, 322 U.S. 665, at 670 (1944); Schneiderman v. United States, 320 U.S. 118, at 123 (1943) ('clear and convincing')). But see Vance v. Terrazas, 444 U.S. 252 (1980) (upholding statute prescribing preponderance standard in expatriation proceedings).

deportation decisions differs from the simple 'substantial evidence' rule applicable to review of other administrative decisions is doubtful. Since, as noted above, the latter has already been construed to require reasonableness, the addition of the word 'reasonable' would seem to add nothing. The word 'probative' should be similarly insignificant, for it is difficult to conceive of non-probative evidence that would satisfy the substantiality requirement of either test. The large volume of cases that have now applied the 'reasonable, substantial and probative evidence' test to deportation decisions[70] do not appear to have reached results different from those that would have been dictated by the 'substantial evidence' test.[71]

Occasionally, citizenship claims are raised as defences to exclusion or deportation. The older cases typically gave little consideration to arguments that the administrative officials had made erroneous findings of fact in denying citizenship claims. Despite the grave consequences of error in such cases, these older decisions showed extreme restraint.[72] Today, however, the statute provides for a de novo judicial trial when a citizenship claim is asserted as a defence to

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70. E.g., Guzman-Guzman v. I.N.S., 559 F.2d 1149 (9th Cir. 1977); Armstrong v. I.N.S., 445 F.2d 1395 (9th Cir. 1971); Kokkinis v. Dist. Director, 429 F.2d 938 (2d Cir. 1970); Yaldo v. I.N.S., 424 F.2d 501 (6th Cir. 1970); Wong Wing Hang v. I.N.S., 360 F.2d 715 (2d Cir. 1966). See also Soo Yuen v. U.S.I.N.S., 456 F.2d 1107 (9th Cir. 1972).

71. See, e.g., Loos v. I.N.S., 407 F.2d 651 (7th Cir. 1969); Shing Hang Tsiu v. I.N.S., 389 F.2d 994 (7th Cir. 1968).

72. E.g., Quock Ting v. United States, 140 U.S. 417 (1891); Tang Tun v. Edsell, 223 U.S. 673 (1912).

exclusion or deportation, as long as the claim is non-frivolous and a 'genuine issue of material fact' is presented.[73]

C. Interpretation of Administrative Regulations

Unlike the United Kingdom,[74] the United States does not restrict review of administrative interpretations of law to cases in which the alleged errors either go to jurisdiction or appear on the face of the record. The A.P.A. provides that 'the reviewing court shall decide all relevant questions of law, and interpret constitutional and statutory provisions'.[75]

One particular type of legal error is the misinterpretation of administrative regulations. In the immigration area, the most important regulations are those promulgated by the I.N.S. under the auspices of the Attorney General.[76] Other significant regulations are issued by the State Department[77] and the Labor Department.[78]

Immigration regulations are far less important in the United States than they are in the United Kingdom. Unlike the U.K. Immigration Act 1971, the Immigration and Nationality Act in the U.S. prescribes almost all the substantive and important procedural rules of law governing entry and deportation. Thus,

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73. 8 U.S.C. s. 1105a(a)(5); see Agosto v. I.N.S., 436 U.S. 748 (1978).
74. See pp. 14-17 above.
75. 5 U.S.C. s. 706. See also ss. 706(2)(B, C, D).
76. See 8 U.S.C. s. 1103(a). The regulations are contained in 8 C.F.R. See especially ibid., s. 2.1.
77. 22 C.F.R., parts 41 (non-immigrant visas); 42 (immigrant visas); 46 (control of departing aliens). For the statutory authority, see 8 U.S.C. s. 1104(a).
78. 20 C.F.R. ss. 655, 656.

the statute defines the numerical limitations on entry,[79] the order in which visa applications are to be considered,[80] the 33 qualitative grounds for exclusion,[81] defences to exclusion, including the specific instances in which the Attorney General is authorised to exercise discretion to waive inadmissibility,[82] the 19 grounds for deportation,[83] both the automatic and discretionary defences to deportation,[84] and the procedure to be followed in both exclusion and deportation hearings.[85]

As a result, the bulk of the administrative regulations in this area tend to be ministerial. Consequently, cases in which the outcome turns on the meaning of the regulations are relatively infrequent. Further, since the regulations tend to be extremely specific and refined, there is relatively little latitude for reasonable disagreement about their meaning. Thus, interpretation of immigration regulations is a less important area of law in the United States than it is in the United Kingdom.

For those reasons, detailed analysis of the way in which American courts interpret administrative immigration regulations would be of limited utility. Nevertheless, two additional points should be made. The first concerns the legal

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79. 8 U.S.C. ss. 1151(a), 1152(a).
80. Ibid., s. 1153.
81. Ibid., s. 1182(a).
82. E.g., ibid., ss. 1182(b,c,d,g,h,i).
83. Ibid., s. 1251(a).
84. E.g., ibid., ss. 1251(b,f), 1254, 1255, 1259.
85. Ibid., ss. 1226(a) (exclusion), 1252(b) (deportation).

effect of the immigration regulations. Unlike the Immigration Rules in the U.K., which have been held to lack the force of law,[86] the American regulations in the area of immigration are generally binding on the agencies issuing them.[87] Second, a regulation will be construed, where practicable, so as to avoid constitutional doubts.[88] Like the principle that statutes should be interpreted to avoid constitutional doubts,[89] this doctrine is somewhat analogous to the British presumption of regularity.[90]

D. Statutory Interpretation

Today the greatest number of court decisions in the immigration area involve claims that administrative decisions have violated statutory provisions.[91] Discussion here will begin with some general observations about the ways in which courts have described their role in these cases. An in-depth analysis of two specific statutory provisions that have spawned

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86. See pp. 76-103 above.
87. Jay v. Boyd, 351 U.S. 345 (1956) (Court assumed regulation binding, but held not violated); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Bridges v. Wixon, 326 U.S. 135 (1945). See also Service v. Dulles, 354 U.S. 363 (1957); In re Escalona, 311 F. Supp. 648 (D. Guam 1970).
But the courts differ over whether the non-statutory I.N.S. Operating Instructions have the force of law: compare Nicholas v. I.N.S., 590 F.2d 802, at 805-08 (9th Cir. 1979) (yes); Loera v. Nutis, 543 F. Supp. 249 (E.D. Mo. 1982) (yes, but only on narrow grounds) with Pasquini v. Morris, 700 F.2d 658 (11th Cir. 1983) (no); Dong Sik Kwon v. I.N.S., 646 F.2d 909, at 918-19 (5th Cir. 1981) (en banc) (no); Wan Chung Wen v. Ferro, 543 F. Supp. 1016 (W.D.N.Y. 1982) (no).
88. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).
89. See pp. 148-49 below.
90. See ch. I, s. G above.
91. Gordon & Rosenfield, note 1 above, s. 8.12a.

especially frequent litigation will follow. Lastly, some conclusions concerning statutory interpretation in immigration cases will be drawn.

Decisions of the Board of Immigration Appeals will be included in this discussion. As in the United Kingdom, interpretation of law is the only area in which the functions of the B.I.A. and the courts can be compared, for in the areas of factfinding and discretion, the judicial role is much more limited than that of the Board.[92] Within the area of legal interpretation, the range of possible comparisons is further limited, since in the United States the Board lacks the power to declare statutes or regulations unconstitutional.[93] Thus it is principally within the area of statutory interpretation that the comparison between the Board and the courts will be the most feasible.

General Observations

The tone of the statutory interpretation cases in this area was expressed colourfully by the Ninth Circuit:

> [W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say.[94]

One statutory construction rule of particular significance in immigration is that a court should not pass on constitutional questions when there is an alternative ground

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92. Compare pp. 223-24 above (scope of review by courts) with p. 455 n. 119 below (de novo review by B.I.A.).
93. See p. 442 n. 56 below.
94. Yuen Sang Low v. A.-G., 479 F.2d 820, at 821 (9th Cir. 1973).

for resolving the case. Applying that principle, the Supreme Court has frequently stretched language in favour of aliens when contrary interpretations would have raised troublesome constitutional issues.[95]

The most important rule of statutory interpretation peculiar to immigration was one declared by the Supreme Court in Fong Haw Tan v. Phelan.[96] Noting the drastic nature of a deportation order, the Court held that all doubts concerning the meaning of a deportation provision must be resolved in favour of the alien. That rule has since been invoked in numerous deportation cases.[97] Until recently, it had been applied with particular force when the dispute centred around the meaning of a statutory prerequisite to the exercise of discretion, since in those cases, a liberal reading would

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95. E.g., Rosenberg v. Fleuti, 374 U.S. 449, at 451 (1963) (see also pp. 152-66 below); Wong Yang Sun v. McGrath, 339 U.S. 33, at 49 (1950); Yamataya v. Fisher, 189 U.S. 86, at 100-101 (1903). See also United States v. Vuitch, 402 U.S. 62, at 70 (1970) (outside immigration context).

96. 333 U.S. 6 (1948).

97. E.g., I.N.S. v. Errico, 385 U.S. 214, at 225 (1966); Bonetti v. Rogers, 356 U.S. 691, at 699 (1958); Barber v. Gonzales, 347 U.S. 637, at 642-43 (1954); Lennon v. I.N.S., 527 F.2d 187, at 193 (2d Cir. 1975); Garcia-Gonzales v. I.N.S., 344 F.2d 804, at 810 (9th Cir. 1965). For analogous approaches to naturalization cases, see, e.g., Girouard v. United States, 328 U.S. 61, at 64 (1946). See also the 'good moral character' cases, described in Gordon & Rosenfield, note 1 above, s. 15.15. The early naturalization cases, however, had often construed doubts against the applicant: e.g., United States v. Macintosh, 283 U.S. 605, at 626 (1931). Accord, United States v. Bland, 283 U.S. 636 (1931); United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Manzi, 276 U.S. 463 (1912). See also Schneiderman v. United States, 320 U.S. 118 (1943) (doubts in denaturalization statute construed in favour of citizen).

merely expand the Attorney General's discretion to suspend deportation.[98] Recent Supreme Court decisions, however, have cut back sharply on that doctrine. They are discussed below.[99] Together with other important decisions,[100] they illustrate that the liberality is not universal.

A final general comment is that, in the United States, a treaty is part of the supreme law,[101] and thus occupies the same level as a federal statute. For that reason, just as one statute would supersede a prior statute, a statute will clearly supersede a prior treaty.[102] Nevertheless, as in the U.K.,[103] a statute will generally be construed, whenever practicable, so as not to conflict with a prior treaty.[104]

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98. 329 F.2d 812, at 816-17 (9th Cir. 1964). See, e.g., Marino v. I.N.S., 537 F.2d 686, at 691 (2d Cir. 1976); Wadman v. I.N.S., 329 F.2d 812, at 816-17 (9th Cir. 1964). For other especially liberal interpretations, see, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)(a liberal purposive approach); North American Industries v. Feldman, 722 F.2d 893 (1st Cir. 1983); Hill v. U.S.I.N.S., 714 F.2d 1470 (9th Cir. 1983). But Hill must be contrasted with In re Longstaff, 716 F.2d 1439 (5th Cir. 1983).

99. See pp. 257-58 (Phinpathya), 270-71 (Wang), below.

100. See especially Reid v. I.N.S., 420 U.S. 619 (1975), discussed in E. Griffith, Exclusion and Deportation: Some Avenues of Relief for the Alien (1977) 15 San Diego L. Rev. 79, at 80-92. See also Leng May Ma v. Barber, 357 U.S. 185 (1958); Rogers v. Quan, 357 U.S. 193 (1958).

101. U.S. Const. art. VI.

102. Moser v. United States, 341 U.S. 41 (1951); Whitney v. Robertson, 124 U.S. 190 (1888); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

103. See pp. 121-22 above.

104. Cheung Sum Shee v. Nagle, 268 U.S. 336, at 345 (1925). But the treaty itself will be enforced by a court only if construed to be self-executing: Valentine v. United States ex rel. Neidecker, 299 U.S. 5, at 10 (1936); United States v. Rauscher, 119 U.S. 407, at 417-18 (1886); Foster v. Neilson, 27 U.S. (2 Pet.) 253, at 314 (1829); Sei Fujii v. State, 38 Cal. 2d 718, at 738, 242 P.2d 617 (1952).

With that general background, it will now be useful to consider the ways in which the courts and the B.I.A. have approached specific issues of statutory construction. The first issue to be treated here will be the meaning of the statutory definition of "entry". The second will be the interpretation of a provision empowering the Attorney General to confer discretionary relief.

The Meaning of 'Entry' and the Fleuti Doctrine[105]

Many consequences flow from the determination of whether an alien has made an 'entry' into the United States. One is that the alien making an entry is at that time subject to all the statutory exclusionary provisions.[106] In addition, an excludable alien who manages to enter despite being excludable will immediately become deportable as an alien who was excludable 'at the time of entry'.[107] Further, several grounds for deportation require the occurrence of specified events within a certain number of years after 'entry'.[108]

In most cases the 'entry' determination is straightforward. The chief difficulty arises when an alien already present in the United States departs temporarily and subsequently returns. In those instances the issue is whether the alien's return constitutes an entry, within the meaning of the statute.

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105. See generally Note, Rosenberg v. Fleuti: Reentry of Aliens Remains Unsettled (1981) 56 Notre Dame Lawyer 696; Comment, Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform (1975) 13 San Diego L. Rev. 192.
106. 8 U.S.C. s. 1182(a).
107. Ibid., s. 1251(a)(1).
108. Ibid., ss. 1251(a)(3,4,8,13,15).

In several older cases, lacking statutory guidance as to the definition of 'entry', the courts ruled that an alien makes an entry every time he or she comes into the United States from a foreign country -- regardless of the duration of lawful American residence or the length of the foreign visit.[109] The harshness of the practical consequences, however, eventually induced the courts to carve out two exceptions. In DiPasquale v. Karnuth,[110] a long-term resident alien taking an overnight train from one American city to another later learned he had passed through a short stretch of Canadian territory en route. Shortly thereafter he was convicted of robbery and ordered deported under a provision requiring that the conviction have occurred within five years after 'entry'. For the entry element the government relied on DiPasquale's return from Canada. The Second Circuit, reasoning that Congress could not have intended for a fate as extreme as deportation to hinge on something so fortuitous, ruled that when an alien's departure from the United States was unintentional, the return does not constitute an entry for immigration purposes.

A second exception was soon recognised for involuntary departure. In Delgadillo v. Carmichael,[111] the court held that a permanent resident alien who had been sent to Cuba under military orders did not make an 'entry' when he returned to

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109. E.g., United States ex rel. Claussen v. Day, 279 U.S. 398 (1929); Lewis v. Frick, 233 U.S. 291 (1914); Ward v. DeBarros, 75 F.2d 34 (1st Cir. 1935); Taguchi v. Carr, 62 F.2d 307 (9th Cir. 1932).
110. 158 F.2d 878 (2d Cir. 1947).
111. 332 U.S. 388 (1947).

the U.S. Other decisions soon followed Delgadillo.[112]

When the Immigration and Nationality Act was passed in 1952, Congress for the first time included a statutory definition of 'entry'. That definition, which has given rise to the cases soon to be discussed, provided:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place . . ., except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry . . . if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place . . . was not intended or reasonably to be expected by him or his presence . . . was not voluntary: . . .[113]

That the statutory definition had codified the exceptions created by DiPasquale and Delgadillo was clear. The question soon arising, however, was whether the statutory exceptions were limited to the facts of those cases. That question was answered in the leading Supreme Court decision of Rosenberg v. Fleuti.[114]

In Fleuti a permanent resident alien had made a two-hour visit to Mexico. After his return the government sought to deport him as an alien who had been excludable at the time of entry.[115] The Government argued that, as a homosexual, Fleuti was within the statutory exclusion of aliens having a 'psychopathic personality',[116] and that he had therefore been inadmissible when he returned from Mexico.

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112. E.g., Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948); Yukio Chai v. Bonham, 165 F.2d 207 (9th Cir. 1947); see also In re Bauer, 10 I. & N. Dec. 304 (1963).
113. 8 U.S.C. s. 1101(a)(13) (emphasis added).
114. 374 U.S. 449 (1963).
115. 8 U.S.C. s. 1251(a)(1).
116. Ibid., s. 1182(a)(4).

The Court cited the statutory exception concerning a return from a departure that was 'not intended'. It noted that Fleuti could not have been deported had he remained in the United States. Examining the Congressional intent behind the exception, the Court then concluded that Congress' main concern was to prevent the situation in which the rights of a returning resident depended on an event as 'fortuitous and capricious'[117] as Fleuti's two-hour trip to Mexico. The Court therefore held that the exception for unintended departures referred to 'an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence'.[118] A visit abroad would not satisfy that description if it were 'innocent, casual, and brief'.[119] More specifically, in determining whether a foreign visit would subject the alien to the consequences of an entry upon his return, courts were to consider the duration of the absence, whether 'the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws', and whether the alien had to procure travel documents for his trip.[120] The last factor was included because an alien who must obtain travel documents can be assumed to have considered the implications of leaving the country.[121]

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117. 374 U.S. at 460.
118. Ibid., at 462. The Supreme Court's decision was by a 5-4 vote.
119. Ibid., at 461.
120. Ibid., at 462.
121. Ibid.

The B.I.A. has generally applied the Fleuti doctrine as restrictively as possible. In In re Karl,[122] for example, a permanent resident alien took a vacation in Mexico City for approximately ten days. On his return he claimed United States citizenship to avoid waiting in the alien inspection queue. Less than five years later, Karl was convicted of a crime involving moral turpitude, and the I.N.S. instituted deportation proceedings on the ground that the crime had occurred within five years after this 'entry'.

The Board held that the alien's intent to resume his American residence was not in itself sufficient to trigger the Fleuti doctrine. It pointed out also that Karl's ten-day trip deep into the interior of Mexico was a more significant departure than Fleuti's two-hour visit to Tijuana, a border town. But the Board also emphasised several times, often sarcastically, that on his foreign vacations Karl had repeatedly claimed American citizenship to expedite his return.[123] In addition, it listed his many juvenile offences committed in the United States prior to the trip, and stressed he had spent several years in penal institutions.[124]

Although Fleuti could certainly be distinguished on the basis of duration, the Board's analysis made it evident that personal feelings about the deportee were impeding its objective resolution of the dispute. The duration of the visit

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122. 10 I. & N. Dec. 480 (1964).
123. Ibid., at 480, 481, 483.
124. Ibid.

was a perfectly legitimate factor to consider, but neither the alien's prior criminal record nor his previous trips outside the country were germane to whether this particular visit had been significant. Although perhaps those factors would have been relevant had the issue before the Board been one of discretion, their connection to the interpretation of the statutory entry definition is not apparent.

Soon after Karl the Board decided In re Giumaraes.[125] A permanent resident alien visited his parents in Portugal for one month. Upon his return he was ordered excluded as an alien ineligible for citizenship.[126] Arguing that the departure was not intended to be meaningfully interruptive of his residence, Giumaraes pointed out that he was aged 55, that he had left behind his wife, child, home, business, and property, and that as a result it was obvious he did not intend to disrupt or jeopardise his resident status. He further noted the innocence of the purpose. The Board nonetheless held Fleuti inapplicable, reasoning that one month was too long an absence and that he had procured a passport and tickets. Not considered was the rationale behind Fleuti: that Congress would not wish to make the continuation of residence dependent on an

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125. 10 I. & N. Dec. 529 (1964).
126. See 8 U.S.C. s. 1182(a)(22).

event unrelated to any possible purpose. Several other B.I.A. decisions followed similar patterns.[127]

In contrast, the courts have applied the Fleuti time factor liberally. In cases in which the B.I.A. had found Fleuti inapplicable, the courts have frequently reversed, even though the durations of the absences far exceeded the two-hour visit in Fleuti.[128] In one particular case, even a six-month absence by an alien whose original entry had been illegal was held to come within the doctrine.[129]

A similar contrast is evident in cases applying the purpose factor. A steady stream of B.I.A. decisions have interpreted the purpose factor to encompass a broad range of undesirable acts, and have assigned virtually dispositive weight to the presence of an undesirable purpose when it does appear.[130] In In re Kolk,[131] for example, a

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127. In addition to the B.I.A. decisions that gave rise to the court decisions considered below, see In re Abi-Rached, 10 I. & N. Dec. 551 (1964)(firm rule adopted), overruled in In Re Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (1965).

128. E.g., Itzcovitz v. Selective Service Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971); Git Foo Wong v. I.N.S., 358 F.2d 151 (9th Cir. 1966); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir. 1965). Contra, Munoz-Casarez v. I.N.S., 511 F.2d 947 (9th Cir. 1975).

129. Toon Ming Wong v. I.N.S., 363 F.2d 234 (9th Cir. 1966).

130. See, e.g., In re Yanez-Jacquez, 13 I. & N. Dec. 449 (1970); In re Wood, 12 I. & N. Dec. 170 (1967); In re Alvarez-Verduzco, 11 I. & N. Dec. 625 (1966); In re Bilbao-Bastida, 11 I & N. Dec. 615 (1966); In re Corral-Fragoso, 11 I. & N. Dec. 478 (1966); In re Scherbank, 10 I. & N. Dec. 522 (1964); cf. In re Caudillo-Villalobos, 10 I. & N. Dec. 15 (1965)(construing special statutory proviso).

131. 11 I. & N. Dec. 103 (1965).

long-term permanent resident alien twice visited Mexico for a few hours, each time falsely claiming citizenship upon his return to expedite his border crossing. Kolk was ordered deported for having made an entry without inspection. The Board held Fleuti inapplicable on the ground that the purpose of evading inspection was contrary to the policy of the immigration laws.

The Board's rationale does not appear to distinguish Fleuti sufficiently. In Fleuti an alien who was assumed by the court to be inadmissible under the substantive law had nevertheless crossed into the United States. In Kolk, an admissible alien came into the United States. To distinguish the two cases, it would therefore be necessary to assume that the policy of excluding aliens whom Congress had declared undesirable was less important than that of requiring perfectly admissible aliens to undergo inspection. Rather than rely solely on the Fleuti language, the Board might instead have considered its rationale: that deportation should not hinge on an event as insignificant as a foreign visit of a few hours.

In contrast with Kolk is the court decision in Yanez-Jacquez v. I.N.S.[132] A permanent resident alien, visiting in Mexico, had been robbed and assaulted. The next day he returned with an ice-pick to regain his property by force. Unable to locate his assailants,

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132. 440 F.2d 701 (5th Cir. 1971).

he crossed back to the American side of the river without passing through the inspection point. He was apprehended by immigration officers and released. Shortly thereafter he committed a crime involving moral turpitude, was convicted, and was ordered deported. To support the charge, it was necessary to find that his return from Mexico had been an 'entry'. The B.I.A. had held it was, emphasising that his purpose had been to commit assault, contrary to immigration policy.

The Fifth Circuit held the Board had erred in treating the purpose factor as controlling. The court ruled that the purpose of the visit was to be balanced against its short duration and against the fact that the alien had made many prior visits to Mexico, from which he had always returned. Concluding that the alien had had no intent to interrupt meaningfully his status as a permanent resident, the court quashed the deportation order.

The Board and the courts have differed in their application of the purpose factor in one other respect. The Fleuti court had said that, if the purpose of 'leaving the country' is contrary to the policy of the immigration laws, that fact should weigh in favour of finding a meaningful interruption.[133] Suppose an alien leaves the country for an innocent purpose, but once outside commits an act contrary to the policy of the immigration laws. Does that

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133. 374 U.S. at 462.

act fall within the purpose factor? The Board has consistently refused to apply Fleuti to cases involving improper purposes, without regard to whether the offending purpose had been formed before or after departure from the United States.[134] The courts, in contrast, are divided on that question.[135]

Another aspect of the Fleuti doctrine in which the approach of the Board has differed markedly from that of the courts has been the extension of the Fleuti principle beyond the problem of defining 'entry'.[136] The extension issue has arisen most frequently in connection with the statutory provision for suspension of deportation. That provision gives the Attorney General the discretion to suspend the deportation of an otherwise deportable alien who meets certain statutory prerequisites, one of which is 'continuous physical presence' in the United States for seven years.[137]

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134. In re Yanez-Jacquez, 13 I. & N. Dec. 449 (1970); In re Wood, 12 I. & N. Dec. 170 (1967); In re Alvarez-Verduzco, 11 I. & N. Dec. 625 (1966); In re Corral-Fragoso, 11 I. & N. Dec. 478 (1966); In re Kolk, 11 I. & N. Dec. 103 (1965); In re Scherbank, 10 I. & N. Dec. 522 (1964); In re Karl, 10 I. & N. Dec. 480 (1964).

135. E.g., compare Vargas-Banuelos v. I.N.S., 466 F.2d 1371 (5th Cir. 1972) with Palatian v. I.N.S., 502 F.2d 1091 (9th Cir. 1974). But see Laredo-Miranda v. I.N.S., 555 F.2d 1242 (5th Cir. 1977). See also Fidalgo-Velez v. I.N.S., 697 F.2d 1026 (11th Cir. 1983)(purpose improper right from start); Longoria-Castenada v. I.N.S., 548 F.2d 233 (8th Cir. 1977); cf. Miramontes v. I.N.S., 643 F.2d 573 (9th Cir. 1980).

136. See, e.g., Maldonado-Sandoval v. I.N.S., 518 F.2d 278 (9th Cir. 1975). But now see Landon v. Plasencia, 103 S.Ct. 321 (1982), narrowed by Joshi v. Dist. Director, 720 F.2d 799 (4th Cir. 1983).

137. 8 U.S.C. s. 1254(a)(1).

In Wadman v. I.N.S.,[138] a permanent resident alien applied for suspension of deportation. The B.I.A. denied the application on the ground that the alien's previous five-day vacation in Mexico had broken the requisite continuity of physical presence. The Ninth Circuit, relying on Fleuti, reversed. The court cited reasoning adopted in both Fleuti and DiPasquale, to the effect that Congress could not have intended for deportation to turn on an event as 'meaningless and irrational' as a brief vacation abroad.[139] The test announced in Wadman for determining whether a foreign visit breaks the continuity required for suspension of deportation was whether the interruption of residence, when balanced against the consequences of finding a break in the continuity, is significant as measured by the guidelines set out in Fleuti.

Several decisions, again reversing the B.I.A., followed Wadman.[140] Some decisions expanded it further.[141] The most significant extension of Wadman came in Kamheangpatiyooth v. I.N.S.[142] Once again the Court of Appeals reversed a B.I.A. decision denying an application for suspension. The court, focusing on the Congressional purpose of ameliorating

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138. 329 F.2d 812 (9th Cir. 1964).
139. Ibid., at 815.
140. In addition to the cases discussed below, see Heitland v. I.N.S., 551 F.2d 495, at 500-04 (2d Cir. 1977) (though ultimately holding that return by fraud made interruption meaningful); Fidalgo-Velez v. I.N.S., 697 F.2d 1026 (11th Cir. 1983) (same).
141. See especially Toon Ming Wong v. I.N.S., 363 F.2d 234 (9th Cir. 1966); Git Foo Wong v. I.N.S., 358 F.2d 151 (9th Cir. 1966); cf. McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960) (pre-Fleuti, but analogous to Wadman).
142. 597 F.2d 1253 (9th Cir. 1979).

harsh results and unsuspected risks 'that would flow from a literal and rigid application' of the exclusion and deportation provisions, articulated a new test for continuous presence that it felt would reflect the degree of the alien's commitment, roots, and future expectations. The court said:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.[143]

Several cases, following this purposive test, similarly reversed B.I.A. decisions that had applied the Fleuti factors mechanically in finding interruptions to the requisite continuity.[144]

The extension of the Fleuti principle to suspension of deportation -- a twenty-year process that began with Wadman -- came to an end when the Supreme Court decided I.N.S. v. Phinpathya.[145] Once more the B.I.A. found no continuous physical presence and, once more, the Court of Appeals reversed.[146] This time, the Supreme Court, which could quite easily have reversed the Court of Appeals on the narrow ground that the facts rendered Wadman inapplicable in this case, instead overruled Wadman entirely[147] -- even though, as

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143. Ibid., at 1257.
144. E.g., Sida v. I.N.S., 665 F.2d 851 (9th Cir. 1981); Gallardo v. I.N.S., 624 F.2d 85 (9th Cir. 1980); Sik-Hung Chan v. I.N.S., 610 F.2d 651 (9th Cir. 1979).
145. 104 S.Ct. 584 (1984).
146. 673 F.2d 1013 (9th Cir. 1982).
147. 104 S.Ct. at 592 n.13.

observed by the dissent, the Government itself had not sought so drastic a holding.[148]

To hold Fleuti inapplicable to suspension of deportation, the majority said they should apply the 'plain meaning of [the suspension provision], however severe the consequences'.[149] They distinguished the liberal interpretation in Fleuti on the basis that the court in Fleuti was construing a statutory clause enacted specifically to ameliorate the harshness of the entry definition. Here, the majority contended, the court was interpreting a limitation on discretionary relief.[150] The distinction seems unconvincing, however, when it is considered that in each case the court was interpreting one prerequisite to a statutory provision granting relief from harsh consequences -- in Fleuti, the requirement that departure be unintended and in Phinpathya the requirement that physical presence be continuous. Finally, the majority cited legislative history that favoured a literal interpretation of the word 'continuous', while ignoring legislative history favouring a contrary conclusion.[151] Phinpathya represents a remarkable departure from the generally liberal and purposive interpretations adopted in the Fleuti line of cases.

The 212(c) Cases

Section 212(c) of the Immigration and Nationality Act provides:

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148. Ibid., at 593.
149. Ibid., at 590 (emphasis added), quoting from Jay v. Boyd, 351 U.S. 345, at 357 (1956).
150. 104 S.Ct. at 591.
151. Compare ibid., at 589-90 (majority) with 594-97 (dissent).

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to [most of the grounds for exclusion].[152]

Several cases have concerned the requirement of 'a lawful unrelinquished domicile of seven consecutive years'. Although space does not permit a comprehensive description of the issues generated by section 212(c),[153] a brief summary will reveal patterns similar to, but not quite as pronounced as, those appearing in the Fleuti cases.

The B.I.A., purporting to follow the 'plain language' of the provision, has held not only that the alien's present domicile must be lawful, unrelinquished, and of seven years duration, but also that the domicile must have been lawful for the entire seven-year period.[154] On the same issue, the courts have split.[155] The courts have similarly differed on whether the period of lawful domicile ceases when an

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152. 8 U.S.C. s. 1182(c).
153. See the articles cited in notes 155, 162 below.
154. In re S., 5 I. & N. Dec. 116 (B.I.A., 1953). Accord, In re Anwo, 16 I. & N. Dec. 293 (B.I.A., 1977) (declining to follow Lok I) (note 155 below); In re Lok, 15 I. & N. Dec. 720 (B.I.A., 1976).
155. Compare Tim Lok v. I.N.S. (Lok I), 548 F.2d 37 (2d Cir. 1977) (seven-year requirement refers to alien's total domicile, not merely lawful portion of it) with contrary holdings in Chiravacharadhikul v. I.N.S., 645 F.2d 248 (4th Cir. 1981); Castillo-Felix v. I.N.S., 601 F.2d 459, at 467 (9th Cir. 1979). The restrictive view has been criticised: e.g., Comment, Lawful Domicile under Section 212(c) of the Immigration and Nationality Act (1980) 47 U. Chi. L. Rev. 771; Recent Development, Immigration--Lawful Unrelinquished Domicile (1979) 12 Vanderbilt J. Trans. L. 1009.

administratively final deportation order is entered.[156]

Finally, several issues have arisen concerning the applicability of section 212(c) outside the context of exclusion. On its face the provision declares only that, if certain conditions are met, the Attorney General has the discretion to admit the alien without regard to specified grounds of exclusion. Frequently, however, the applicability of section 212(c) to deportation proceedings has been the subject of dispute. The B.I.A., opting for a literal interpretation, was originally unsympathetic to those arguments.[157] Only if the deportation ground was the alien's inadmissibility at time of entry, so that the inadmissibility could be waived nunc pro tunc, would the B.I.A. apply section 212(c).[158] If an alien had physically remained in the United States for the full seven years, section 212(c) would be inapplicable, even if the provision would have applied had the alien left and returned.[159] That anomaly persuaded the Second Circuit in

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156. Compare Wall v. I.N.S., 722 F.2d 1442 (9th Cir. 1984)(no); Marti-Xiques v. I.N.S., 713 F.2d 1511 (11th Cir. 1983)(no), now vacated for rehearing, 724 F.2d 1463 (1984) with Tim Lok v. I.N.S., 681 F.2d 107 (2d Cir. 1982)(Lok II)(yes). For a restrictive B.I.A. decision on a related issue, see In re M., 7 I. & N. Dec. 140 (1956).

157. In re M., 5 I. & N. Dec. 642 (B.I.A., 1954); In re T., 5 I. & N. Dec. 389 (B.I.A., 1953).

158. In re F., 6 I. & N. Dec. 537 (B.I.A., 1955); In re S., 6 I. & N. Dec. 392 (B.I.A., 1954), aff'd by A.-G. (1955); In re M., 5 I. & N. Dec. 598 (B.I.A., 1954). See also In re G.A., 7 I. & N. Dec. 274 (B.I.A., 1956). On the issue of whether section 212(c) may be invoked to make an alien 'otherwise admissible' for purposes of adjustment of status (per 8 U.S.C. s. 1255), the B.I.A. decisions seem contradictory: compare In re R.E., 9 I. & N. Dec. 103 (B.I.A., 1960) with In re Smith, 11 I. & N. Dec. 325 (B.I.A., 1965).

159. In re Arias-Uribe, 13 I. & N. Dec. 696 (B.I.A., 1971).

Francis v. I.N.S.[160] to reach a contrary conclusion, though on constitutional grounds. The Francis decision, in turn, prompted the B.I.A. to hold in subsequent cases that section 212(c) does not require an actual departure and return.[161] Somewhat analogous decisions have been reached by other courts.[162]

Two major differences in the approaches generally taken by the Board and the courts emerge from the foregoing cases. The courts seem far more willing than the B.I.A. to examine the policy reasons underlying statutory requirements, in order to gauge their applicability to particular issues of statutory construction. In particular, the courts appear anxious to avoid interpretations that would cause the result of the case to hinge on an event unrelated to any possible Congressional purpose.

That desire to minimise arbitrariness has played a crucial part in many of the judicial decisions discussed in this section. It formed the foundation for the pre-Fleuti

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160. 532 F.2d 268 (2d Cir. 1976).
161. In re Hom, 16 I. & N. Dec. 112 (B.I.A., 1977); In re Silva, 16 I & N. Dec. 26 (B.I.A., 1976).
162. See Vissian v. I.N.S., 548 F.2d 325 (10th Cir. 1977). The Ninth Circuit resisted this conclusion for several years with respect to one sub-category of deportation cases: Bowe v. I.N.S., 597 F.2d 1158 (9th Cir. 1979); Nicholas v. I.N.S., 590 F.2d 802 (9th Cir. 1979); Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974); Arias-Uribe v. I.N.S., 466 F.2d 1198 (9th Cir. 1972). These decisions have been criticised vigorously: B.O. Hing, The Ninth Circuit: No Place for Drug Offenders (1980) 10 Golden Gate L. Rev. 1; see generally Griffith, note 100 above, at 93-97. Now, however, the Ninth Circuit follows Francis: see Tapia-Acuna v. I.N.S., 640 F.2d 223 (9th Cir. 1981). See also Marti-Xiques v. I.N.S., 713 F.2d 1511 (11th Cir. 1983), where the court ranged far beyond the literal wording of section 212(c) (but decision now vacated for rehearing, 724 F.2d 1463 (11th Cir. 1984)).

decisions refusing to find an entry in the cases of aliens whose departures had been involuntary or unintended. It lay at the heart of the Fleuti decision itself, the Supreme Court refusing to permit deportation to turn on a brief vacation irrelevant to any possible governmental objective. The judicial progeny of Fleuti constantly examined the rationale of the Fleuti decision to ascertain whether it should be extended to variants of the fact situation presented in that case, particularly in the context of suspension of deportation. The same concern to assure that such drastic consequences as exclusion and deportation would depend solely on events pertinent to a valid legislative aim underlay several important judicial decisions interpreting section 212(c), a concern reaching constitutional proportions in Francis.

The intensity of that concern is evident from the Fleuti decision. The court could have avoided the issue of what constitutes an entry by interpreting the term 'psychopathic personality' not to include homosexuality. Such an approach would not only have fulfilled its goal of avoiding the constitutional question of vagueness, but also have obviated the need to place on the statute a construction at variance with its literal language. Despite the ready availability of such an alternative, the Supreme Court voluntarily based its holding on the more broadly applicable entry definition, a result that it felt would eliminate the arbitrariness inherent in permitting deportation to depend on a fortuitous event. At the same time, to make certain that its holding would not be

employed when the foreign visit did have significance, it included, as one factor, whether the purpose of the visit had been contrary to some policy of the immigration laws, even though the statutory language being construed made no mention of such a limitation.

In contrast, the Board has frequently tended to rely largely on the literal language of either the statute or the court's opinion in Fleuti. Thus, mechanical applications of the time and travel documents factors of the Fleuti decision have resulted in the Board declining to apply the Fleuti doctrine in situations where its rationale of avoiding arbitrariness was at least arguably applicable. In the context of section 212(c), the same phenomenon can be observed in cases construing the requirement that the alien's domicile be 'lawful' and in cases assessing the applicability of section 212(c) to deportation proceedings.

By focusing on the pertinent policies and the presence of arbitrariness, the courts have tended to reach results that are more satisfying not only to the parties involved in the individual case, but also to the bodies affected by the prospective applications of the decisions. In some instances the judicial decision has carried over to the Congressional level. The holdings of the pre-Fleuti cases, DiPasquale and Delgadillo, have been affirmatively codified. That the Supreme Court's 1963 decision in Fleuti has never been superseded by amendment to the statutory entry definition provides further evidence of Congressional satisfaction with the expansive

interpretation adopted by that case. The same can be said of the many judicial decisions extending the Fleuti doctrine to other contexts.

The reasoned analyses of court decisions have also influenced the Board to alter its own literal readings of statutory language. The court's decision in Wadman, applying Fleuti to an absence of five days, prompted the Board to change its view that Fleuti was limited to durations not appreciably longer than two hours.[163] In a similar way, the constitutional decision in Francis persuaded the Board to expand its interpretation of section 212(c).

A second major difference between the approaches of the Board and the courts has concerned the relative degrees of sympathy with which the claims of aliens have been received.[164] The courts have generally been more sensitive to the harshness that would accompany a narrow reading of an ameliorative statutory provision. The Board, placing less value on the importance of the individual interest at stake, has tended to read section 212(c) fairly restrictively, and to apply the Fleuti doctrine with particular reluctance. In Karl, for example, the Board displayed its strong negative feelings

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163. See In re Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (B.I.A., 1965). See also In re Rangel, 15 I. & N. Dec. 789 (B.I.A., 1976), voluntarily adopting the position of Maldonado-Sandoval v. I.N.S., 518 F.2d 278 (9th Cir. 1975).

164. These two differences need not work in the same direction. For example, in recognising that a visit intended to accomplish an object contrary to the policy of the immigration laws would undercut the Fleuti doctrine, the Supreme Court increased the likelihood of a result adverse to the alien.

toward the alien appellant, citing a number of extraneous factors in holding Fleuti inapplicable. In other cases the Board has resorted to unusually strained statutory interpretations to reach results adverse to the aliens involved.

Both the above differences seem to be more pronounced in the Fleuti cases than in the 212(c) cases. As the above discussion demonstrates, there have been few exceptions in the Fleuti cases to the observations that the courts have applied the doctrine in an expansive and policy-oriented fashion and that the Board has applied it in a restrictive and literal way. In the 212(c) context, however, numerous exceptional cases have deviated from those general rules.

One possible explanation for this latter disparity is a feature that was noted earlier.[165] A broad interpretation of the prerequisites to discretionary relief merely increases the scope of the Attorney General's discretion. Thus, if the Board errs on the side of holding section 212(c) applicable, it does nothing more than expand the scope of its own discretion; in cases of doubtful merit the power need not be exercised. In the Fleuti cases, in contrast, entry is usually a required element of the exclusion or deportation charge. Consequently, a finding of no entry ordinarily disposes of the case.

One qualification should be added here. In most cases, the issues presented will be sufficiently clear that the Board

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165. See pp. 244-45 above.

and the courts are likely to agree. It is only in close cases that the differences discussed here are likely to surface, and even then the correlations noted will be less than exact.

E. Review of the Exercise of Discretion[166]

The American immigration laws contain numerous provisions authorising the exercise of administrative discretion in cases possessing specified attributes.[167] Judicial review of that discretion has been exhaustively treated in other sources.[168] Consequently, only a few observations will be made here.

It is clear that courts can review the administrative immigration decision to assure that discretion was in fact

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166. For definitions of discretion, see p. 12 & n. 10 above. For general treatment of the review of administrative discretion in the United States, see 2 K.C. Davis, Administrative Law Treatise (2d ed. 1979), chs. 8, 9; K.C. Davis, Discretionary Justice, A Preliminary Inquiry (1969); L.L. Jaffe, Judicial Control of Administrative Action (1965); A.D. Sofaer, Judicial Control of Informed Discretionary Adjudication and Enforcement (1972) 72 Col. L. Rev. 1293.

167. The most important are 8 U.S.C. ss. 1182(c), 1182(d)(5), 1182(h), 1182(i), 1201(a), 1253(h), 1254(a), and 1254(e).

168. E.g., K.C. Davis, Administrative Law, Cases - Text - Problems (6th ed., 1977), at 460-68; Gordon & Rosenfield, note 1 above, ss. 8.14-8.17; S. Loue, What Went Wrong with Wang?: An Examination of Immigration and Naturalization Service v. Wang (1982) 20 San Diego L. Rev. 59; S.O. Ludd, Administrative Discretion and the Immigration and Naturalization Service: To Review or Not to Review (1983) 8 Thurgood Marshall L. Rev. 65; M.A. Roberts, The Exercise of Administrative Discretion under the Immigration Laws (1975) 13 San Diego L. Rev. 144; Developments in the Law, Immigration Policy and the Rights of Aliens (1983) 96 Harv. L. Rev. 1286, at 1395-99; Comment, Suspension of Deportation: A Revitalized Relief for the Alien (1980) 18 San Diego L. Rev. 65; Note, Access to Discretionary Relief under the Immigration and Nationality Act (1980) 12 Lawyer of Americas 461; Comment, Suspension of Deportation: Illusory Relief (1976) 14 San Diego L. Rev. 229.

exercised.[169] One issue arising in this context is whether the repository of the discretion has acted under the dictation of a superior. In United States ex rel. Accardi v. Shaughnessy,[170] the B.I.A. had denied a statutorily eligible alien the discretionary remedy of suspension of deportation. Before deciding, the Board had received from the Attorney General a list of undesirable aliens whom he wished to deport. The Court held that the list, which included the name of the alien in question, had prevented the Board from exercising the independent discretion required of it by the Attorney General's own regulations. The judicial remedy, however, was merely to remand the case to the Board for a fresh determination. When the Board reasserted its refusal to award discretionary relief, the Court accepted the Board decision as being free of any undue influence from its superior.[171]

The failure to exercise discretion can also result from the adoption of general rules that exclude adequate consideration of individual circumstances. Davis usefully contrasts a Ninth Circuit case in which rigid rules were held to prevent the exercise of true discretion with a Second Circuit case in which rules limiting discretion were held to represent legitimate determinations that certain factors were sufficiently important

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169. See, e.g., United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Silverman v. Rogers, 309 F. Supp. 570 (D. Mass.), rev'd on other grounds, 437 F.2d 102 (1st Cir. 1970).
170. 347 U.S. 260 (1954).
171. Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280 (1955). See also A.-G. v. Bufalino, 371 F.2d 738 (D.C. Cir. 1966).

to outweigh all others as long as the rules rationally related to the aims of the statute.[172] The latter view accords, at least in result, with the U.K. decision in Schmidt.[173] The general question of the extent to which a repository of discretion should limit his or her discretion by adopting fixed rules is beyond the scope of this thesis and has been treated elsewhere.[174]

One additional way[175] in which an administrative official can fail to exercise discretion is to conclude erroneously that the statutory prerequisites to the exercise of discretion have not been met. If the challenge is to the official's interpretation of law, it is clear that the court will independently decide the correct construction of the statutory prerequisite.[176] In other cases, however, the standards have varied. In one extreme case,[177] the appellate court actually refused to review an administrative finding of ineligibility for suspension of deportation. Without stating the basis for

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172. Davis Casebook, note 168 above, at 445-55, contrasting Asimakopoulos v. I.N.S., 445 F.2d 1362 (9th Cir. 1971) with Fook Hong Mak v. I.N.S., 435 F.2d 728 (2d Cir. 1970). See also James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953); Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950).
173. See pp. 126-27 above.
174. See sources cited on p. 124 n.367 above.
175. A further question might be whether the official has impermissibly sub-delegated his or her discretionary power to a subordinate official. This issue has not figured significantly in the immigration cases. But see Jarecha v. I.N.S., 417 F.2d 220 (5th Cir. 1969).
176. Dessalernos v. Savoretti, 356 U.S. 269 (1958); Ceballos v. Shaughnessy, 352 U.S. 599 (1957); McGrath v. Kristensen, 340 U.S. 162 (1950); United States ex rel. Szlajmer v. Esperdy, 188 F. Supp. 491 (S.D.N.Y. 1960).
177. Anderson v. Holton, 242 F.2d 596 (7th Cir. 1957).

the finding, the court reasoned that the determination had been 'committed to agency discretion' within the meaning of the A.P.A. provision precluding review.[178]

In other cases the courts have applied standards roughly equivalent to the narrow arbitrariness test, or to the substantial evidence test, or to some intermediate test. In three cases, for example, aliens had been denied discretionary relief on the ground they had failed to prove they were of 'good moral character', a prerequisite to the exercise of discretion under the applicable statutory provisions.[179] In one case the administrative decision was upheld because it was not 'so unreasonable as to justify a court in setting it aside'.[180] In another the decision was upheld on the basis that the evidence was 'sufficient to support' a finding of the absence of good moral character.[181] In the third, the decision was reversed. The court ruled that, although there was some evidence that the alien had had an adulterous relationship, the evidence was not strong enough.[182]

Apart from the failure to exercise discretion, an administrative discretionary decision may be set aside when it

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178. 5 U.S.C. s. 701(a)(2).
179. 8 U.S.C. ss. 1254(a) (suspension of deportation), 1254(e) (voluntary departure).
180. Brownell v. Cohen, 250 F.2d 770, at 771 (D.C. Cir. 1957).
181. Estrada-Ojeda v. Del Guercio, 252 F.2d 904, at 905 (9th Cir. 1958).
182. United States ex rel. Exarchou v. Murff, 265 F.2d 504 (2d Cir. 1959).

was arbitrary, capricious, or an abuse of discretion.[183] One problem arising here is whether that standard governs judicial review of an administrative decision applying statutory terms couched in broad language. For example, one prerequisite to eligibility for suspension of deportation is 'extreme hardship'.[184] In reviewing an I.N.S. decision finding insufficient hardship, the courts have generally limited their enquiry to whether discretion has been abused.[185] In I.N.S. v. Jong Ha Wang,[186] the Supreme Court held that the B.I.A. has the discretion to interpret the phrase 'extreme hardship' narrowly. Similar approaches have been taken with respect to administrative determinations that the services of an alien worker are not needed in the United States,[187] and that a

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183. 5 U.S.C. s. 706(2)(A). In the immigration sphere, see, e.g., Kimm v. Rosenberg, 363 U.S. 405 (1960); Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Carlson v. Landon, 342 U.S. 524 (1952) (required a 'clear' abuse of discretion). The substantial evidence test has been expressly held inapplicable to the review of discretion (Chao-Ling Wang v. Pilliod, 285 F.2d 517 (7th Cir. 1960)), as has substitution of judgment (Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956)).

184. 8 U.S.C. s. 1254(a)(1).

185. See, e.g., Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977); Llacer v. I.N.S., 388 F.2d 681 (9th Cir. 1968); Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956). But see Acosta v. Landon, 125 F. Supp. 434, at 441 (S.D. Cal. 1954)(A.-G. decided 'erroneously').

186. 450 U.S. 139 (1981). See generally Loue, note 440 above. In Wang, the alien had petitioned for review of a B.I.A. decision denying a motion to reopen deportation proceedings for the purpose of applying for suspension of deportation: see 8 C.F.R. ss. 3.2, 3.8, 103.5, 242.22. The motion to reopen added a second discretionary ingredient.

187. E.g., Roumeliotis v. I.N.S., 304 F.2d 453 (7th Cir. 1962); Bergen Dress Co. v. Bouchard, 304 F.2d 145 (3d Cir. 1962); Yusuf v. Regional Manpower Administration, 390 F. Supp. 292 (W.D. Va. 1975).

particular alien is not a 'professional'.[188] That treatment is consistent with the U.K. cases applying narrow review to decisions made under broadly worded statutory provisions.[189]

Yet the American courts have not been uniform in their articulation of the standards governing such cases. In one case the standard applied to the administrative decision that an alien's labour services were not needed was the substantial evidence test.[190] In another the court held such a decision was neither an abuse of discretion nor unsupported by substantial evidence.[191] No explanation for the differences in standard of review are immediately apparent. The political persecution cases have been particularly prone to apply diverse standards.[192]

Given the categorisation of a particular administrative decision as discretionary, the question arises as to the grounds on which an abuse of discretion will be found.

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188. Reyes v. Carter, 441 F.2d 734 (9th Cir. 1971); Javier v. I.N.S., 335 F. Supp. 1391 (N.D. Ill. 1971).
189. See, e.g., pp. 147-59 above.
190. Flower Furniture Mfg. Corp. v. Esperdy, 229 F. Supp. 182 (S.D.N.Y. 1962).
191. Kirsten-Sanders Dental Lab., Inc. v. Sahli, 348 F.2d 442 (6th Cir. 1965).
192. See now Refugee Act of 1980, P.L. No. 96-212, s. 203(e), amending 8 U.S.C. s. 1253(h). Under the pre-1980 version of the statute, the standard of review appeared to vary even within a given circuit. Compare, e.g., the formulations in Moghanian v. U.S.D.O.J., 577 F.2d 141, at 142 (9th Cir. 1978); Pereira-Diaz v. I.N.S., 551 F.2d 1149, at 1154 (9th Cir. 1977); Khalil v. Dist. Director, 457 F.2d 1276, at 1277 (9th Cir. 1972); Kovac v. I.N.S., 407 F.2d 102, at 104 (9th Cir. 1969); Hosseinmardi v. I.N.S., 405 F.2d 25, at 27 (9th Cir. 1968). See generally E. Griffith, Deportation and the Refugee (1982) Mich. Yearbook of Int'l Legal Studies 125; D.A. Martin, The Refugee Act of 1980: Its Past and Future (1982) Michigan Y.B. Int'l L. Studies 91.

The first general observation should be that American courts, like those in the U.K.,[193] have been extremely reluctant to question discretionary immigration decisions.[194] Many judicial opinions can be found in which courts have used strong language to stress the narrowness of the standard for reviewing the exercise of discretion in this field.[195] Nonetheless the intensity of judicial review has fluctuated wildly from court to court,[196] and examination of the cases reveals four grounds potentially resulting in judicial invalidation.

One of the most common grounds on which a discretionary immigration decision can be set aside is that it rested on a reason not intended by Congress.[197] This basis is similar to the 'improper purpose' ground considered in the U.K.[198] Its applicability in a given case will require an interpretation of the Congressional intent. Some reason for a denial of discretionary relief must be advanced,[199] but the courts have

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193. See generally ch. I, s. F above.
194. See Gordon & Rosenfield, note 1 above, s. 8.14.
195. E.g., Jay v. Boyd, 351 U.S. 345, at 354, 357 (1956); MacKay v. McAlexander, 268 F.2d 35, at 40 (9th Cir. 1959); United States ex rel. Adel v. Shaughnessy, 183 F.2d 371, at 372 (2d Cir. 1950).
196. See Developments in the Law, Immigration and Nationality (1953) 66 Harv. L. Rev. 643, at 700.
197. See, e.g., Wong Wing Hang v. I.N.S., 360 F.2d 715 (2d Cir. 1966); Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961); Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956).
198. See pp. 106-07 above.
199. Sida v. I.N.S., 665 F.2d 851, at 854-55 (9th Cir. 1981); Perez v. I.N.S., 643 F.2d 640, at 641 (9th Cir. 1981); Flores v. U.S.I.N.S., 524 F.2d 627 (9th Cir. 1975).

held that any facially legitimate reason will satisfy that requirement.[200]

As in the U.K.,[201] a discretionary immigration decision can also be struck down on the basis that the official considered irrelevant factors or ignored relevant ones.[202] B.I.A. decisions denying suspension of deportation on grounds of no extreme hardship have occasionally been set aside because the Board had failed to consider factors relevant to hardship.[203] A denial of labor certification was set aside as an abuse of discretion when the Labor Department, though considering the general availability of university faculty members, had ignored the specific availability within the applicant's particular field.[204] The Supreme Court, however, upheld a decision denying an alien bail pending deportation proceedings, even though the Attorney General had not considered such important factors as the probability of being found deportable, the seriousness of the charge, the danger to public safety, and the likelihood of the alien being available for the proceedings.[205]

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200. Kleindienst v. Mandel, 408 U.S. 753 (1972); Lena v. I.N.S., 379 F.2d 536 (7th Cir. 1967). But compare Santos v. I.N.S., 375 F.2d 262 (9th Cir. 1967) with Siang Ken Wang v. I.N.S., 413 F.2d 286 (9th Cir. 1969).
201. See p. 133 above.
202. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, at 416 (1971); Yong v. Regional Manpower Administrator, 509 F.2d 243 (9th Cir. 1975).
203. E.g., Santana-Figueroa v. I.N.S., 644 F.2d 1354, at 1356-57 (9th Cir. 1981); Barrera-Leyva v. I.N.S., 637 F.2d 640, at 643 (9th Cir. 1980); United States ex rel. Partheniades v. Shaughnessy, 146 F. Supp. 772 (S.D.N.Y. 1956).
204. Yusuf v. Regional Manpower Administration, 390 F. Supp. 292 (W.D. Va. 1975).
205. Carlson v. Landon, 342 U.S. 524, at 563 (1952).

Arbitrariness can be found even in cases where proper purposes were advanced and the factors considered were those relevant to such purposes. Those cases are consistent with the language of Lord Greene M.R. in Wednesbury.[206] The Supreme Court has acknowledged this possibility by recognising 'clear error of judgment' as a ground for abuse of discretion.[207] Although atypical, cases can occasionally be found in which courts have set aside immigration decisions on the ground that the balance of relevant factors was too lopsided to permit a reasonable person to reach the challenged result.[208]

Finally, although unequal treatment is not per se an abuse of discretion,[209] a district court held in Lennon v. United States[210] that the Attorney General had abused his discretion by selectively prosecuting an admittedly deportable alien solely because of the alien's political views and associations. Davis has recommended that an abuse of discretion be found if an administrative agency inexplicably departs from its usual policies.[211] At least two immigration cases have

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206. See p. 133 n.398 above.
207. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, at 416 (1971).
208. See, e.g., Rassano v. I.N.S., 492 F.2d 220 (7th Cir. 1974); Hegerich v. Del Guercio, 255 F.2d 701 (9th Cir. 1958).
209. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, at 264 n.5 (1954); Santos v. I.N.S., 375 F.2d 262, at 265 (9th Cir. 1967); United States ex rel. Lo Duca v. Neelly, 213 F.2d 161 (7th Cir. 1954).
210. 387 F. Supp. 561 (S.D.N.Y. 1975). Accord, Lennon v. I.N.S., 527 F.2d 187, at 195 (2d Cir. 1975) (obiter in connected case).
211. Davis, note 168 above, at 463-64.

followed that approach.[212]

The most striking observation about the American cases reviewing the exercise of discretion under the immigration laws must be the lack of uniformity among the courts. Although review has generally been restrained, great disparity has been noted as to the standards. Within the cases concerned with failure to exercise discretion, the results have been especially unpredictable when failure has stemmed from an allegedly erroneous finding that the statutory prerequisites to discretion were not satisfied. Further diversity of opinion concerns the criteria for reviewing decisions applying broad statutory language arguably classifiable as discretionary. Finally, even within the class of cases conceded to confer discretion, there has been disagreement as to the specific grounds on which an abuse of discretion will be found. In particular, whether an inexplicable departure from established norms constitutes an abuse is still subject to dispute.

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212. Wong Wing Hang v. I.N.S., 360 F.2d 715, at 719 (2d Cir. 1966); Factora v. Dist. Director, 292 F. Supp. 518 (C.D. Cal. 1968). Accord, Atchison, Topeka, and Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973). But see previous contra holding in Santos v. I.N.S., 375 F.2d 262 (9th Cir. 1967).

CHAPTER III

IMMIGRATION LAW AND THE AMERICAN CONSTITUTION

In the United States, unlike the United Kingdom, the courts have the long-established power to strike down actions of either the federal[1] or state[2] governments as violative of the Constitution. The federal government is said to be one of enumerated powers; it can generally act only if it can tie its action to one of the federal powers enumerated in the Constitution.[3] In addition the Constitution contains numerous affirmative limitations. The latter provisions, most of which[4] provide for the protection of individual rights, describe specific things that the federal government may not do.[5] Thus federal action will ordinarily be constitutional only if it is authorised by the Constitution, and then only if nothing in the Constitution prohibits it.[6]

The states, in contrast, have residual power. State action need not rest on an affirmative grant of power in the Constitution. It is limited, however, by the supremacy clause,

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
2. Cohens v. Va., 19 U.S. (6 Wheat.) 264 (1821); McCulloch v. Md., 17 U.S. (4 Wheat.) 316 (1819).
3. See U.S. Const. amend. X; Keller v. United States, 213 U.S. 138 (1909); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 305, at 326 (1816); L.H. Tribe, American Constitutional Law (1978), at 225. One such power, however, is to make all laws 'necessary and proper' for executing the other powers: U.S. Const. art. I, s. 8, cl. 18. That clause has been interpreted broadly: see Tribe, at 227-31.
4. Some, however, have other functions: e.g., U.S. Const. art. I, ss. 9, 10 (federalism).
5. E.g., amend. I (freedom of expression); amend. V (due process).
6. See Monongahela Navigation Co. v. United States, 148 U.S. 312, at 336 (1893).

which provides that federal law prevails over contrary state law.[7] Moreover, certain of the enumerated federal powers have been held to contain 'dormant' components; i.e., even when not exercised by Congress, the existence of such powers places constraints on what states may constitutionally do.[8] Finally, like federal action, state action is subject to affirmative constitutional limitations protecting individual rights.[9]

In American immigration law, the courts' constitutional role has been unusually limited. The Supreme Court, referring to immigration, has said, 'Over no conceivable subject is the legislative power of Congress more complete.'[10] At the heart of that phenomenon lies the so-called 'plenary power' doctrine, under which courts have refused to review federal statutory provisions governing the entry and deportation of aliens for compliance with substantive constitutional restraints.

It will be argued in this chapter that the plenary power doctrine has evolved through misplaced reliance on previous judicial decisions. It will be useful to provide at the outset a general description of the form the argument will take. To do so, it is first necessary to draw a distinction to which frequent allusion will be made.

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7. U.S. Const. art. VI, cl. 2; see generally G. Gunther, Constitutional Law Cases and Materials (10th ed., 1980), at 343-57.
8. See ibid., at 256-373.
9. E.g., U.S. Const. amend. XIV, s. 1 (equal protection and due process clauses).
10. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, at 339 (1909), quoted approvingly in Fiallo v. Bell, 430 U.S. 787, at 792 (1977). Accord, Oloteo v. I.N.S., 643 F.2d 679, at 680 (9th Cir. 1981).

The question of who has how much power to regulate immigration can be viewed as consisting of three components. The most general component is the right of a nation to exclude aliens from its own territory. That right concerns the allocation of power among various nations. It therefore presents issues of international law. The second component, applicable within the United States, is federalism, which governs the dispersal of power between the federal government and the states.[11] Issues relating to the scope of the constitutionally enumerated federal powers -- both exercised and dormant -- fit within this component. A third component, located within the federal government, is the principle of separation of powers, which controls the sharing of powers by the legislative, executive, and judicial branches. Within that third component, the more specific question pertinent here is the allocation between the Judiciary, on the one hand, and the other two branches - the Legislative and the Executive - on the other hand.

The specific argument advanced here is that the plenary power doctrine has resulted from the failure by the Supreme Court to distinguish between the second and third components. It will be shown that evolution of the plenary power doctrine has proceeded in five stages. In each of the first three stages, the Court made second-component decisions. In the latter two stages, the Court made third-component decisions.

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11. See generally D.B. LaPierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation (1982) 60 Wash. U.L. Rev. 779.

In stage I the Supreme Court struck down attempts by individual states to exclude aliens. It did so on the ground that the Constitution entrusted the subject matter exclusively to the federal government. In stage II the Court relied on the stage I cases to uphold the federal exclusion statute as a valid exercise of the constitutionally enumerated Congressional power to regulate international commerce. The federal power to exclude aliens took on a new dimension in stage III. Relying on the principles formed in the first two stages, the Court again upheld the exclusion power, but this time on the basis that it was inherent in the sovereignty of every nation, and therefore not dependent on any explicit constitutional grant. All such stages thus involved the allocation of power between the federal government and the states.

In stage IV, the Supreme Court adopted the plenary power doctrine. Relying on the stage III principle, it held that when Congress exercises its exclusion power, the Judiciary is barred from reviewing the statute for compliance with the affirmative limitations in the Constitution. Stage V, building on the previous stages, is the snowballing phase that has continued through today. During this period the Supreme Court has extended the plenary power doctrine in several respects, and has hardened it with protective layers of additional precedent. At the same time, the Court has qualified the doctrine in various ways. Stages IV and V therefore present the third-component issue noted above: the allocation of power between Congress and the Judiciary.

This discussion of constitutionality will explore the development of the plenary power doctrine through its five stages. The possibility that stage V is nearing completion, and that a more liberal sixth stage is upon us, will then be considered. A summary of how the doctrine was able to unfold inadvertently will follow. Lastly, the restrained judicial approach in this area will be contrasted briefly with approaches taken in several related areas of law.

One further comment about the scope of this chapter is needed. The courts' adoption of the plenary power doctrine, and their continued adherence to it, have been based almost entirely on judicial perception of applicable precedent. There has been little in the way of independent reasoned analysis. Rough rationales for the doctrine have, however, been advanced occasionally. One is the political question doctrine. That theory and others are collected and examined in the final chapter of this thesis, as one aspect of the more general prescriptive question.

A. Stage I: The Early State Regulation Cases

The earliest Supreme Court cases assessing the constitutionality of immigration statutes were those dealing with the allocation of power between the federal government and the states. Of those, the first were the state regulation cases, in which the Court had to determine whether state statutes affecting the immigration of aliens unconstitutionally intruded into the exclusive concern of the federal government.

The seeds of the plenary power doctrine were planted in 1849, when the Supreme Court decided the Passenger Cases.[12] At issue was the constitutionality of two state statutes, one taxing the importation of passengers from foreign ports, and the other taxing the importation of alien passengers. In a 5-4 decision the Court struck down both tax provisions on the ground that they usurped exclusively federal powers.

The four dissenters argued that the federal government had no power to exclude aliens, and therefore no power to tax the importation of aliens. In their view, it followed that nothing in the Constitution prevented the states from doing so. The Justices in the majority had different reasons for their conclusion. The majority opinion most pertinent to the argument that will be advanced in this chapter was that of Justice McClean. Maintaining that the constitutional provision empowering Congress to regulate interstate and international commerce prohibited the states from taxing the importation of aliens, he said:

> This power [to regulate commerce], like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution . . . [T]he sovereignty of Congress, though limited to specified objects, is plenary as to these objects.[13]

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12. Smith v. Turner, consolidated with Norris v. City of Boston, 48 U.S. (7 How.) 283 (1849). One previous Supreme Court decision, Mayor, Aldermen, & Commonalty of the City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), had upheld a state immigration statute against a constitutional attack based on federalism. However Miln was later qualified by Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840), and has never significantly influenced subsequent Supreme Court decisions in this area.

13. 48 U.S. (7 How.) at 394-95 (emphasis added), quoting from Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, at 196-97 (1824).

Several features of this quotation should be noted. First, the word used to describe those federal powers held to be exclusive of the states was 'plenary', the first time that word had appeared in an immigration decision. Justice McClean later explained that his rationale was the need for a uniform approach by all the states. Thus, the use of the word 'plenary' to describe a particular Congressional power was intended to convey only the idea that the Congressional decision superseded that of the states.

The second noteworthy point is that the federal power was said to have no limitations 'other than are prescribed in the Constitution'. Justice McClean thus assumed that even a 'plenary' federal power was in fact limited by other constitutional clauses.

Third, the above observations concerning the Congressional commerce power apply equally to 'all others vested in Congress'. Thus, regardless of the accepted basis for recognising a federal power to regulate immigration, there is nothing in the 'plenary power' language of the Passenger Cases to suggest that Congress, when regulating immigration, is immune from the usual constitutional restraints.

The next important developments were the 1875 Supreme Court decisions in Henderson v. Wickham[14] and Chy Lung v. Freeman.[15] The Court was faced again with state statutes

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14. 92 U.S. (2 Otto.) 259 (1875).
15. 92 U.S. (2 Otto.) 275 (1875).

that restricted the entry of aliens. These particular statutes authorised state officials to require the masters of vessels to post bonds against any alien passengers becoming public charges. Unlike the varying opinions produced by the Passenger Cases, both these cases produced clear holdings of a majority of the Court. In each case the Court held that the international commerce clause makes the power to regulate immigration exclusively federal. The overriding rationale for both decisions was the need for uniformity in the immigration laws. The idea expressed in Chy Lung was that the practice of a single state in regulating aliens could prompt the aliens' own nations to seek redress. In such cases, the Court reasoned, the claim of the foreign country would be directed at the entire nation. It was this rationale, the desire to prevent individual states from embroiling the United States in quarrels with other countries, that persuaded the Court to declare immigration control beyond the power of the states.[16]

B. Stage II: A Constitutionally Enumerated Federal Power to Exclude Aliens

The state regulation cases, culminating in Henderson and Chy Lung, thus held that the states lacked the power to regulate the immigration of aliens. The converse question -- whether the federal government had such a power -- remained to be determined.

16. See also People v. Compagnie Generale Transatlantique, 107 U.S. 59 (1883).

The various opinions in the Passenger Cases contained suggestions that several constitutional clauses could be construed to confer upon Congress the power to regulate immigration. Justice Wayne, for example, invoked the Congressional power 'to establish an uniform Rule of Naturalization'.[17] The apparent idea was that if Congress may determine which aliens to naturalize, it should be permitted to decide which aliens to admit within the country. One dissenting opinion in the Passenger Cases also referred briefly to the Congressional power to declare war, but concluded that that power could at most authorise regulation of alien enemies.[18]

But the constitutional source considered most seriously in the state regulation cases was the Congressional power 'to regulate Commerce with foreign Nations'.[19] Justice McClean in the Passenger Cases supported the connection between the commerce clause and immigration control by arguing that the transportation of aliens 'has always given a profitable employment to our ships'.[20] The same conclusion commanded

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17. U.S. Const. art. I, s. 8, cl. 4. See 48 U.S. (7 How.) at 426.
18. U.S. Const. art. I, s. 8, cl. 11. See 48 U.S. (7 How.) at 509-11 (Daniel J., dissenting). For a third possible source, see the 1808 migration clause, U.S. Const. art. I, s. 9, cl. 1, invoked by McKinley J., 48 U.S. (7 How.) at 452-55. But see ibid., at 511 (Daniel J., dissenting, arguing the 1808 migration clause was concerned solely with the importation of slaves). On that point, see R.L. Garis, Immigration Restriction (1927), at 59-68. Finally, see Toll v. Moreno, 458 U.S. 1, at 10 (1982)(federal authority over aliens derives from several clauses, including commerce clause, naturalization clause, and foreign affairs powers).
19. U.S. Const. art. I, s. 8, cl. 3.
20. 48 U.S. (7 How.) at 401 (McClean J.). Accord, ibid., at 414 (Wayne J.).

majorities of the Court in Henderson and Chy Lung, the former reasoning that immigrants bring labour and wealth to develop the nation's natural resources.[21]

The first constitutional challenge to a federal statute regulating immigration was addressed by the Supreme Court in the Head Money Cases.[22] The statute required the master of a vessel arriving in the United States to pay the government 50 cents for each alien passenger, the fund to be used for administering the immigration system and for helping immigrants in distress. The question was whether the federal government had the power to regulate immigration.

The Court relied on the state regulation cases. It observed that, in striking down state statutes restricting the admission of aliens, those cases had reasoned that the need for uniformity precluded controls by individual states. The Court concluded that, under the same reasoning, the commerce clause provides a federal power to exclude aliens. It emphasised the need to provide a system of law 'applicable to all ports and to all vessels'.[23] Thus, as in the state regulation cases, the Court's emphasis on uniformity makes clear that its concern was with the allocation of power between the federal government and the states. The vehicle by which the issue was resolved was the constitutionally enumerated federal power to regulate commerce.[24]

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21. See p. 189 above.
22. Edye v. Robertson, 112 U.S. 580 (1884).
23. 112 U.S. at 593.
24. For similar lower court holdings, see In re Florio, 43 F. 114 (S.D.N.Y. 1890); United States v. Craig, 28 F. 795 (E.D. Mich. 1886).

C. Stage III: Federal Exclusion Power Inherent in Sovereignty

The next major[25] development on the issue of federal power to regulate immigration was the Chinese Exclusion Case.[26] A federal statute prohibited Chinese labourers from entering the United States without an administratively issued certificate granting them permission to enter. At issue was the constitutionality of the exclusion as applied to those aliens who had left the country before enactment of the statute and who tried to return after its enactment.

The Court again held that Congress may exclude aliens. Rather than rely on the commerce clause or some other enumerated power, however, the Court quoted Chief Justice Marshall, who had said in another context, 'Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.'[27] The Court listed several enumerated powers, which it described as 'sovereign' powers, to bolster its conclusion that when dealing with foreign countries the United States is one nation.[28] Implicit in the court's reasoning was the assumption that the exclusion of aliens was an example of such dealings. Declining to pin on a specific enumerated power its

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25. Before the Chinese Exclusion Case, the Supreme Court had rendered two liberal decisions interpreting the Chinese Exclusion Act: see United States v. Jung Ah Lung, 124 U.S. 621 (1888); Chew Heung v. United States, 112 U.S. 536 (1884).
26. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
27. Ibid., at 603-04, citing The Exchange, 11 U.S. (7 Cranch) 116, at 136 (1812).
28. 130 U.S. at 604.

holding that Congress may exclude aliens, the Chinese Exclusion Case held instead that such a power is 'an incident of sovereignty delegated by the Constitution'.[29] That concept has since been endorsed by a long line of Supreme Court decisions.[30]

It will be argued here that the sovereignty theory is unsound, and that any federal power to exclude aliens must emanate from some constitutional grant. Today the effect of immigration on the nation's commerce is undisputed, and with the expansive modern interpretation placed on the commerce clause, it would surely be an easy matter to demonstrate that that clause embraces the power to exclude aliens.[31] That being so, one might ask why it matters whether the authority for the exclusion power is the sovereignty theory, rather than one of the enumerated powers. One reason such a distinction is crucial is that recognising federal powers beyond those granted by the Constitution could by definition create unpredictable excesses quite apart from the subject of immigration.[32]

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29. Ibid., at 609.
30. E.g., Kleindienst v. Mandel, 408 U.S. 753 (1972); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); cf. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, at 318 (1936) (power over foreign affairs is inherent in sovereignty).
31. For discussions of the Congressional power to regulate commerce, see J.E. Nowak, R.D. Rotunda, & J.N. Young, Constitutional Law (2d ed., 1983), ch. 9; Tribe, note 3 above, at 232-44.
32. See Fong Yue Ting v. United States, 149 U.S. 698, at 737 (Brewer J., dissenting)(1893).

But the purpose of analysing the soundness of the sovereignty theory in this thesis is that, as will be seen, it has served as a pedestal on which the plenary power doctrine has been based.

Problems with the sovereignty theory become manifest when the rationales arguably supporting it are closely examined. One argument advanced by the Supreme Court in the Chinese Exclusion Case can be elicited from its quotation of Chief Justice Marshall, mentioned above. In recognising a nation's jurisdiction over its own territory, however, the Chief Justice had intended to make only the modest point that the United States as a nation has the power to exclude aliens. He maintained that restriction by an 'external source' would result in a diminution of national sovereignty, and concluded that any exceptions to the sovereign power must therefore be made by 'the consent of the nation itself'.[33] The Chief Justice was addressing what this thesis describes as a first-component issue.

One way in which the United States has limited the powers of its federal government is the very adoption of the Constitution and its principle of enumerated powers. Thus, unless the power to exclude aliens can be connected to one of the enumerated powers, the question is whether the Constitution, adopted by 'the consent of the nation', is one of the exceptions to which the Chief Justice had referred. To answer

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33. The Exchange, 11 U.S. (7 Cranch) 116, at 136 (1812).

that question, it is not sufficient to observe that the nation may exclude aliens if it wishes.[34]

Another argument possibly intended to support the sovereignty theory was the notion, expressed in the Chinese Exclusion Case, that with respect to foreign countries the United States must act as one. That rationale rests on the uniformity argument articulated by the Court in the early state preemption cases. In those cases the reasoning had been entirely valid, since a state law denying admission to citizens of particular countries might indeed strain national relations with those countries. As the Supreme Court later held, however, the fact that no single state is able to deal effectively with a particular problem does not necessarily imply Congress may act.[35] That state laws excluding aliens can irritate foreign nations does not prove that a federal power to exclude aliens is needed to achieve the opposite effect.

Nor can the sovereignty theory be justified as a practical necessity. As noted earlier, it would require no stretching at all to hold, as the Head Money Cases did, that the regulation of commerce among nations encompasses the power to regulate the flow of people from another nation to the U.S. Thus, the holding that there is a non-enumerated Congressional power to exclude aliens could not be explained on the basis of necessity, even if it could be shown that a general necessity principle exists at all.

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34. On this point, see L. Henkin, Foreign Affairs and the Constitution (1972), at 18.
35. Kansas v. Colorado, 206 U.S. 46 (1907).

The Chinese Exclusion Case also ignored previous Supreme Court exposition of the enumerated powers doctrine. In a more infamous context, the Court had previously said:

> [The federal government] does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the Legislative, Executive, nor Judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.[36]

In addition, it is unclear on what source of law the sovereignty theory was intended to rest. The Court referred to the sovereign powers delegated by the Constitution.[37] The implication is that the holding was intended to flow from interpretation of the Constitution itself. One argument that proponents of the sovereignty theory might invoke is that the framers of the Constitution considered a federal exclusion power too obvious to require mention. That possibility requires consideration of the historical attitudes and practices preceding and shortly following adoption of the Constitution.

Both in colonial times and in the early years of the new nation, the general practice was to encourage immigration.[38]

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36. Scott v. Sandford, 60 U.S. (19 How.) 393, at 401 (1856).
37. 130 U.S. at 609.
38. J. Bentley, American Immigration Today (1981), at 14; F.F. Chuman, The Bamboo People: The Law and Japanese-Americans (1976), at 53; T.J. Curran, Xenophobia and Immigration, 1820-1930 (1975), at 11; E.A. Hoyt, Naturalization under the American Colonies: Signs of a New Community (1952) 67 Pol. Sci. Q. 248, at 262; M.R. Konvitz, The Alien and the Asiatic in American Law (1946), at 1; E.E. Proper, Colonial Immigration

There were wide-open spaces that required development;[39] labour was in short supply;[40] and people were needed to defend the frontiers against hostile forces.[41] The need for immigrants was evidenced by numerous practices. In many cases, colonists would pay transportation costs in order to obtain indentured servants.[42] Colonial legislatures offered a variety of inducements, including land grants, cash bounties to defray shipping fares, tax exemptions,[43] immunity from actions for debt,[44] and liberal naturalization rules.[45] Demand was so great that it became common to kidnap English children and sell them into slavery in the colonies.[46]

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38. (continued) Laws (1967), chap. 2; E. Risch, Encouragement of Immigration as Revealed in Colonial Legislation (1937) 45 Va. Magazine 1, at 9; M.S. Seller, Historical Perspectives on American Immigration Policy: Case Studies and Current Implications (1982) 45 L. & Contemp. Probs. 137, at 140-41; W.C. Van Vleck, The Administrative Control of Aliens (1932), at 3; see also Passenger Cases, 48 U.S. (7 How.) 283, at 401 (1849)(per McClean J.).

39. Bentley, note 38 above, at 14; M.R. Davie, World Immigration (1936), at 38-39; M.A. Jones, American Immigration (1960), at 41; Risch, note 38 above, at 1.

40. Jones, note 39 above, at 41.

41. Ibid., Risch, note 38 above, at 1.

42. See Davie, note 39 above, at 30-31; W.D. Griffin, The Irish in America 550-1972 (1973), at 36; M. Kraus, Immigration, The American Mosaic (1966), at 10-11. See especially Jones, note 39 above, at 32-34.

43. As to those three inducements, see Jones, note 39 above, at 41-42; Proper, note 38 above, at 11-15; Risch, note 38 above, at 3-6; Seller, note 38 above, at 140-41.

44. Jones, note 39 above, at 42; Risch, note 38 above, at 1-3.

45. Hoyt, note 38 above, at 250-51, 262; Proper, note 38 above, at 14-15; Risch, note 38 above, at 6-10.

46. Kidnapping of children and transportation of criminal offenders were the principal forms of forced immigration: see Davie, note 39 above, at 31-35; Garis, note 18 above, at 11-13; Kraus, note 42 above, at 11-12. The forces attracting immigration to the colonies were bolstered by numerous 'push' factors: see O. Handlin, Immigration as a Factor in American History (1959), ch. 2; M.L. Hansen, The Atlantic Migration 1607-1860 (1940).

The colonists' desire for new settlers was evidenced by the Declaration of Independence, which complained that the King had hampered immigration to the Colonies.[47]

All this is not to imply that immigrants were unreservedly welcomed. Many of the early Americans had serious misgivings about immigration.[48] Several colonial leaders, including Franklin and Jefferson, urged restrictions.[49] A number of colonial legislatures passed laws discouraging specified classes of immigrants -- commonly paupers, criminals, and members of unpopular religious sects.[50]

It seems likely, therefore, that the framers did not intend to foreclose the possibility of restricting immigration. There remains, however, the question of whether

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47. For details, see Curran, note 38 above, at 14; see also Davie, note 39 above, at 37-38; Hoyt, note 38 above, at 266; Seller, note 38 above, at 143. See also Passenger Cases, 48 U.S. (7 How.) 283, at 440-43 (Catron J., dissenting).

48. Some writers have noted the ambivalence of popular feelings towards immigrants: see, e.g., C.D. Eby, American "Asylum": A Dual Image (1962) 14 Amer. Q. 483; Garis, note 18 above; Jones, note 39 above, at 40; cf. Seller, note 38 above, at 141-43 (ambivalence toward non-English immigrants).

49. Benjamin Franklin believed that immigration should be restricted whenever it was 'hurtful': Garis, note 18 above, at 24-25. He was particularly concerned about immigrants who were criminals (ibid.) and about those who did not intend to work (see Franklin letter to prospective immigrants, reproduced in M. Rischin (ed.), Immigration and the American Tradition (1976), at 37-42). Thomas Jefferson feared a large influx of immigrants holding monarchist views: Davie, note 39 above, at 38-39; Garis, note 18 above, at 25-26; Jones, note 39 above, at 80; Proper, note 38 above, at 90-91.

50. For a detailed study of the colonial immigration laws, organised by individual colony, see Proper, note 38 above, chs. 3-6. The text of the early statutes is reproduced in E. Abbott, Immigration - Select Documents and Case Records (1924), part II, s. 1. See also Curran, note 38 above, at 12-14; Davie, note 39 above, at 37; Garis, note 18 above, at 13-18; Jones, note 39 above, at 43-44.

they meant to vest such a power in the federal government or the states. On the one hand, as observed in the Supreme Court decisions discussed thus far, the need for uniformity is a strong policy reason for federal control. But contrary policy arguments have also been advanced. One nineteenth century state immigration official conceded that the federal government is properly empowered to enter treaties governing passage of immigrants on the high seas, but argued that, once the immigrant lands, the matter is solely one of state concern. His position was that the disproportionate effects of immigration on certain states should entitle those states to make policy unilaterally.[51]

When one looks at the actual positions taken by early legislatures and other leaders, the results are equally inconclusive. The Alien Act 1798, permitting the President to deport dangerous aliens,[52] might be taken as evidence of a contemporary view that the framers intended to create a federal power over immigration. For several reasons, however, that evidence is weak. The statute was an unusual act, passed because peace with England had not yet been fully achieved in all respects.[53] The statute was highly unpopular,[54] and

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51. See the excerpt reproduced in Abbott, note 50 above, at 164-68.
52. Act of 25 June 1798, 1 Stat. 570. For a thorough study of the Alien and Sedition Acts, see J.M. Smith, Freedom's Fetters (1956).
53. Chuman, note 38 above, at 53.
54. Ibid.; see also Van Vleck, note 38 above, at 3; Hines v. Davidowitz, 312 U.S. 52, at 70-71 (1941); Fong Yue Ting v. United States, 149 U.S. 698, at 750 (1893)(Field J., dissenting).

thus was not renewed when it expired two years later.[55] Several colonial leaders in fact believed the Act was unconstitutional as being outside the Congressionally enumerated powers,[56] but the courts were unable to address the question because no person was ever deported under this Act.[57] Not until the Chinese Exclusion Act did Congress ever again even claim the power of deportation.[58] For all those reasons the Alien Act 1798 should be viewed as an aberration providing little insight into the framers' views on federal immigration control.

There were, in fact, several indicators that immigration control was thought to be a matter for state legislatures. In 1787, Franklin, warning against the influx of European criminals, urged the states to act.[59] A year later, on the eve of Constitutional ratification, the Continental Congress passed a resolution urging the states to pass legislation excluding alien criminals.[60] Several states did so, some just before ratification of the Constitution and some just

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55. Chuman, note 38 above, at 53; M.R. Konvitz, Civil Rights in Immigration (1953), at 95-96.
56. See J. Madison, Report on the Virginia Resolutions, 4 Elliot's Debates 546, at 554; T. Jefferson, Kentucky Resolutions of 1798 and 1799, ibid. at 540-41. The Act was also attacked on other constitutional grounds not pertinent to the sovereignty theory: see Konvitz, note 38 above, at 46-47.
57. Konvitz, note 38 above, at 46.
58. Ibid; Van Vleck, note 38 above, at 3.
59. Garis, note 18 above, at 25. Jefferson, despite his restrictionist views on immigration, strongly opposed federal immigration legislation: ibid., at 26. But cf. the views of other colonial leaders on federal naturalization legislation: ibid., at 28-32.
60. Ibid., at 22.

afterward.[61] Laws containing these and other restrictions became increasingly common through the first half of the nineteenth century,[62] giving rise to the state regulation cases discussed earlier.

Thus, early attitudes and actions concerning immigration reveal ambivalence. General immigration was encouraged, but certain specific classes of immigrants were discouraged. As to whether exclusion of the latter was intended to be a matter for the federal government or the states, the evidence is mixed. It cannot, therefore, be said that the framers omitted an express federal power to exclude aliens out of a belief that the existence of such a power was too obvious to require mention. That four of the nine Supreme Court Justices in the Passenger Cases were unwilling to recognise a federal power to exclude aliens reinforces the view that the omission cannot be ascribed to obviousness.

Finally, even a showing that the existence of a federal power to exclude aliens was thought obvious by the framers would prove little. There are far more obvious federal powers, such as those to declare war, to make treaties, and to raise an army. Yet the obviousness of those powers did not induce the framers to omit them from the list of areas Congress could regulate.[63]

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61. Ibid., at 22-23.
62. Ibid., at 35-39.
63. See U.S. Const., art. I, s. 8.

The above discussion reveals no persuasive reason to read the Constitution itself as excepting immigration from the doctrine of enumerated powers. Perhaps, however, the holding that there exist independent sovereign powers stems from some source of law thought by the Court to transcend the Constitution. The Court in the Chinese Exclusion Case did not identify such a source.

Several decades later, however, the majority opinion of Justice Sutherland in United States v. Curtiss-Wright Export Corp.[64] explicitly recognised an extraconstitutional source of federal power to regulate foreign affairs. The theory adopted in Curtiss-Wright was this: During the colonial period, sovereignty resided in the Crown. Upon the Declaration of Independence, this sovereignty passed to the states collectively, not to the states individually.[65] The framers of the Constitution intended to reallocate only those powers possessed by the states individually. Therefore, nothing in the Constitution altered the sovereign powers possessed by the states in their corporate capacity as the United States. In particular, control over foreign policy is one power inherent in sovereignty. Thus, the central government, before the

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64. 299 U.S. 304 (1936).
65. Historians differ on this point. For a summary of the opposing authorities, see Henkin, note 34 above, at 23, 289-91 n.10. Henkin observes, however, that this proposition is probably not essential to Justice Sutherland's theory. Arguably, for example, even if sovereignty rested with the individual states from 1776 to 1789, sovereignty passed to the United States upon the adoption of the Constitution at the latest: ibid., at 23-24.

Constitution, possessed the power to regulate foreign affairs, and nothing in the Constitution stripped it of that power. It followed that this power did not require an affirmative constitutional grant.[66]

Apart from the uncertain practical consequences of recognising inherent federal powers, the Sutherland theory has been vigorously attacked on several fronts. One writer has argued convincingly that, before the Constitution was adopted, the states considered themselves separate sovereign entities.[67] Another has proffered strong historical evidence that the framers did not intend to limit the enumerated powers doctrine to internal affairs.[68] Moreover, the Sutherland theory raises the question of why, if constitutional authorisation is unnecessary, the framers would explicitly enumerate certain Congressional powers clearly related to foreign affairs. Congress, for example, is expressly authorised to 'regulate Commerce with foreign Nations', 'declare war', raise and support Armies', and 'provide and maintain a Navy'.[69] A possible explanation is that, even if such grants are technically unnecessary under an inherent powers theory, the framers thought it prudent to be explicit

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66. 299 U.S. at 315-18.
67. D.M. Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory (1946) 55 Yale L.J. 467, at 479-90. But see note 67 above.
68. R. Berger, The Presidential Monopoly of Foreign Relations (1972) 71 Mich. L. Rev. 1, at 26-33 (concerned also with allocation of foreign affairs powers between President and Congress).
69. U.S. Const., art. I, s. 8.

with respect to those powers that would either be handled differently from the treatment provided by the previous Articles of Confederation or would for other reasons be controversial.[70] As one writer has noted, however, that argument does not account for the enumeration of the Congressional war power, which was neither reallocated nor controversial; nor does it explain the failure to specify the foreign affairs powers of the President, who did not exist at all under the Articles of Confederation.[71]

Thus, as the above discussion demonstrates, there are serious problems with the theory that the Congressional power to regulate immigration is inherent in sovereignty. The weaknesses persist whether the theory is based on constitutional interpretation or on extraconstitutional sources. From this point on, however, it will be assumed arguendo that the sovereignty theory is sound. It remains to be determined whether the plenary power doctrine logically follows.

D. Stage IV: Birth of the Plenary Power Doctrine - The Absence of Affirmative Limitations

As the previous discussion has shown, the Supreme Court initially held in the Head Money Cases that the federal power to exclude aliens stemmed from the commerce clause. Reliance was placed on the state regulation cases, with emphasis on the

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70. See Henkin, note 34 above, at 24.
71. Ibid.

need for a uniform immigration policy. In the Chinese Exclusion Case the federal exclusion power was recognised again, this time as an incident of sovereignty. To the extent that the latter opinion rested on the need for uniformity, it implicitly drew on the principles of the state regulation cases and the Head Money Cases.

In building up to its conclusion that the federal power to exclude aliens is inherent in sovereignty, the Court left no doubt that it was concerned only with federalism. It quoted passages from two cases, both expressly addressing the distinction between federal and state power,[72] and one of them supporting its finding of federal power after emphasising the need for uniform regulation.[73] The Court expressly contrasted local matters, which it said could be controlled by local authorities, with matters that it said must be centrally decided.[74] Its rationale goes to the second-component question of how power should be allocated between the federal government and the states.

After its lengthy examination of that issue, however, the Court added a further proposition for which it offered no authority and no reasoned analysis. It stated that the Congressional decision to exclude aliens 'is conclusive upon the Judiciary.'[75] What did that statement mean?

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72. Knox v. Lee, 79 U.S. (12 Wall.) 457, at 555 (1870); Cohens v. Va., 19 U.S. (6 Wheat.) 264, at 413 (1821).
73. Knox v. Lee, 79 U.S. (12 Wall.) 457, at 555 (1870).
74. 130 U.S. at 604.
75. Ibid., at 606.

In the Chinese Exclusion Case the constitutional doctrine that the sovereignty theory was held to abrogate was the requirement that the federal government connect its action to one of the powers granted by the Constitution. That ruling can be viewed as a second component issue, since the doctrine concerns the allocation of power between the federal government and the states. However if the question is whether the Judiciary can review a Congressional action for compliance with the affirmative constitutional limitations protecting individual rights, a clear 3rd-component issue is presented.

Aside from the question of whether the Court's adoption of the sovereignty theory was a valid response to the 2nd-component issue, it is suggested here that the Court certainly never intended to address the 3rd-component issue. The alien had alleged that Congress had exceeded its enumerated powers. The Court's language that the Congressional determination is binding on the Judiciary undoubtedly meant only that the Court could not interfere because Congress had done nothing unconstitutional, a conclusion following from its rejection of the argument that Congress had no power to exclude aliens at all.

That interpretation is supported by the absence of any reference by the Court to any of the affirmative constitutional limitations protecting individual rights. It provided no hint of a desire to preclude review of claims that Congress had violated those provisions. Indeed, the Court expressly acknowledged that even sovereign powers are restricted by the

Constitution.[76]

In the context of the Court's concern with the need for uniformity, it becomes further evident that it did not consider what the judicial role should be when an individual constitutional right has allegedly been violated. Although the need for uniformity militates toward holding the immigration power exclusively federal, it does not lead to the conclusion that the power must be exclusively Congressional. Because it is accepted that the Court can strike down unconstitutional legislation, the problem posed when several equally authoritative bodies make conflicting pronouncements does not arise with respect to disagreements between Congress and the Judiciary.

The third-component issue was soon squarely presented in 1892, however, in Ekiu v. United States.[77] An administrative officer excluded an alien on the ground that she was likely to become a public charge. The alien argued that the government's failure to provide a judicial trial violated due process. The Supreme Court rejected her argument, holding that the Congressional decision to entrust the factfinding to executive officers was unreviewable in court. To support its holding, it recited the international law maxim that every sovereign nation

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76. Ibid., at 604. Accord, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, at 319-20 (1936) (even inherent powers must be exercised in conformity with Constitution). See also Henkin, note 34 above, at 252-53; Note, Constitutional Limits on the Power to Exclude Aliens (1982) 82 Col. L. Rev. 957, at 970-71.

77. 142 U.S. 651 (1892).

has the power to exclude aliens, the rule that in the United States that power has been entrusted to the federal government, and finally the statement that 'It belongs to the political department of the government'.[78] For all those propositions the Court cited the Head Money Cases and the Chinese Exclusion Case.

The Court did not consider whether the failure to provide a judicial trial denied due process of law. Its statement that the Congressional power to exclude aliens 'belongs to the political department' must therefore be interpreted to mean that it rests exclusively with that department. In so holding, Ekiu marks the first clear judicial enunciation of the 'plenary power' doctrine. Rather than provide a rationale for its conclusion, Ekiu relied solely on the two cases noted above. Do those cases support the Ekiu holding?

In the Head Money Cases the Court had held only that Congress has the power to exclude aliens. It found such a power in the commerce clause. As previously discussed, the Head Money rationale, and that of the state regulation cases on which it relied, was that the need for uniformity required federal control. There was no issue of whether Congress had violated any of the constitutional limitations, and no inkling of what the Court would have held had such a question been presented.

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78. Ibid., at 659.

In the Chinese Exclusion Case the Court had also upheld the Congressional power to exclude aliens, this time locating such a power within the concept of sovereignty. Again, the only issue presented had been whether such power exists, not whether Congress must heed the usual constitutional restraints when exercising it. The only support for the Ekiu position would be the later statement in the Chinese Exclusion Case, taken out of context and certainly unsupported by precedent or analysis, that the Congressional decision is binding on the Judiciary.

Thus did the plenary power doctrine come about. The Supreme Court, relying on cases that had concerned only the federalism question whether Congress could exclude aliens at all, held in Ekiu that when Congress does exclude aliens, the Court is powerless to determine whether the particular enactment violates any constitutional provisions. To use the terminology employed here, the plenary power doctrine resulted from misplaced reliance on the sovereignty theory.

E. Stage V: The Snowball Effect

The first case to follow the new plenary power doctrine was Fong Yue Ting v. United States,[79] where the doctrine was expanded to cover deportation. A federal statutory provision required the deportation of any alien labourer of Chinese descent who, inter alia, could not prove by the testimony of at least one white witness that he or she had been a resident at

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79. 149 U.S. 698 (1893).

the time the statute was enacted.[80] An alien labourer offered the testimony of Chinese witnesses that he had been resident in the United States on the enactment date, but alleged he knew no white person who could confirm that testimony. The issue was whether the statute violated due process.

The Court cited Ekiu and the Chinese Exclusion Case for the proposition that in international law every nation has the power to exclude aliens or to admit them conditionally. It next pointed out that only the federal government may decide questions of foreign policy.[81] It then quoted from the Chinese Exclusion Case the sentence, discussed above, to the effect that the legislative determination is binding upon the Judiciary.[82]

The Court next extrapolated all those propositions from exclusion to deportation. Citing several authors, it said the right of a nation to deport aliens was a sovereign power recognised in international law.[83] It then stated, without elaboration, that control of foreign relations is vested entirely in the federal government. The Court next warned against judges passing on 'political questions, the final decision of which has been committed by the Constitution to the other departments of the government'.[84] Finally, it applied

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80. See Act of 5 May 1892, ch. 60, ss. 2,3,6, 27 Stat. 25, at 26.
81. Ibid., at 705-06, quoting Knox v. Lee, 79 U.S. (12 Wall.) 457, at 555 (1870)(Bradley J.).
82. 149 U.S. at 706.
83. Ibid., at 707, 711.
84. Ibid., at 712, quoting from McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, at 421 (1819).

that principle to deportation, stating that '[T]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government'.[85] The Court concluded it could not review the statute for compliance with the requirements of due process.[86]

The Court's refusal to consider whether the statute violated the due process clause was further predicated on its assumption that deportation, being merely a means of removing an alien from the country, is not a form of punishment. Having made that assumption, the Court then reasoned that an alien 'has not, therefore, been deprived of life, liberty, or property without due process of law.'[87] This rationale is puzzling. First, it is not clear why deportation is nonpunitive. This point is taken up later.[88] Second, the categorisation of a particular disability as punishment is not now,[89] and was not then,[90] an essential element of a due process claim.

Thus Fong Yue Ting held that courts lack the power to review federal deportation statutes for compliance with constitutional limitations. To reach its decision, the Court relied on an extension of the sovereignty principle announced in the Chinese Exclusion Case, a belief that a deportation issue necessarily constitutes a political question on which

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85. 149 U.S. at 713.
86. But see ibid., at 732-44 (Brewer J., dissenting).
87. Ibid., at 730 (emphasis added).
88. See pp. 324-26 below.
89. See, e.g., Fuentes v. Shavin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
90. See, e.g., Windsor v. McVeigh, 93 U.S. 274, at 277-78 (1876); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, at 233 (1863).

courts must not pass, the unexplained conclusion that deportation is non-punitive, and the unsupported inference that the due process clause is confined to the imposition of punishment.

In the same year as Fong Yue Ting, the Supreme Court decided Lees v. United States.[91] A federal statute penalised any person importing aliens under contract to perform labour in the United States. Unlike the procedural issue in Fong Yue Ting, the immigration issue in Lees was the constitutionality of the substantive discrimination against specified classes of aliens. Citing the Chinese Exclusion Case and Fong Yue Ting, the Court held that Congress' 'absolute power to exclude aliens' permits it to discriminate against classes of aliens and, further, that such Congressional decisions are 'not open to challenge in the courts'.[92] As a result, the Court reasoned, Congress may make the exclusion effective by penalising those who undermine it. No rationale for holding the exclusion power absolute was provided, the Court being content to rest on the cited cases.[93]

By disabling itself from reviewing governmental action for substantive reasonableness, the Court in Lees adopted a position poles apart from the assertive posture it was then beginning to take outside the immigration context. In 1887,

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91. 150 U.S. 476 (1893).
92. Ibid., at 480.
93. It also cited a third case, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). In that case, however, the sole issue had been one of statutory interpretation.

six years before Lees, the Supreme Court had stated obiter that a state statute having no 'real or substantial relation' to the police power would be unconstitutional.[94] The Court carried out that threat in 1897, when in Allgeyer v. Louisiana [95] it held unconstitutional a state statute restricting the sale of marine insurance. To support its holding the court had to find, within the due process clause, substantive protection from certain restraints on liberty. Substantive due process reached its peak in 1905, when the Supreme Court decided Lochner v. New York.[96] The Court held that a law restraining a person's liberty must be reasonable in order to be valid, and went on to apply the reasonableness test in an especially assertive way. That technique was soon repeated in several other Supreme Court decisions invalidating both state and federal legislation.[97]

Although the intensity with which the Court has applied the substantive due process doctrine has eroded significantly since Lochner,[98] governmental action still requires 'a reasonable relation to a proper legislative purpose'.[99] In the last few decades, review for compliance with substantive due process has been especially strong in cases involving

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94. Mugler v. Kansas, 123 U.S. 623, at 661 (1887).
95. 165 U.S. 578 (1897).
96. 198 U.S. 45 (1905).
97. E.g., New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Adams v. Tanner, 244 U.S. 590 (1917); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Adair v. United States, 208 U.S. 161 (1908).
98. See, e.g., West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).
99. Ibid., at 537.

legislation interfering with non-economic personal interests.[100] The latter cases, unlike Lees and subsequent immigration decisions,[101] have left no doubt that when important individual interests are at stake, the Court will take seriously its duty to review the substantive reasonableness of governmental action.

Lees was followed by a series of Supreme Court cases further restricting the judicial role in entry and deportation cases. Each of these cases relied on those previously discussed. In Lem Moon Sing v. United States[102] the Court reaffirmed the Ekiu holding that procedural due process does not bar Congress from committing to executive officers the final decision whether to exclude an alien. The Court disposed of the issue summarily by citing the Chinese Exclusion Case, Ekiu, and Fong Yue Ting. Similar decisions accumulated.[103]

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100. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Conn., 381 U.S. 479 (1965); Skinner v. Okla., 316 U.S. 535 (1942). Although no constitutional provision explicitly bars the federal government from denying equal protection of the laws, fifth amendment due process has been held to prohibit unjustifiable federal discrimination: see Johnson v. Robison, 415 U.S. 361, at 364 n.4 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954). Those cases too have been an important source of substantive protection.

101. See, e.g., Harisiades, Galvan, and Fiallo, at pp. below.

102. 158 U.S. 538 (1895). Accord, Lee Lung v. Patterson, 186 U.S. 168 (1902).

103. See, e.g., 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, at 495 (1901); Fok Yong Yo v. United States, 185 U.S. 296, at 302 (1902).

The first crack in the absolute rule of judicial impotence came with Yamataya v. Fisher.[104] The Court reaffirmed that Congress may constitutionally entrust the enforcement decision to executive officers. In dictum, however, it then said it was not holding that the 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'.[105] One such principle was the opportunity to be heard, a right that the Court construed the statute to require. Clearly left open was the possibility that executive action denying that basic right could be held violative of due process, at least in the case of domiciled aliens threatened with deportation. With respect to non-domiciled aliens, the Court said executive decisions satisfying the statutory requirements would be immune from constitutional attack.[106] No indication was provided whether a deportation statute construed as not requiring an opportunity for a domiciled alien to be heard could be reviewed for compliance with procedural due process.

The next major development was United States ex rel. Turner v. Williams,[107] in which a resident alien was ordered deported on the ground that he was an anarchist. After dismissing several constitutional arguments by summary citation of several of the plenary power doctrine cases already

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104. 189 U.S. 86 (1903)(also called Japanese Immigrant Case).
105. Ibid., at 100.
106. Ibid., at 98.
107. 194 U.S. 279 (1904).

discussed,[108] the Court addressed the alien's argument that the statute abridged his First Amendment right to free speech. It held that even when construed to extend to aliens who are merely 'political philosophers, innocent of evil intent',[109] the statute would withstand a First Amendment challenge. That the Court would uphold the statute even as so construed is a radical departure from the rigid standards ordinarily applied in First Amendment cases involving restrictions on political speech.[110]

During the period from 1905 to 1950, there followed a series of procedural due process challenges to exclusion and deportation orders. Most such cases summarily dismissed the aliens' arguments without exploring the need for specific safeguards. Many simply cited previous plenary power doctrine cases.[111] Some were especially extreme.[112]

The Supreme Court's 1950 decision in United States ex rel. Knauff v. Shaughnessy[113] is one of the classic plenary power cases. The alien wife of an American citizen had been ordered excluded, without a hearing, pursuant to an administrative

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108. The Court cited the Chinese Exclusion Case, Fong Yue Ting, and Lem Moon Sing (ibid., at 291-92).
109. 194 U.S. at 294.
110. See pp. 319-20 below.
111. E.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); United States ex rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103 (1927); United States ex rel. Tisi v. Tod, 264 U.S. 131 (1924); Tiaco v. Forbes, 228 U.S. 549 (1913); Low Wah Suey v. Backus, 225 U.S. 460 (1912); Tang Tun v. Edsell, 223 U.S. 673 (1912); Yeung How v. North, 223 U.S. 705 (1911); United States v. Ju Toy, 198 U.S. 253 (1905).
112. E.g., Low Wah Suey v. Backus, 225 U.S. 460 (1912); United States v. Ju Toy, 198 U.S. 253 (1905).
113. 338 U.S. 537 (1950).

regulation permitting the Attorney General to bypass a hearing if he finds the alien excludable on the basis of confidential information. She argued she had been denied procedural due process.

The Court began by classifying the admission of an alien as a privilege, rather than a right.[114] It then described exclusion as a 'fundamental act of sovereignty', which is 'inherent in the executive power to control the foreign affairs of the nation.'[115] Relying on those premises, the Court then held: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'[116] That statement appears to go even further than previous decisions, which at least had acknowledged that the procedure must meet a threshold requirement of avoiding 'manifest unfairness'.[117]

The Court's first rationale, that procedural due process may be denied when the interest in question is a mere 'privilege', has been considered already in the section on judicial review in the United Kingdom.[118] The conclusion reached was that the right/privilege distinction should not be determinative of the need for procedural safeguards. In the United States the conclusion can be bolstered by a great number

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114. Ibid., at 542. See also Jay v. Boyd, 351 U.S. 345, at 354 (1956).
115. 338 U.S. at 542.
116. Ibid., at 544.
117. See Low Wah Suey and Tang Tun, note 111 above.
118. See pp. 70-73 above.

of court decisions outside the immigration area, holding violative of due process the unfair deprivation of an interest classifiable as a privilege.[119]

The second rationale, focusing on the concept of sovereignty, requires further comment. To support its reliance on the notion of sovereign powers, the Court cited Fong Yue Ting and Curtiss-Wright, both discussed above. It will be recalled that in Fong Yue Ting the Court did hold that the sovereign power to regulate immigration was vested exclusively in the political branches. To reach that conclusion, however, it had relied on the uniformity rationale, logically applicable to federalism questions but not to those concerning separation of powers within the federal government. In Fong Yue Ting, the Court had relied on the Chinese Exclusion Case and Ekiu; Ekiu, in turn, had relied on the Chinese Exclusion Case and the Head Money Cases; and of the last two cases, the only one mentioning the question whether exclusion or deportation actions of the political branches are subject to judicial review for constitutionality was the Chinese Exclusion Case, in which the only issue and the only analysis had pertained to federalism. The Knauff court's citation of Curtiss-Wright is similarly

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119. See, e.g., J.D. French, Unconstitutional Conditions: An Analysis (1961) 50 Georgetown L.J. 234; C. Gordon & H.N. Rosenfield, Immigration Law and Procedure (1984), s. 15.3; W.W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law (1968) 81 Harv. L. Rev. 1439. See especially Bd. of Regents v. Roth, 408 U.S. 564, at 571 (1972); Goldberg v. Kelly, 397 U.S. 254, at 262 (1970). For qualifications, see R.A. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much (1982) 35 Stan. L. Rev. 69.

unpersuasive, for even in that case the Court, while recognising a sovereign power over foreign relations, nonetheless made clear that such power was subject to the limitations contained in the Constitution.[120] The conclusion reached by Knauff has been severely criticised by commentators.[121]

During and shortly after that same period, the Supreme Court rendered a series of decisions modifying the application of the plenary power doctrine to procedural challenges. In Kwock Jan Fat v. White,[122] the combination of a citizenship claim by a returning resident, a special reliance element, and some crucial errors in the transmission of information persuaded the Supreme Court that due process had been violated. The Supreme Court found a violation of due process. Later, in Ng Fung Ho v. White,[123] the Supreme Court held that procedural due process requires a judicial trial when a citizenship claimant is being deported, at least where there is evidence to support the claim. The Court emphasised the greater security inherent in judicial proceedings and the great

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120. 299 U.S. at 319-20.
121. See especially H.M. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic (1953) 66 Harv. L. Rev. 1362, at 1391-96; D.A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond (1983) 44 U. Pitt. L. Rev. 165, at 173-80. The Hart dialogue is reproduced in H.M. Hart & H. Wechsler, The Federal Courts and the Federal System (2d ed., by P.M. Bator, P.J. Mishkin, D.L. Shapiro & H. Wechsler, 1973), at 330-60, with subsequent developments at 360-75.
122. 253 U.S. 454 (1920).
123. 259 U.S. 276 (1922). For subsequent qualifications of Ng Fung Ho, see Kessler v. Strecker, 307 U.S. 22, at 34-35 (1939) (obiter); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923).

deprivation of liberty entailed by deportation.[124] Without acknowledging Kwock Jan Fat, the court also said obiter that even a citizenship claimant may be excluded without a judicial trial because such a person is outside the country and therefore unprotected by the Constitution.[125] Finally, in Wong Yang Sun v. McGrath,[126] the Court held that procedural due process forbids the government from deporting a person--even one not claiming citizenship--without a hearing on the record. Coming in the same year as Knauff, Wong Yang Sun illustrates the differing approaches to procedural protection as between exclusion and deportation cases.[127]

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124. 259 U.S. at 285.

125. Kwock Jan Fat did not require a judicial trial, but its recognition of some due process limitations contradicts the Ng Fung Ho rationale that excluded persons claiming citizenship are unprotected by the Constitution because of their absence from the country. For the Congressional response to this problem, see 8 U.S.C. s. 1105a(a)(5).

126. 339 U.S. 33 (1950).

127. Shortly after Knauff, the Court decided two cases in which returning resident aliens had been excluded without notice of the charges and without the opportunity to be heard. In Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), the Court invalidated the exclusion order by interpreting a regulation to avoid constitutional doubts. However, in its subsequent decision in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court rejected a procedural due process challenge by characterising the regulation of aliens as 'a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control', and citing the Chinese Exclusion Case, Fong Yue Ting, Knauff, and Harisiades (ibid., at 210). It distinguished Chew on such narrow grounds (see ibid., at 213-14) that the latter decision appeared to retain very limited vitality. But in Landon v. Plasencia, 103 S.Ct. 321 (1982), the Court cited Chew approvingly (ibid., at 329). 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 (1983) 24 Harv. Int'l L.J. 198. Other cases, however, reveal a more restrictive

The next important development was the Supreme Court's 1952 decision in Harisiades v. Shaughnessy.[128] Scattered throughout the opinion in that case were statements comprising the Supreme Court's fullest attempt to provide rationales for the plenary power doctrine. Those rationales are collected and analysed along with others in the final chapter of this thesis.[129] In Harisiades several long-term permanent resident aliens had been ordered deported because of their membership in the Communist Party. The aliens made several constitutional arguments.

Two arguments were predicated upon substantive due process. The first was that the aliens' admission to permanent residence created a vested right to remain in the United States. The second was the less radical one that the grounds for deportation must at least bear a reasonable relation to some legitimate governmental interest. Rejecting both arguments, the Court held that Congressional immigration decisions 'are so exclusively entrusted to the political branches of government as to be largely immune from judicial interference.'[130]

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127. (continued) view of procedural due process: see, e.g., Boutilier v. I.N.S., 387 U.S. 118 (1967); Marcello v. Bonds, 349 U.S. 302 (1955); Jordan v. DeGeorge, 341 U.S. 223 (1951).
128. 342 U.S. 580 (1952).
129. See ch. V, s. E below.
130. 342 U.S. at 588-89 (emphasis added). For an excellent exposition of the view that Congress should be prohibited from deporting long-term permanent resident aliens, see S. Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel (1959) 69 Yale L.J. 262. See also Hesse's companion article, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases (1959) 68 Yale L.J. 1578.

The term 'largely immune' was an accurate description. The Court remarked that it was unable to consider Congressional alarm about Communism a 'fantasy', and that therefore it could not say there were 'no possible' grounds on which Congress could declare membership in the Communist Party a deportable offence.[131] The Court added that the Constitution did not require the court to 'equate' its political judgment with that of Congress.[132] The last comment was unfortunate, for it created the erroneous impression that review for reasonableness would be tantamount to a substitution of judgment. Still, although the standard of review was unusually narrow, the Court's formulation assumed that a deportation ground devoid of all possible relation to a legitimate Congressional goal might violate due process.

Justice Frankfurter, concurring in the result, was apparently unwilling to make even that concession. He argued that the policy of admitting aliens is solely one of 'national self-interest', belonging to the political branches.[133] In his view, although Congress was subject to limitations of procedural due process, Congress alone determined which classes of aliens are excludable or deportable, and review of such decisions was completely outside the power of the courts.[134] Justice Douglas, dissenting, argued for an explicit overruling of Fong Yue Ting and the plenary power doctrine.[135]

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131. 342 U.S. at 590.
132. Ibid.
133. Ibid., at 596.
134. Ibid., at 597.
135. Ibid., at 598-601.

It was next argued that deporting an alien because of membership in the Communist Party would violate the freedom of association guaranteed by the First Amendment.[136] Rejecting that argument too, the Court reasoned that an alien had no right to advocate the overthrow of the government, and that Congress had found the Communist Party so advocated. The rationale is questionable, for even if the advocacy of violent overthrow had been a view entirely unprotected by the First Amendment,[137] the question was whether the same was true of membership in an organisation found to advocate such overthrow. Because one might join an organisation out of a belief in any number of its tenets, it cannot be assumed that every Communist Party member personally favours overthrow. The significant point for present purposes is that the standard by which the Court reviewed the aliens' First Amendment argument was far narrower than that ordinarily employed in the adjudication of such claims.[138]

Harisiades was followed by other substantive constitutional challenges. In Galvan v. Press,[139] an alien who had been ordered deported on the basis of his prior membership in the Communist Party argued that, during the time

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136. Aliens are protected by the First Amendment: Bridges v. California, 314 U.S. 252 (1941)(sub silentio). Cf. Rowoldt v. Perfetto, 355 U.S. 115 (1957)(narrow interpretation of statutory term 'membership').
137. Absent a clear and present danger that such advocacy will lead to lawless action, it is doubtful that even that view would be outside the protection of the 1st Amendment. See pp. 319-20 below.
138. See pp. 319-20 below.
139. 347 U.S. 522 (1954).

he was a member, he had had no reason to think he was acting wrongfully, and that therefore substantive due process barred his deportation. Justice Frankfurter responded:

> [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 . . .
>
> 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.[140]

Writing the opinion of the Court, Justice Frankfurter proceeded to confirm the plenary power doctrine.

The next major affirmation of the plenary power doctrine occurred in 1972, when the Supreme Court decided Kleindienst v. Mandel.[141] At issue was whether the First Amendment prevented the government from excluding an alien for advocating communism. The Court implied that in an ordinary political speech case, the governmental interest would be balanced against the individual interest in free expression.[142] Referring several times to Congress' 'plenary' power to exclude aliens,[143] however, the Court held that no balancing was required, at least when a 'facially legitimate and bona fide'

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140. Ibid., at 530-31. One writer very effectively contrasts Justice Frankfurter's reluctance in Galvan to disturb precedent with his eagerness to do so in another context: see Martin, note 121 above, at 235, quoting from Graves v. New York ex rel. O'Keefe, 306 U.S. 466, at 491-92 (1939).

141. 408 U.S. 753 (1972). See also Note, First Amendment and the Alien Exclusion Power--What Standard of Review? (1983) 4 Cardozo L. Rev. 457.

142. 408 U.S. at 765.

143. Ibid., at 766, 768, 769.

reason[144] was offered for the exclusion. To reach that conclusion, it stated that the exclusion power was 'inherent in sovereignty', citing the Chinese Exclusion Case and Fong Yue Ting.[145] Then, citing several of the plenary power cases previously discussed in this chapter,[146] the Court added that the power was necessary for foreign relations and defence, and that it was to be exercised exclusively by the political branches. The Court next quoted approvingly the 'clean slate' rationale of Justice Frankfurter in Galvan v. Press.

The First Amendment aspect of the plenary power doctrine invoked in cases like Turner, Harisiades, and Mandel can be fully appreciated only in contrast with the assertive approach characterising review of First Amendment claims outside the immigration area. During the twentieth century the Supreme Court has ordinarily reviewed such claims 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.[147]

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144. Ibid., at 769, 770.
145. Ibid., at 766.
146. See citations ibid., at 766 n.6.
147. 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

Far from applying those stringent standards, the Court in all the immigration cases discussed here[148] has refused to perform any balancing of the relevant conflicting interests.

The most recent Supreme Court application of the plenary power doctrine was its 1977 decision in Fiallo v. Bell.[149] The Immigration and Nationality Act provides special benefits to aliens seeking admission as 'parents' or 'children' of United States citizens.[150] In the case of an illegitimate birth, however, the father/child relationship is not recognised for immigration purposes.[151] The latter provision was challenged by a father seeking admission through his citizen child and by a child seeking admission through his citizen father. The aliens argued that the discrimination against illegitimate children and their fathers violated due process.

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147. (continued) compelling governmental interest (LaMont v. Postmaster General, 381 U.S. 301, at 308 (1965); N.A.A.C.P. v. Button, 371 U.S. 415, at 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 M.R. Konvitz, Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly (1957), at 280-341. See also T.I. Emerson, The System of Freedom of Expression (1970); T.I. Emerson, Toward a General Theory of the First Amendment (1963) 72 Yale L.J. 877; A.E. Fuchs, Further Steps Toward a General Theory of Freedom of Expression (1976) 18 Wm. & Mary L. Rev. 347; M.R. Konvitz, First Amendment Freedoms (1963).

148. See pp. 309-10, 317-19 above.

149. 430 U.S. 787 (1977). See Note, Ending Discrimination Against Unwed Fathers and Their Illegitimate Children Under the Immigration Laws (1981) 56 N.Y.U.L. Rev. 146.

150. 8 U.S.C. ss. 1151(a,b) (exempt from numerical restrictions); 1182(a)(14) (exempt from labor certification requirement).

151. Ibid., s. 1101(b)(1)(D). There are exceptions: see ibid., ss. 1101(b)(1)(B,C,E,F).

Of all the immigration cases the Supreme Court had decided, Fiallo appeared to be the one in which the arguments for broad judicial review were the strongest. The statutory provision in question classified not only by alienage, but also by gender and legitimacy. The latter two classifications are normally subjected to some form of heightened judicial scrutiny.[152] Further, the interest of which the plaintiffs were being deprived was that of American citizens in reuniting their families, a factor that should certainly have militated toward broader review.[153] Arguably any one of those factors should have increased the standard of review. A fortiori the combination of all of them should have had that effect.

In addition to the presence of factors ordinarily setting off greater than usual review, Fiallo was devoid of the factors usually influencing the Court to defer to Congress in

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152. For gender cases, see, e.g., Miss. University for Women v. Hogan, 102 S.Ct. 3331 (1982); Kirchberg v. Feenstra, 450 U.S. 455 (1981); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971). That is not to say, of course, that the classification will necessarily be struck down: see, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981).

For review of actions distinguishing between legitimate and illegitimate children, see, e.g., Mills v. Habluetzel, 456 U.S. 91 (1982); Gomez v. Perez, 409 U.S. 535 (1973); Jiminez v. Weinberger, 417 U.S. 628 (1974); Levy v. Louisiana, 391 U.S. 68 (1968).

153. The standard of review has been more stringent when the complainant has been deprived of a 'fundamental' interest: see, e.g., Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. Illinois, 351 U.S. 12 (1956). Marshall J., dissenting in Fiallo, argued inter alia that the interest in family unity should be regarded as fundamental (430 U.S. at 810).

immigration matters. The majority acknowledged that the distinction in question did not relate to foreign affairs, a subject area in which the occasions for judicial deference tend to be more frequent. Citing Harisiades, however, the Court said the standard of review has not been shown to be 'a function of the nature of the policy choice at issue'.[154]

Despite the strong arguments for greater than usual review, the Court again described the Congressional power to exclude and deport aliens as a 'fundamental sovereign attribute . . . largely immune from judicial control', perfunctorily citing both early and more recent plenary power cases.[155] To emphasise its point, the Court repeated its earlier statement: 'Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'[156] The Court next quoted approvingly the 'clean slate' comment of Justice Frankfurter.[157] Finally, the Court implied that, in order to accept the alien's substantive due process argument, it would have had to 'substitute [its] judgment' for that of Congress,[158] once again failing to distinguish between substitution of judgment and any of several lesser standards of review. One noteworthy qualification, however, was a footnote recognising a 'limited judicial

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154. 430 U.S. at 796, citing also a non-immigration case, Mathews v. Diaz, 426 U.S. 67 (1976).
155. 430 U.S. at 792 (emphasis added).
156. 430 U.S. at 792.
157. Ibid., at 792 n.4.
158. Ibid., at 798.

responsibility' even in reviewing statutes excluding or deporting aliens.[159]

Although the precise degree of deference shown in Fiallo might be difficult to discern from its language, there can be no doubt that its holding reflected deference far greater than that applicable in other settings. To support the particular classification in question, the Court reasoned that Congress might have believed that permitting fathers to immigrate through their illegitimate citizen children would create problems concerning proof of paternity.[160] Yet, on the same day as Fiallo, the Court decided Trimble v. Gordon.[161] In that case it held violative of equal protection a state statute preventing an illegitimate child from inheriting property by intestate succession from his father, but not preventing such inheritance from his mother. The test applied in Trimble was whether the classification bears a 'rational relationship to a legitimate state purpose'.[162] Applying that standard, the Court rejected as too weak the argument concerning proof of paternity. Thus, in two cases decided the same day, the Supreme Court held that the practical problems of proving the paternity of illegitimate children, though not serious enough to warrant a barrier to intestate succession, were sufficiently serious to justify the separation of parents and children. Fiallo and Trimble together epitomise the contrast between the

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159. Ibid., at 793 n.5.
160. Ibid., at 799 n.8.
161. 430 U.S. 762 (1977).
162. Ibid., at 766.

standards of review applicable to immigration cases and those applicable elsewhere.

Most of the plenary power doctrine cases analysed thus far have addressed constitutional challenges based on either substantive or procedural due process, or on the First Amendment. One further adjunct of the doctrine, sufficiently distinct to require separate treatment, concerns challenges based on constitutional provisions for which one essential element is punishment. When deportation provisions are challenged on any of those grounds, the question presented is whether deportation is a form of punishment.[163]

With the single exception of a district court decision later reversed on appeal,[164] every court passing on the question has held that deportation is not punishment. More important here, however, is the observation that, as with the other aspects of the plenary power doctrine, that conclusion has been reached mechanically, without reasoned analysis.

The first such Supreme Court decision was its 1893 opinion in Fong Yue Ting, where, as discussed earlier,[165] the Court described deportation as non-punitive. It did so without examining the attributes of punishment to assess their applicability to deportation, and without attempting to fashion any alternative principled analysis. After Fong Yue Ting, the

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163. See P. Schuck, The Transformation of Immigration Law (1984) 84 Col. L. Rev. 1; Note, Deportation as Punishment: Plenary Power Re-examined (1975) 52 Chicago-Kent L. Rev. 466.
164. See the Lieggi decision, described in note 188 below.
165. 149 U.S. 698 (1893). See p. 305 above.

most frequent purpose for which the court had to decide whether deportation is punishment was to determine the applicability of the constitutional prohibition of ex post facto laws,[166] a clause that has been held limited to the imposition of punishment.[167]

In 1913 the Supreme Court in Bugajewitz v. Adams[168] held that the ex post facto clause does not bar Congress from deporting an alien on the basis of behaviour occurring at a time when it did not constitute a deportable offence. Citing no authority, the Court held deportation is not punishment, describing it instead as merely 'a refusal by the government to harbor persons whom it does not want'.[169] That characterisation does not eliminate the need to explain why deportation is not punishment. Incapacitation, the separation of an undesirable person from society, is itself one of the classic purposes of punishment.[170]

From 1913 until the present day, the Supreme Court has repeatedly confirmed its view that Congress may deport aliens retroactively. Like Fong Yue Ting and Bugajewitz, no such case has even attempted to offer a rationale in support of that position, content instead to cite previous cases adopting the

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166. U.S. Const. art. I, s. 9, cl. 3.
167. Johannessen v. United States, 225 U.S. 227, at 242 (1912); Calder v. Bull, 3 U.S. (3 Dall.) 386, at 390 (1798).
168. 228 U.S. 585 (1913).
169. Ibid., at 591.
170. See H. Packer, The Limits of the Criminal Sanction (1968), at 48-53.

same approach.[171] The snowball effect, similar to that in the other plenary power doctrine cases, was made especially explicit in Galvan v. Press, where the Court expressed its great reluctance to deviate from an 'unbroken rule'.[172]

A line of recent lower court decisions serves as another example of particular restraint on both constitutional and other issues. After the seizure of the American embassy in Iran in 1979, President Carter issued an executive order directing the Attorney General to (a) summon all Iranian students to I.N.S. offices for inspection purposes, and (b) to identify and deport any Iranian students found to be in violation of the immigration laws.[173] The I.N.S.[174] issued a series of regulations giving rise to numerous cases.

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171. In chronological order, see Lapina v. Williams, 232 U.S. 78, at 88 (1914) (single sentence that Congress has the 'plenary' power to decide who may enter and remain in the United States, citing the Chinese Exclusion Case, Ekiu, Fong Yue Ting, and Lem Moon Sing); Lewis v. Frick, 233 U.S. 291, at 296 (1914) (citing Lapina); Ng Fung Ho v. White, 259 U.S. 276, at 280 (1922) (obiter citing Bugajewitz, Lapina, and Lewis); Mahler v. Eby, 264 U.S. 32, at 39 (1924) (citing Fong Yue Ting and Bugajewitz); United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521, at 529 n.15 (1950) (citing Fong Yue Ting, Bugajewitz, Ng Fung Ho, and Mahler); Harisiades v. Shaughnessy, 342 U.S. 580, at 594-95 (1952) (citing Bugajewitz and Mahler); Galvan v. Press, 347 U.S. 522, at 531 (1954) (citing Bugajewitz and Ng Fung Ho); Marcello v. Bonds, 349 U.S. 302, at 314 (1955) (citing Harisiades and Galvan); Lehmann v. United States ex rel. Carson, 353 U.S. 685, at 690 n.4 (1957) (citing Bugajewitz, Ng Fung Ho, Mahler, Eichenlaub, Harisiades, Galvan, and Marcello); Mulcahey v. Catalanotte, 353 U.S. 692, at 694 n.5 (1957) (citing same cases as Carson).

172. 347 U.S. 522, at 531 (1954).

173. (1979) 15 Weekly Compilation of Presidential Documents 2107.

174. The Attorney General's powers to implement the immigration laws, including the power to issue regulations, have been delegated to the Commissioner of the I.N.S.: see 8 C.F.R. s. 2.1.

The first such case was Narenji v. Civiletti.[175] An alien challenged, as unconstitutionally discriminatory, an I.N.S. regulation ordering Iranian students to report to the I.N.S. for investigations of their status. The D.C. Circuit upheld the regulation. It stated that either Congress or the President may distinguish by nationality when regulating immigration, and that such distinctions are constitutional unless 'wholly irrational'.[176] Emphasising the limited role of the courts in reviewing the foreign affairs decisions of the President, and acknowledging the Attorney General's affidavit stating that the regulation was part of the President's effort to resolve the Iranian crisis, the Court found the distinction rational.[177] Judge MacKinnon, concurring, cited a number of recurring themes discussed below.[178]

The decision in Narenji is certainly supportable. The I.N.S. regulation in question simply did what the President had expressly ordered. Consequently, the foreign policy judgment reflected in the regulation could be imputed to the President. In Yassini v. Crosland,[179] however, the Ninth Circuit took Narenji to extreme lengths. In Yassini, the challenged I.N.S. regulation revoked the permission previously given to all Iranian nationals to remain in the United States until a

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175. 617 F.2d 745 (D.C. Cir. 1980).
176. Ibid., at 747.
177. Ibid., at 747-48.
178. Ibid., at 749-50.
179. 618 F.2d 1356 (9th Cir. 1980).

specified date. The alien attacked the regulation on several fronts.[180]

One argument was based on the Supreme Court's decision in Hampton v. Mow Sun Wong.[181] In that case, the Supreme Court had invalidated on due process grounds a Civil Service Commission regulation denying federal employment to aliens. In doing so, it had laid down an important principle:

> 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.[182]

The Court in Yassini disposed of the due process argument by concluding that the I.N.S. regulation was 'within the scope' of the Presidential order.[183] Since the asserted purpose was to assist the President in resolving the Iranian crisis, the court reasoned that the asserted purpose, being rational, was the actual purpose.

But there is a vast difference between a regulation that is 'expressly mandated' by a Presidential order and one that is merely 'within the scope' of it. If a rational agency action

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180. See especially the arguments based on the Administrative Procedure Act: ibid., at 1359-62.
181. 426 U.S. 88 (1976). See generally Comment, Federal Civil Service Employment: Resident Aliens Need Not Apply (1977) 15 San Diego L. Rev. 171.
182. 426 U.S. at 103.
183. 618 F.2d at 1362.

is expressly mandated by the President, then, as Mow Sun Wong concedes, the action is valid. That was the case in Narenji, where the I.N.S. had simply executed a foreign policy decision of the President. To uphold a regulation assertedly justified only by an interest that the agency has no responsibility for fostering, however, runs exactly 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 U.S. The regulation simply reflected the judgment of the I.N.S. that this sanction would help to resolve the Iranian crisis. The I.N.S. has not been delegated any authority to make such foreign policy judgments. The practical effect of the Court's holding, therefore, is to expand the plenary power doctrine, extreme already when used to insulate Congressional action from meaningful constitutional review, to cover I.N.S. action. The Tenth Circuit, citing Yassini, similarly upheld an I.N.S. regulation that selectively disadvantaged Iranian students in a way not mandated by the Presidential order.[184] These decisions are typical of the restraint exhibited generally in the Iranian student cases,[185] an external explanation for which is offered in the next chapter.

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184. Nademi v. I.N.S., 679 F.2d 811, at 814 (10th Cir. 1982).
185. E.g., 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).

F. The Beginnings of a Sixth Stage?

The Iranian cases display a degree of deference entirely consistent with the tone of the Supreme Court's plenary power decisions. There have, in addition, been numerous other lower court cases virtually declining to review Congressional immigration decisions for compliance with substantive constitutional constraints.[186]

At the same time, however, a number of lower federal courts are beginning to show less than full acceptance of the plenary power doctrine. In many cases, this phenomenon has been confined to rhetoric; courts have claimed the power to invalidate federal immigration legislation that draws irrational distinctions, only to find the particular legislation rational.[187] In other cases, however, the rhetoric has been matched by the results. Two district court decisions have held deportation provisions unconstitutional as applied to the particular facts, though both were ultimately reversed on appeal.[188] The 1976 decision of the Second

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186. E.g., Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982); Pierre v. I.N.S., 547 F.2d 1281 (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, at 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, at 963 (11th Cir. 1984) (en banc) (Attorney General may discriminate on basis of national origin when detaining excluded aliens).

187. E.g., United States v. Barajas-Guillen, 632 F.2d 749, at 752 (9th Cir. 1980); Menezes v. I.N.S., 601 F.2d 1028, at 1034 (9th Cir. 1979); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975); Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974).

188. Acosta v. Gaffney, 413 F. Supp. 827 (D.N.J. 1976), rev'd, 558 F.2d 1153 (3rd Cir. 1977); Lieggi v. U.S.I.N.S., 389 F. Supp. 12 (N.D. Ill. 1975), rev'd in unreported opinion, see 529

Circuit in Francis, discussed earlier,[189] was the first non-reversed court decision to strike down as unconstitutional a federal statutory provision governing either the exclusion or the deportation of aliens. The Ninth Circuit, in Tapia-Acuna v. I.N.S.,[190] followed Francis.

Further, the lower courts have intervened in several cases to provide procedural protection to aliens undergoing exclusion or deportation proceedings. Several such cases, arising in the asylum context, have been well covered in other sources.[191] Others, outside the realm of asylum, have reflected similar assertiveness.[192] These procedural decisions cannot be described as disregarding the teachings of the Supreme Court, since the Supreme Court has itself sometimes indicated a

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188. (continued) F.2d 530 (7th Cir. 1976). The 3rd Circuit decision in Acosta accords with Gonzalez-Cuevas v. I.N.S., 515 F.2d 1222 (5th Cir. 1975) and Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972).

189. See pp. 260-61 above.

190. 640 F.2d 223 (9th Cir. 1981).

191. See, e.g., Martin, note 121 above, at 168-71; Note, The Constitutional Rights of Excluded Aliens: Proposed Limitations on the Indefinite Detention of the Cuban Refugees (1982) 70 Geo. L.J. 1303; Note, Filling the Immigration Void: Rodriguez-Fernandez v. Wilkinson--An Excludable Alien's Right to be Free from Indeterminate Detention (1982) 31 Cath. L. Rev. 335; Note, United States Asylum Procedures: Current Status and Proposals for Reform (1981) 14 Cornell Int'l L.J. 405.

192. See, e.g., Lopez-Mendoza v. I.N.S., 705 F.2d 1059 (9th Cir. 1983)(en banc); Aguilera-Enriquez v. I.N.S., 516 F.2d 565, at 568-69 n.3 (6th Cir. 1975). See generally T.A. Aleinikoff, Aliens, Due Process and "Community Ties": A Response to Martin (1983) 44 U. Pitt. L. Rev. 237; I.A. Appleman, Right to Counsel in Deportation Proceedings (1976) 14 San Diego L. Rev. 130; Schuck, note 163 above, at 66-68; cf. R.D. Gardner, Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine (1981) 8 Hastings Const'l L.Q. 397 (advocating safeguards applicable to criminal proceedings).

willingness to review immigration decisions for compliance with procedural due process.[193] But the lower court decisions do perhaps reflect a difference in degree of assertiveness.[194]

Finally, the Supreme Court has shown some signs of relaxing even the substantive application of the plenary power doctrine. The rhetoric has changed noticeably. In the earlier cases, the Court had disavowed entirely the power to review the constitutionality of immigration decisions. The more modern cases, in contrast, contain language that has generally been less absolute.[195] In 1983, for the first time ever,[196] the Supreme Court struck down a provision of the Immigration and Nationality Act as unconstitutional. That

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193. See pp. 313-14 below. The seemingly inconsistent approaches of the Supreme Court in addressing procedural challenges to immigration decisions have been noted by others: see, e.g., Hart, note 121 above, at 1387-96, especially at 1392; F.W. Scharpf, Judicial Review and the Political Question: A Functional Analysis (1966) 75 Yale L.J. 517, at 578-81 n.218.

194. See the articles cited in note 191 above.

195. Compare the language in such early decisions as the Chinese Exclusion Case, 130 U.S. at 606 (Congressional decision 'conclusive upon the Judiciary'); Ekiu, 142 U.S. at 659 (exclusion power 'belongs to the political department'); Fong Yue Ting, 149 U.S. at 706 ('conclusive upon the Judiciary'); Lees, 150 U.S. at 480 (Congressional exclusion power is 'absolute' and 'not open to challenge in the courts') with the language in some of the more modern cases, such as Harisiades, 342 U.S. at 588-89 (Congressional decision 'largely immune from judicial interference') (emphasis added); Mandel, 408 U.S. at 769, 770 (executive action excluding alien invalid on First Amendment grounds at least when 'facially legitimate and bona fide' reason given); Fiallo, 430 U.S. at 792 ('largely immune'), 793 n.5 (recognising a limited judicial responsibility to review Congressional decisions even in immigration context).

196. Those immigration cases either holding or suggesting obiter that a particular action might violate procedural due process have concerned acts of executive or administrative officers, not acts of Congress: see Landon v. Plasencia, 103 S.Ct. 321 (1982); Wong Yang Sun v. McGrath, 339 U.S. 33 (1950);

decision, I.N.S. v. Chadha,[197] requires close examination.

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.[198] The statute further provides, however, that either House of Congress may nullify the suspension by passing a resolution to that effect.[199] The latter provision, known as a 'legislative veto',[200] was challenged by an alien whose grant of suspension had been vetoed by the House of Representatives. He argued that the legislative veto was unconstitutional. The Court ultimately agreed. It reasoned that the power asserted by 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.[201]

But how could the Court reach the merits at all? The cases discussed above have uniformly recognised a 'plenary' Congressional power to regulate immigration. The Court's only

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196. (continued) Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Ng Fung Ho v. White, 259 U.S. 276 (1922); Kwock Jan Fat v. White, 253 U.S. 454 (1920); Yamataya v. Fisher, 189 U.S. 86 (1903); cf. Keller v. United States, 213 U.S. 138 (1909) (criminal statute).
197. 103 S.Ct. 2764 (1983).
198. See 8 U.S.C. s. 1254(a).
199. Ibid., s. 1254(c).
200. See 103 S.Ct. at 2771 n.2.
201. 103 S.Ct. at 2780-88, relying on U.S. Const. art. I, ss. 1, 7.

acknowledgement of the problem was its response to the House's argument that the case presented a nonjusticiable political question because the statutory provision in question was an exercise of the Congressional power to 'establish an uniform Rule of Naturalization'.[202] The Court said: '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'.[203] It then reviewed the various prongs of the political question doctrine collected in Baker v. Carr[204] 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,[205] the Court 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 the Chadha decision. 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'.[206]

As to the first point, it is undoubtedly true that the Court's central concern was with the validity of legislative

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202. U.S. Const. art. I, s. 8, cl. 4. See 103 S.Ct. at 2778-79.
203. Ibid., at 2779.
204. 369 U.S. 186 (1962).
205. See ch. V, s. D below.
206. Schuck, note 163 above, at 59 n.319.

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,[207] have been enacted by Congress.[208] All are potentially endangered by the decision in Chadha.[209] Under these circumstances, it would indeed be short-sighted to think that the Court's primary concern in Chadha was with immigration law.

At the same time, the Court's detour around the plenary power doctrine could not have been inadvertent. In one of its briefs, the House of Representatives devoted no less than twelve pages to its argument that the Court should invoke the doctrine in this case.[210] 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

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207. Objections to the broad sweep of the Court's holding are voiced in P.L. Strauss, Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision (1983) 4 Duke L.J. 789.
208. J. Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives (1977) 52 Ind. L. Rev. 323, at 324.
209. Justice Powell would have avoided that result by limiting the holding to the case in which the decision being vetoed was 'judicial' in character: 103 S.Ct. at 2788-92.
210. See No. 80-1832, Second Supplemental Brief of House of Representatives, at 10-22.

statute rested.[211] The distinction is important because, as discussed above, the Supreme Court has frequently cited the sovereignty theory to support its view that the judicial role is very limited. Yet, as revealed in the excerpt quoted above, the Supreme Court disregarded the House argument and assumed that the statute rested solely on an enumerated power, the naturalization clause. In doing so, it declined to mention any of the plenary power cases cited in the brief.

For the above reasons, 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 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 the fact remains that the breakthrough has been made. It will no longer be possible for the Court, without ignoring Chadha, to discuss an alien's constitutional attack simply by describing the Congressional power as 'plenary'. It will have to distinguish Chadha; as will be seen, distinctions are possible.

Moreover, if in a future case the Supreme Court is disposed to declare a provision of a federal immigration statute

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211. Ibid., at 13-16.

unconstitutional but hesitant to do so because of the plenary power doctrine and the 'clean slate' problem identified in Galvan, the Chadha decision might enable the Court to declare that the plenary power doctrine has been gradually eroding. Alternatively, it could cite Chadha to show that the Court has never intended to cut off all constitutional review, and that the Court would not hesitate to fulfill its constitutional responsibilities in a proper case. Finally, the decision might prove to be an effective instrument by which he lower courts, already restive, can palliate the rigours of the plenary power doctrine.

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 describes the power as 'plenary', it frames the issue as whether Congress' exercise of that power conforms with the Constitution. Further, the Court ultimately invalidated the exercise of this admittedly 'plenary' power. Under such an approach, it is not clear what, if anything, the word 'plenary' actually adds.[212]

For the above reasons, it is submitted that the Chadha case will have a major impact on the continued viability and

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212. 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, at 83-84 (1977); Liddick v. City of Council Bluffs, 232 Iowa 197, 5 N.W.2d 361, at 382 (1942).

scope of the plenary power doctrine. That is not to say, however, that the Court will be unable to distinguish Chadha if it wants to. One possibility is that Chadha will be viewed simply as a procedural case. The argument would be that the Court's only constitutional objection was to the procedure Congress had enacted for disapproving a grant of suspension; Congress could constitutionally disapprove such a grant only pursuant to the legislative procedure prescribed by the Constitution. Once characterised as procedural, the decision could be analogised to the procedural due process cases allowing review, and could be distinguished from the cases withholding substantive constitutional review.

Alternatively, the Chadha holding that a political question was not presented might 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 rationalised as a case in which the Court could avoid such interference only at the cost of permitting one political department -- Congress -- to invade the territory of another political department -- the Executive. If so characterised, the Chadha rationale would be inapplicable to constitutional attacks based on individual rights.

G. The Plenary Power Doctrine and its Inadvertent Development

The evolution of the plenary power can now be summarised. The foundations of the doctrine were laid in the state

regulation cases, where the Supreme Court repeatedly struck down attempts by individual states to control immigration into their territory. In the Passenger Cases Justice McClean, to convey the idea that Congress' power over immigration was exclusive of the states, described that Congressional power as 'plenary'. Although he acknowledged that such a power was subject to the restrictions contained in the Constitution, the term 'plenary' was later to be construed as dispensing with that limitation. Emphasised throughout the state regulation cases was the need for uniformity in the nation's immigration laws, a rationale applicable to the allocation of power between the federal government and the states. The same was true in the Head Money Cases, where the Court first upheld the constitutionality of a federal immigration statute against the argument that the subject matter did not fall within any of the enumerated powers of the federal government.

The next major expansion of Congressional power came with the Chinese Exclusion Case. The theme articulated there was that the federal power to exclude aliens was 'inherent in sovereignty', so that no enumerated power was necessary. Drawing implicitly on the rationales of the state regulation cases and the Head Money Cases, the Court in the Chinese Exclusion Case stressed the need for uniformity in the nation's immigration laws.

After upholding Congress' power to regulate immigration, the Court used the unfortunate language that Congress' 'determination is conclusive upon the Judiciary'. The entire

opinion, however, had dealt with the question whether Congress could regulate immigration at all, the issue being whether that power should reside in the federal government or the states. Having held that Congress had acted constitutionally, the Court of course had no authority to invalidate the Congressional action. It is submitted here that the latter idea was all the Court intended to convey when it described the Congressional decision as conclusive upon the Judiciary. If the Court truly meant it was powerless to set aside the Congressional decision even when violation of the Constitution was perceived, it provided no rationale to support the abdication of its ordinary constitutional functions.

Ekiu supplied the next major extension. For the first time the issue was whether the federal exclusion statute violated an affirmative constitutional limitation, in that instance procedural due process. Erroneously relying on the Head Money Cases and the Chinese Exclusion Case, the Court refused to review the federal statute for compliance with due process. The Head Money Cases had contained no reference to conclusiveness upon the Judiciary, and it has been shown that even the Chinese Exclusion Case had not so held. Thus, through its lack of independent analysis and its reliance on prior cases, Ekiu gave birth to the plenary power doctrine. Fong Yue Ting, relying on the Chinese Exclusion Case and Ekiu, then extended the doctrine to deportation, again without independent analysis.[213]

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213. The Court's only independent attempt to justify judicial deference was a vague reference to international relations: see Fong Yue Ting v. United States, 149 U.S. 698, at 713 (1893). That argument is examined on pp. 483-95 below.

The latter case, also without explanation, held deportation non-punitive, a statement that many of the more modern Supreme Court decisions were later to quote.

From Fong Yue Ting until very recently, the Supreme Court has continued to recognise the plenary power doctrine. The repeated attempts by aliens to obtain constitutional review of Congressional action have been rebuffed by citation of the early cases, particularly frequent reliance having been placed on the Chinese Exclusion Case and Fong Yue Ting. With each new opinion, the body of precedent to support the plenary power doctrine has become larger and seemingly more entrenched. In 1954 the Supreme Court's 'clean slate' comment finally acknowledged the strength of the arguments against the doctrine, but held that by then the precedent had become too overwhelming to dislodge. The 'clean slate' quotation was itself quoted in subsequent cases, and even came to be viewed as an independent reason for retaining the plenary power doctrine. Most discouraging of all has been the consistency with which even the modern cases have declined to analyse whether the doctrine is justifiable. One notable exception was the 1952 decision in Harisiades, where the Court at least purported to base on a reasoned analysis its decision to apply the doctrine. The reasons provided by Harisiades, together with other possible justifications for special judicial deference, are considered in the final chapter.[214]

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214. See ch. I, s. E below.

Thus, the plenary power doctrine resulted from highly unfortunate language contained in the early cases, followed by the failure of future courts either to consider the context of that language or to reason independently on the question of what the judicial role should be. The chief error has been the failure to distinguish between the federalism question of allocating power between the federal government and the states, and the separation of powers question applied to the relationship between Congress and the Judiciary.

Finally, there is evidence that the plenary power doctrine is beginning to warp. There are lower court decisions in which the rhetoric, and occasionally the results, have effectively repudiated at least a strict application of the doctrine. The Supreme Court's language has been taking a less absolute form. And in Chadha, without acknowledging the prior cases, the Court took the ultimate step of declaring a provision of a federal immigration statute unconstitutional. If the decision withstands the passage of time, it might well augur the end of the plenary power doctrine. If so, the demise of the doctrine will have been as mysterious as its birth.

H. Comparisons Between the Plenary Power Doctrine and Related Issues

Several contrasts may be noted between the courts' unusually restrained constitutional posture in immigration cases and the standards of constitutional review in certain closely related areas.[215]

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215. In addition to the contrasts noted here, see the foreign affairs cases, on pp. 487-89 below.

The criminal cases are especially noteworthy. In Wong Wing v. United States[216] the Supreme Court struck down a federal statute imposing the criminal punishment of imprisonment at hard labour, as a sanction for violation of the immigration laws, without affording the accused a jury trial. The Court held the plenary power doctrine inapplicable to immigration measures that imposed infamous criminal punishment. A similar result was reached in Keller v. United States,[217] where the Court held there was no enumerated power justifying the criminal prosecution of an American citizen for his harbouring an alien prostitute within three years of her entry. In contrast was Oceanic Steam Navigation Co. v. Stranahan,[218] where the master of a vessel challenged the civil penalty imposed on him for failing to discover that one of his passengers had had a loathesome disease at the time of embarkation. Rejecting the master's procedural due process argument, the Court described the Congressional power over immigration as 'plenary', and as 'complete and absolute', stating further, '[O]ver no conceivable subject is the legislative power of Congress more complete'.[219]

The aliens' rights cases are also worthy of mention.[220] State action discriminating against aliens has frequently been

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216. 163 U.S. 228 (1896).
217. 213 U.S. 138 (1909).
218. 214 U.S. 320 (1909). Accord, Int'l Mercantile Marine Co. v. Stranahan, 214 U.S. 344 (1909).
219. 214 U.S. at 339, 343.
220. See the works cited on pp. 4-5 n.7 above.

challenged on equal protection grounds.[221] The traditional rule is that a state-created classification comports with the equal protection clause if the classification is rationally related to some legitimate state interest.[222] In certain cases, however, the Court applies a more stringent test, requiring that the classification be necessary to an extremely important interest. One such case is that in which the classification is said to be 'suspect'.[223]

Although the early cases frequently applied minimal scrutiny in upholding state statutes discriminating against aliens,[224] the Supreme Court in the early 1970's began holding that alienage, like race and ethnicity,[225] is a suspect classification. Applying strict judicial scrutiny, the Court has struck down as violative of equal protection state statutes barring or limiting aliens' eligibility for various

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221. Aliens are 'persons' for equal protection purposes: Yick Wo v. Hopkins, 118 U.S. 356 (1886).
222. See, e.g., McGowan v. Md., 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
223. See pp. 471-73 below.
224. E.g., Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927); Cockrill v. Calif., 268 U.S. 258 (1925); Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Terrace v. Thompson, 263 U.S. 197 (1923); Heim v. McCall, 239 U.S. 175 (1915); Patsone v. Pa., 232 U.S. 138 (1914); Blythe v. Rinckley, 180 U.S. 333 (1901); Hauenstein v. Lynham, 100 U.S. (10 Otto.) 483 (1880); see also Zschernig v. Miller, 389 U.S. 429 (1968); People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915). But see Truax v. Raich, 239 U.S. 33 (1915).
225. Loving v. Va., 388 U.S. 1 (1967); McLaughlin v. Fla., 379 U.S. 184 (1964); Oyama v. Calif., 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).

social benefits or for designated fields of employment.[226]

Strict scrutiny has not been applied to federal statutes discriminating against aliens, even outside the context of immigration. However the Court in those cases has at least invoked a minimal rationality test -- admittedly very minimal -- to determine whether the classification satisfies the requirements of substantive due process.[227] Without ignoring the deference embodied in that standard, one may still observe that this review is at least more assertive than the virtual non-reviewability generated by the plenary power doctrine in immigration cases. And in Hampton v. Mow Sun Wong,[228] the Court struck down a federal administrative regulation discriminating against aliens on the ground that it was not

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226. See especially Plyler v. Doe, 457 U.S. 202 (1982)(state denial of free public education to undocumented alien children violates equal protection). See also Nyquist v. Mauclet, 432 U.S. 1 (1977) (educational assistance funds); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) (commercial fishing licences, decided on preemption grounds); Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (engineering licences); In re Griffiths, 413 U.S. 717 (1973) (practice of law); Sugarman v. Dougall, 413 U.S. 634 (1973) (state Civil Service employment); Graham v. Richardson, 403 U.S. 365 (1971) (welfare benefits); cf. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (commercial fishing licences). And see Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). But state attempts to disqualify aliens from participating in the political community have been upheld: 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 dis'd, 430 U.S. 961 (1977). Also compare Toll v. Moreno, 458 U.S. 1 (1982) with DeCanas v. Bica, 424 U.S. 351 (1976).

227. Mathews v. Diaz, 426 U.S. 67, at 82-83 (1976); Flemming v. Nestor, 363 U.S. 603, at 611 (1960).

228. 426 U.S. 88, at 103 (1976).

supported by a governmental interest that could be presumed to have been actually intended by the agency.

Unlike the uniformly deferential approaches to constitutional review of exclusion and deportation statutes, the Supreme Court decisions on questions concerning the acquisition[229] and loss[230] of citizenship demonstrate mixed results, and frequently great assertiveness. Two specific contrasts are noteworthy.

In the plenary power cases, as discussed earlier, the Court proceeded mechanically to its conclusion that deportation is non-punitive. In modern loss of citizenship cases, however, the Court has taken the conceptual approach of examining the intended purposes of the sanction to assess whether they differ

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229. Compare Rogers v. Bellei, 401 U.S. 815 (1971) (reasonableness test applied, but found satisfied); United States v. Wong Kim Ark, 169 U.S. 649 (1898) with Terrace v. Thompson, 263 U.S. 197, at 220 (1923) (obiter); Elk v. Wilkins, 112 U.S. 94 (1884); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). For two extremes on the Court's role in challenges to naturalization requirements, compare the lower court decisions in 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) (non-justiciable).

230. Compare Afroyim 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, above); 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); cf. Nishikawa v. Dulles, 356 U.S. 129 (1958) (burden on government to prove voluntary renunciation of citizenship). See also P.L. 95-432, 92 Stat. 1046 (1978) (repealing provisions declared unconstitutional in Afroyim, Schneider, and Trop).

from those underlying punishment.[231]

There is a second important contrast. In United States v. Wong Kim Ark, the Supreme Court stated that 'it is the inherent right of every independent nation' to determine who its citizens will be.[232] The Court's remarkably similar statement in the Chinese Exclusion Case, adopting the sovereignty theory to justify a federal power to exclude aliens, led ultimately to the plenary power doctrine. Yet in Wong Kim Ark, despite the sovereign nature of the citizenship power, the Court held that the government could not constitutionally deny citizenship to persons born in the United States to alien parents.[233]

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231. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958). Similarly realistic approaches have been taken in other Supreme Court decisions holding technically civil sanctions to be punishment for purposes of the ex post facto and bill of attainder clauses: e.g., United States v. Lovett, 328 U.S. 303 (1946); Ex p. Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Mo., 71 U.S. (4 Wall.) 277 (1866).

232. 169 U.S. 649, at 668 (1898).

233. In Terrace v. Thompson, 263 U.S. 197, at 220 (1923), the Court said obiter that Congress may withhold naturalization on any ground it wishes. However it is doubtful that statement is valid today (see Gordon & Rosenfield, note 119 above, s. 15.3).

CHAPTER IV

PATTERNS AND CONCLUSIONS: A DESCRIPTIVE ANALYSIS

The three previous chapters have analysed the language, the results, and the techniques of the British and American cases reviewing administrative decisions that arise under the immigration laws of the two countries. Several broad patterns were established. The aims of this chapter are to explain why those patterns have developed and to break them down more finely.

Section A of this chapter offers possible explanations for the differences between the courts' handling of the immigration cases and their handling of other public law cases. In section B, the British immigration decisions will be compared to the American ones. Similarities and differences will be identified and reasons for the differences will be suggested. Finally, section C will isolate fourteen specific factors that appear to influence judicial decisionmaking within the realm of immigration law.

A. Factors Underlying the Courts' Decisions in the Immigration Cases

There can be little doubt today that judges frequently have choices between two or more alternative dispositions of a particular case.[1] These choices arise because, to varying degrees,

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1. See, e.g., L. Blom-Cooper & G. Drewry, Final Appeal (1972), at 152; H.L.A. Hart, The Concept of Law (1961), at 12-13; C. Palley, Decision Making in the Area of Public Order by English Courts, The Open University, D203, Block II, Part 3 (1976), at 41, 79-87; A. Paterson, The Law Lords (1982), at 194-95 (Law Lords regard themselves as having choices).

judges have freedom to find facts, to categorize those facts as being governed by relevant rules of law, and to develop legal rules.[2] The higher the court, the less freedom it has to find facts,[3] and the more freedom it has to make new law.[4]

These freedoms, though broad, are not limitless. The flexibility inherent in the judicial process is constrained by the now familiar 'steadying factors' that Llewellyn assembled as a response to what he perceived as the excesses of legal realism.[5] Probably the most significant of these constraints is the professional office occupied by the judge.[6]

In this thesis the above propositions will be taken as premises. It will be assumed, in other words, that there are many cases in which judges can realistically be said to have choices, admittedly fettered, as to either the outcome or the means of reaching the outcome. This premise underlies the

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1. (continued) One writer distinguishes between 'trouble' cases, where courts have choices, and 'clear' cases, where they do not: R. Seidman, The Judicial Process Reconsidered in the Light of Role Theory (1969) 32 Mod. L. Rev. 516, at 521. See also the general discussion at pp. 368-69 below on the declaratory theory of judicial decisionmaking and in particular the view of Dworkin, note 35 below.
2. Palley, note 1 above, at 49. For elaboration of the specific mechanisms affording this freedom of choice, see ibid., at 75-83. See also J.A.G. Griffith, The Politics of the Judiciary (1977), at 1-2, 185.
3. Palley, note 1 above, at 44.
4. Ibid; Blom-Cooper & Drewry, note 1 above, at 13 (House of Lords has broad lawmaking power); G. Schubert, Quantitative Analysis of Judicial Behavior (1959), at 10-11 & n.23 (primary function of U.S. Supreme Court is to make policy).
5. K. Llewellyn, The Common Law Tradition -- Deciding Appeals (1960), at 19-61. See also Palley, note 1 above, at 87-88. Cf. L.L. Jaffe, English and American Judges as Lawmakers (1969), at 44 (rational standards even for policy choices).
6. Llewellyn, note 5 above, at 45-46.

selection of the illustrative immigration cases analysed in chapters I and II, in which the courts had two or more avenues reasonably open to them.

How, then, have British and American judges exercised this freedom of choice in the immigration context? The most general observation is that, with the single[7] exception of the American statutory interpretation decisions, immigration cases in both countries have had generally conservative endings. The question addressed in this section is why that has been so.

The immigration decisions discussed in this thesis 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 Llewellyn's steadying factors is not to be a mere platitude, this explanation must be taken seriously. Thus, in a given case, the legal reasoning leading to the actual result might simply have been more convincing to the court than the legal reasoning leading to other results.

Yet, in many of the cases analysed, the legal doctrine invoked by the court did not seem especially persuasive and at times required real stretching. Further, within the field of immigration law, the narrow issues raised by the cases discussed in this thesis have cut across numerous boundaries: they have been set in two different countries; they have been decided during different time periods; the challenged decisions

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7. But cf. the liberal decisions of the European Court and possible explanations (Ch. I, s. I, above).

have been legal, factual, and discretionary; those that were legal required interpretation of radically different provisions in constitutions, statutes, and regulations, as well as application of common law; the contexts have been exclusion, deportation, and change of status. Although the degree of conservatism has varied somewhat in accordance with the presence or absence of these and other factors,[8] and although there have been noteworthy exceptions to the general conservative drift of these cases, the striking fact remains that the conservative results have for the most part engulfed these distinctions. It seems unlikely that so systematic and so all-embracing a conservative tilt could be ascribed entirely to superior persuasiveness of the specific legal doctrine favouring the Government's position in individual cases.

More likely candidates for explaining the general conservatism of these cases are two sets of overlapping considerations. One is a collection of general doctrinal explanations that from time to time have surfaced in the written opinions. The extent to which these various theories ought to affect the results of immigration cases is considered in chapter V.[9] Identification of these theories and an assessment of their actual impact, though relevant here, will be deferred until chapter V to avoid repetition.

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8. See s. C below.
9. See ch. V, ss. D,E below.

The other set of influences is 'external'.[10] The discussion of these factors will consume the remainder of this section. The argument will be a specific application to the immigration context of the increasingly well accepted view that various factors not typically appearing in courts' opinions contribute heavily to the results. The major external factors that there is reason to believe account in large part for the special judicial conservatism in this area include 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.[11] These three types of influences will now be taken up in that order.

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10. 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 -- attitude and prevailing social forces -- can be revealed by the opinion: see note 131 below.

11. These factors have been culled from a more comprehensive list of variables compiled by Professor Palley (see note 1 above, s. 4). She 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. The four factors holding special promise as explanations of the judicial conservatism in immigration cases are the first two individual factors (background and attitudes), which it will be convenient to treat together; role perception; and the relationship between the courts and the general public.

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.[12] Second, there are the attitudinal variables. As used here, the term 'attitude' will encompass the judge's values, general ideological orientation, and views on specific policy questions.[13]

Backgrounds and Attitudes of British Judges[14]

It is generally accepted that British judges are recruited from among the most distinguished members of the Bar and that, at least since the mid-1940's, politics have played a relatively small part in the appointment process.[15] The average age of

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12. All but the last two are taken from Palley, note 1 above, s. 4.1, except that pre-judicial experience has been expanded to include all previous experience, including judicial experience on a lower court (see, e.g., T.B. Marvell, Appellate Courts and Lawyering (1978), at 180, for effect of previous trial court experience) and judicial experience accumulated by a judge on the same court.
13. See generally Palley, note 1 above, s. 4.2.
14. Attention here will be confined to judges of those courts that typically hear immigration cases -- the High Court, the Court of Appeal, and the Appellate Committee of the House of Lords.
15. See Lord Hailsham of St. Marylebone, Democracy and Judicial Independence (1979) 28 U. of New Brunswick L.J. 7, at 12; Lord Hailsham of St. Marylebone, The Lord Chancellor and Judicial Independence (1980) 11 Cambrian L. Rev. 40; Jaffe, note 5 above, at 67; Palley, note 1 above, at 53 (High Court judges are distinguished barristers); cf. Sir R.E. Megarry,

all full-time British judges in office is approximately 52 or 53;[16] that figure rises to 65 in the Court of Appeal and 68 in the House of Lords.[17] The overwhelming majority have elite educational backgrounds and come from upper or upper-middle-class families.[18] Almost all are male.[19]

These background attributes, reinforced both by the closeness of the legal community[20] and by the conservative rule-oriented influence of legal training, have bred what many observers see as a strong homogeneity of attitude.[21]

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15. (continued) Barristers and Judges in England Today (1982) 51 Fordham L. Rev. 387, at 395-96 (politics not a factor). Ten years of experience as a barrister are a minimum requirement, and many more years have typically been accumulated: see C.N. Tate, Paths to the Bench in Britain: A Quasi-Experimental Study of the Recruitment of a Judicial Elite (1975) 28 Western Political Q. 108, at 112-13. But see Griffith, note 2 above, at 209 ('unorthodoxy in political opinion is a certain disqualification for appointment').
16. H. Cecil, The English Judge (1970), at 11; Griffith, note 1 above, at 27.
17. Griffith, note 1 above, at 27.
18. Family class, as used here, encompasses prominence, wealth, political connections, and parental occupations. See generally Cecil, note 16 above, at 26-30 (educationally elite); Griffith, note 2 above, at 24-29 (social and political prominence); R. Stevens, Law and Politics -- The House of Lords as a Judicial Body, 1800-1976 (1978), at 167 (only handful of Law Lords have burst class barrier), 152-74 (general); Tate, note 15 above, at 112, 117 (upper class bias), 119 (especially in Court of Appeal and House of Lords); M. Zander, The Law-Making Process (1980), at 204 (narrow social class background).
19. S. Shetreet, Judges on Trial (1976), at 59-60.
20. See Lord Evershed M.R., The Judicial Process in Twentieth Century England (1961) 61 Columbia L. Rev. 761, at 763, 766-67; Megarry, note 15 above (applauding closeness of Bar as factor contributing to high quality of judicial decisions); Palley, note 1 above, at 54.
21. E.g., Lord Devlin, Judges and Lawmakers (1976) 39 Mod. L. Rev. 1, at 8 (judges conservative by nature because law is conservative profession); Lord Devlin, Judges, Government, and Politics (1978) 41 Mod. L. Rev. 501, at 505 (judges homogeneous because elderly and have had common working life); Lord

Professor Griffith argues persuasively that British judges are generally concerned to protect certain values that, in their view, it is in society's interest to protect.[22] He further maintains that their views of what is in society's interest follow predictably conservative lines.[23] Among the specific values that Professor Griffith and others believe to be especially favoured by British judges are law and order,[24] stability,[25] property rights,[26] and protection of the interests of the State when they conflict with certain interests of the individual.[27]

The personal backgrounds and attitudes of appellate tribunal members have not been studied as comprehensively as

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21. (continued) Evershed, note 20 above, at 773-74 (history and tradition make judges conservative); Griffith, note 2 above, at 52, 193 (education, training, and experience as barristers have resulted in homogeneous attitudes). This entire discussion is subject to the running qualifier that no theory of monolithic conservatism is being suggested. It is recognized that a given judge might entertain politically 'conservative' views on some issues but not others. Cf. Schubert, note 4 above, at 382-83 (scalogram analysis showing some American judges sympathetic only to certain constitutional rights).
22. Griffith, note 2 above, at 52, 202.
23. Ibid., at 195-202. Accord, B. Abel-Smith & R. Stevens, In Search of Justice (1968), at 188-89; S.A. de Smith, Judicial Review of Administrative Action (4th ed., by J.M. Evans, 1980), at 33-34; Lord Devlin, note 21 above, 39 Mod. L. Rev. at 8; Lord Evershed, note 20 above, at 8.
24. de Smith, note 23 above, at 34; Griffith, note 2 above, at 195.
25. Griffith, note 2 above, at 213; Lord Evershed, note 20 above, at 773-74.
26. Griffith, note 2 above, at 195, 198-200; see, e.g., Belfast Corp. v. O.D. Cars Ltd. [1960] 1 All E.R. 65 (H.L.).
27. de Smith, note 23 above, at 34; Griffith, note 2 above, at 195-98.

have those of the higher Judiciary.[28] It can be said, however, that the British immigration appellate authorities have typically included many solicitors, barristers, and advocates.[29] Some adjudicators are legally trained and some are lay persons, although some of the latter are part-time justices of the peace.[30] The I.A.T. sits in three-member panels. Each panel is presided over by a legally qualified chairperson; the other two members are normally part-time lay persons.[31] The generally conservative attitudes of these appellate authorities,[32] particularly the adjudicators,[33] have been noted by others.

Numerous recent studies now show empirically[34] what many

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28. But see the brief description provided in J.A. Farmer, Tribunals and Government (1974), at 170-71. See also W.E. Cavenagh & D. Newton, The Membership of Two Administrative Tribunals (1970) 48 Pub. Admin. 449; W.E. Cavenagh & D. Newton, Administrative Tribunals: How People Become Members (1971) 49 Pub. Admin. 197; R. Flockhart, Some Aspects of Tribunal Membership, in M. Adler & A. Bradley (eds.), Justice, Discretion and Poverty (1975), at 99-107 (background of members of Supplementary Benefits Appeal Tribunals in Scotland); S. McCorquodale, The Composition of Administrative Tribunals (1962) Pub. L. 298.
29. See I.A. Macdonald, Immigration Law and Practice (1983), at 270; I.A. Macdonald, The New Immigration Law (1972), s. 215 (true of adjudicators). By law, the I.A.T. chairman and the presiding member of each panel, if not the Chairman, must be a barrister, advocate, or solicitor of at least seven years standing: Immigration Act 1971, sch. 5, paras. 7, 12, 14.
30. Letter to author from F.G. Pegg, Home Office (30 Dec. 1983) (copies available on request).
31. Ibid.
32. Macdonald (1983), note 29 above, at 4-5.
33. Ibid., at 271 & nn. 7,8, citing reports prepared by the Joint Council for the Welfare of Immigrants, the United Kingdom Immigrants Advisory Service, and the Runnymede Trust.
34. An extensive bibliography, listing primarily American empirical studies, has been compiled by Tate, note 15 above, at 109 n.2.

writers had sensed intuitively[35] -- that a judge's background and attitudes can profoundly influence his or her decisions. If that conclusion is correct, and it will be assumed in this thesis that it is, then the homogeneous conservativism of British judges might partly explain the typically conservative results of the immigration cases. But before a general judicial conservatism is translated into a more specific judicial conservatism in immigration cases, the backgrounds and attitudes of American judges will be surveyed.

Backgrounds and Attitudes of United States Federal Judges[36]

The federal judicial appointment process in the United States bears little resemblance to that in the United Kingdom. The American process places much less premium on legal distinction, and much more on politics, than does the British

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35. E.g., Abel-Smith & Stevens, note 23 above, at 171; Hon. B.N. Cardozo, The Nature of the Judicial Process (1921), at 167-79; R. Dworkin, Taking Rights Seriously (1977), at 4 (describing views of Pound), 6 (judicial decision often reflects judge's background and temperament, but it does not follow that there are no binding principles); Palley, note 1 above, ss. 4.1, 4.2; Lord Radcliffe, Not in Feather Beds (1968), at 212-16. Cf. Farmer, note 28 above, at 170 (character and personality of tribunal member can affect decisionmaking process); Macdonald (1983), note 29 above, at 4 (implying that attitudes of immigration appellate authorities affect decisions). But see Lord Devlin, note 21 above, 41 Mod. L. Rev. at 506, acknowledging the homogeneity of judicial attitudes but questioning whether such attitudes influence judicial decisionmaking.

36. Immigration cases are litigated in federal court: see 8 U.S.C. s. 1105a.

process.[37] The result is a federal judiciary in which the quality is less even, and in which political connections and previous service to the party in power become much more important, than in the U.K.[38]

One consequence of the American emphasis on political considerations, however, has been a certain amount of ideological diversity on the federal bench. Some of that diversity results from the direct consideration of political ideology in the selection process,[39] particularly at the Supreme Court level.[40] Ideological diversity can also result indirectly. The overwhelming majority of federal judges belong to the political party of the President who appointed them,[41] and positive correlations have been observed between membership in one of the two major political parties and ideological views

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37. See Jaffe, note 5 above, at 62-63, 67; L.H. Tribe, American Constitutional Law (1978), at 49-50. For general descriptions of the politics of federal judicial appointments, see H.W. Chase, Federal Judges -- The Appointing Process (1972); H.R. Glick, Federal Judges in the United States: Party, Ideology, and Merit Nomination (1979) 12 Loyola of L.A. L. Rev. 767, at 772-92; D.D. Jackson, Judges (1974), at 247-76. At the district and circuit judge levels, senatorial politics can be more important than Presidential politics: ibid., at 249, 310.

38. Jaffe, note 5 above, at 62-63.

39. Lord Devlin, note 21 above, 39 Mod. L. Rev. at 6; Glick, note 37 above, at 772; S. Goldman, Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image (1983) 66 Judicature 334, at 337 n.2; Jackson, note 37 above, at 270-73; Jaffe, note 5 above, at 61; J.R. Schmidhauser, Judges and Justices -- The Federal Appellate Judiciary (1979), at 66, 86, 90.

40. Glick, note 37 above, at 773. Ideology is less important in choosing district and circuit judges: ibid., at 779.

41. From 1952 to 1979, the figure was over 90%: ibid., at 801, 805, 806.

on several subject areas likely to come before the courts.[42] 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 ideological attitudes into the federal Judiciary.

These sources of ideological diversity are tempered by the prevalence of several common background characteristics that promote judicial homogeneity. Supreme Court justices, and to a lesser extent lower federal judges, tend generally to come from families enjoying a reasonably high social status.[43] The vast majority of federal judges have amassed considerable financial net worth by the times of their appointments.[44] Ethnic minorities are extremely underrepresented in relation to the general population.[45] All but a handful of federal judges are male.[46] Other common background characteristics of federal judges include prosecutorial experience[47] and

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42. See S.S. Nagel, Multiple Correlation of Judicial Backgrounds and Decisions (1974) 2 Fla. St. U.L. Rev. 258, at 266-68. For a bibliography of empirical studies linking party membership to judicial decisionmaking, see ibid., at 268-69 n.37.
43. Glick, note 37 above, at 800; Jackson, note 37 above, at 252-53, 328; Schmidhauser, note 39 above, at 52, 96 (Supreme Court Justices), 55, 97 (Circuit Judges).
44. See the statistics compiled by Goldman, note 39 above, at 346 (as of March, 1983). See also S. Goldman, Carter's Judicial Appointments: A Lasting Legacy (1981) 64 Judicature 344.
45. Glick, note 37 above, at 800-01, 805, 806; Schmidhauser, note 39 above, at 59-61. See also Jackson, note 37 above, at 254.
46. Glick, note 37 above, at 801, 805, 806; Jackson, note 37 above, at 248, 253; E. Martin, Women on the Federal Bench: A Comparative Profile (1982) 65 Judicature 306, at 307; Schmidhauser, note 39 above, at 59.
47. Jackson, note 37 above, at 252-54.

corporate connections.[48]

Apart from relatively common attributes pertaining to family, economic status, ethnicity, sex, and previous work experience, American judges are subject to the same types of conservative influences inherent in legal training as are British judges. One writer, paralleling Griffith's observations about the British Judiciary, describes American federal judges as 'conditioned by the conservative impact of legal training and professional legal attitudes and associations.'[49] The similarity of background, combined with the respect judges feel both for the office they hold and for one another, produces a fraternal atmosphere in the federal courts.[50]

The portrait that emerges from this analysis is of an American federal Judiciary subject to many of the same homogeneously conservative influences already discussed in relation to British judges,[51] but nonetheless ideologically diverse. As in the U.K., there is reason to believe that these background and attitudinal variables affect the decisions of individual judges. First, numerous judges freely acknowledge such influences.[52] Second, the empirical evidence bears out

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48. Ibid., at 255.
49. Schmidhauser, note 39 above, at 99. As to the effect of legal education on English and American judges' perceptions of their roles, see Jaffe, note 5 above, at 105-13.
50. Jackson, note 37 above, at 248.
51. See pp. 353-57 above.
52. See Marvell, note 12 above, at 180-81.

those admissions.[53]

It is unclear precisely to what extent the background and attitudinal variables discussed above apply to immigration judges and B.I.A. members, who have not yet been the subject of empirical study. All immigration judges and all B.I.A. members are lawyers.[54] Beyond that, however, generalisations are difficult. Former B.I.A. Chairperson Maurice Roberts has been highly critical of the selection criteria. In one article, he suggests that immigration judges have been 'recruited almost exclusively from INS personnel with largely prosecutorial and enforcement backgrounds.'[55] In another article he contends that political considerations have led to the appointments of B.I.A. members who 'lack the professional aptitudes or personal qualities needed to do the Board's work effectively.'[56] Mr. Roberts argues that B.I.A. members should be capable of compassion and of exercising discretion in favour of people

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53. See Martin, note 46 above, at 307 & n.3; Nagel, note 42 above, at 266-67 (Table I), and especially bibliography at 268-69 n.37. But cf. S. Cann, Social Backgrounds and Dissenting Behavior on the North Dakota Supreme Court 1965-71 (1974) 50 N. Dak. L. Rev. 773 (results inconclusive).
54. Letter to author from D.B. Holmes, Chief Atty. Examiner, Executive Office for Immigration Review (4 Jan. 1984).
55. M.A. Roberts, Proposed: A Specialized Statutory Immigration Court (1980) 18 San Diego L. Rev. 1, at 16 (rhetorical question whether such a practice should be 'continued' implies it currently exists). Another leading immigration practitioner agrees: L. Wildes, The Need for a Specialized Immigration Court: A Practical Response (1980) 18 San Diego L. Rev. 53, at 55. Immigration Judges are now all lawyers: Roberts, 18 San Diego L. Rev. at 8.
56. M.A. Roberts, The Board of Immigration Appeals: A Critical Appraisal (1977) 15 San Diego L. Rev. 29, at 41. See also ibid., at 42 (low pay scale attracts 'political hacks who cannot aspire to the better paying jobs in Government').

with alien cultural patterns and life styles.[57] Taken in context, his discussion strongly implies that these criteria for selection of B.I.A. members are frequently disregarded.

Effect of Background and Attitudinal Variables on Immigration Cases

Although one whose views are generally regarded as politically liberal will not necessarily be more predisposed to take a pro-immigrant position on substantive immigration policy than one who is generally regarded as politically conservative,[58] there has historically been a positive correlation between general political liberalism and sympathy toward immigrants.[59] Such a correlation is not surprising, since

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57. Ibid., at 43.
58. 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 favour a liberal immigration policy. Finally, even a person with consistently liberal views might favour a restrictive immigration policy out of a belief that its net effect would be to further liberal values; e.g., in theory 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 L. Grant & I. Martin, Immigration Law and Practice (1982), at 356; Macdonald (1983), note 29 above, at 16-17; Macdonald (1972), note 29 above, at 14-15; R. Moore & T. Wallace, Slamming the Door - The Administration of Immigration Control (1975), at 2-4. Alternatively, a political liberal might believe that restrictions would improve 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).
59. See, e.g., the problems discussed by J.A. Garrard, Institute of Race Relations, The English and Immigration, 1880-1910 (1971), at 10, 132-33, 203-09.

substantive immigration policy questions frequently implicate values to which political conservatives and political liberals attach differing weights. Some such values are the ones that Professor Griffith and others have identified as favoured by British judges:[60] stability,[61] the interests of the State in preference to certain interests of the individual, effective law enforcement,[62] and property rights.[63]

In addition to the conservative forces specifically noted by Professor Griffith, people's attitudes toward immigration can reflect their views on race relations,[64] nationalism,[65] the balance between national security and civil rights,[66] and the distribution of wealth.[67] Occasionally, even people's

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60. See notes 24-27 above.
61. Several of the patterns identified by B. Gainer, The Alien Invasion (1972), at 212, can be seen to rest ultimately on the public perception of a threat to either cultural or economic stability. Cf. Moore & Wallace, note 58 above, at 26 (coloured immigrants presented to public as threat). See also pp. 377-94 below.
62. 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.
63. See the discussion of the guest theory, analogising immigration law to landlord-tenant law, pp. 497-99 below.
64. See note 61 above.
65. E.g., the deportation of Iranian nationals during the American hostage crisis (pp. 326-29 above).
66. E.g., Hosenball (see p. 67 below).
67. See, e.g., W.A. Fogel, Illegal Aliens: Economic Aspects and Public Policy Alternatives (1977) 15 San Diego L. Rev. 63, at 76; R.F. Hofstetter, Economic Underdevelopment and the Population Explosion: Implications for U.S. Immigration Policy (1983) 45 L. & Contemp. Prob. (No. 2) 55; G.H. Manulkin & B.R. Maghame, A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker (1975) 13 San Diego L. Rev. 42, at 45; Select Comm'n on Immigration and Refugee Policy, Final Report, U.S. Immigration Policy and the National Interest (1981) [hereafter cited as SCIRP], at 37; Hon. W.F. Smith, Introduction [to symposium] (1983) 45 L. & Contemp. Prob. (No. 2) 3, at 3-4.

feelings about the ideological creeds of the immigrants themselves can influence attitudes toward immigration.[68]

The British immigration cases provide a convenient framework for summarising the preceding discussion. It has been argued that British judges, by and large, tend to be politically conservative. It has also been submitted that there is a positive correlation between a general political conservatism and a specific tendency to view immigration in an unsympathetic light. If both propositions are correct, then British judges can generally be expected to have relatively pro-Government attitudes in disputes between the government and immigrants.[69] Since it has also been shown that attitudes can affect judicial decisionmaking, it might be predicted that British judges would tend to reach pro-Government decisions in immigration cases. Chapter I demonstrated that in fact that is precisely what has occurred.

The application of those propositions to the American immigration cases is less clear. At the B.I.A. level, the conservative patterns of the results would be consistent with, and might very well be at least partly explained by, the attitudes impliedly attributed to some of the B.I.A. members by Mr. Roberts. At the judicial level, however, the ideologically diverse attitudes of the American federal judges might be

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68. See, e.g., pp. 310-18 below (Supreme Court decisions in early 1950's); p. 292 below (fears of Colonial leaders that immigrants would hold monarchist views); pp. below (anarchism associated with Jewish immigrants to England).
69. See Grant & Martin, note 58 above, at 355.

expected to produce mixed results. As shown in Chapter II, the results in the statutory interpretation cases have indeed been mixed but most often have tended in a liberal direction. And in the constitutional cases the results have been uniformly conservative.

The diverse ideology brought to the federal bench might help to explain why the results in the American statutory interpretation cases have been mixed, but it does not explain why liberal results have predominated. If anything, the general conservatising influences to which federal judges are subjected would be expected to induce at least a moderate conservative tone. One possible hypothesis, not immediately susceptible to testing, is that some judges who harbour generally conservative views on immigration soften when confronted with the compassionate circumstances presented by live litigants. Assuming arguendo that the latter phenomenon occurs in the statutory interpretation cases, the question arises why it does not carry over a fortiori to the constitutional cases, where the elasticity of the textual language provides even more room in which the mixed ideological attitudes can operate. One possible answer is that the more sweeping effect of a constitutional interpretation[70] causes

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70. Constitutional interpretations are inherently sweeping partly because they can affect the validity of multiple statutory provisions and partly because, unlike statutory interpretations, they cannot be altered by subsequent legislation. The particular constitutional interpretations considered here are especially sweeping because, unlike most of the statutory interpretation cases, they are typically Supreme Court decisions and thus binding on the lower courts.

judges to emphasise the precedential effects of their holdings and to deemphasise the results for the particular litigants. Under that view, when a judge's general conservative philosophy on immigration conflicts with a desire to dispense relief to the immigrant in the individual case, the more drastic consequences of a constitutional holding might dissuade the judge from subjugating the former to the latter.

But at bottom the hypothesis that conservative judges soften their general philosophies when presented with the realities of individual cases, however intuitively appealing, would require empirical testing that does not yet appear to have been performed. A more promising explanation for the disparity between the results of the American statutory and constitutional cases lies in the application of role perception to immigration cases. That is the subject of the next subsection.

Role Perceptions

As noted earlier, a court's role will be taken here to mean the normative expectations concerning the functions, duties, and powers of a court. Those expectations can vary in accordance with the perspective of the holder. Several writers, through differing methodologies, have argued convincingly that judges' own perceptions of their roles -- i.e., their own expectations concerning the functions, duties, and powers that courts ought to assume -- are one of the central factors

influencing judicial decisionmaking.[71] That view will be accepted here and will be applied to the immigration cases.

Although role perception is treated here as merely one of several discrete determinants of judicial behaviour, it cannot be divorced entirely from the other two major contributors examined in this section. The previous subsection was framed as a discussion of the effect that background and attitudinal variables have on judicial decisionmaking. It can as easily be viewed, however, as reinforcement for the position that Professor Griffith articulates in role language: that judges perceive their role as the protection of the public interest in a stable society,[72] and that that role perception is in fact what is important.[73] Further, the more broadly judges perceive their roles, the more important the social and political attitudes of the judges become. This theme will be resurrected later in the specific context of the immigration cases.

Similarly, the next subsection will consider the effect of contemporary political forces on judicial decisionmaking. That discussion could be characterised equally well as a vindication of Cardozo's prescriptive view that, when making law, a judge's

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71. See Griffith, note 2 above, at 189-90; Palley, note 1 above, s. 4.4; see also Paterson, note 1 above; Seidman, note 1 above. The further question of which groups are most influential in causing judges to perceive their roles the way they do is examined empirically by Paterson, note 1 above, in his study of decisionmaking by the Law Lords. See especially ibid., at 33-34, 119-21 (most important reference group for most Law Lords was their fellow Law Lords).
72. Griffith, note 2 above, at 212-13.
73. Ibid., at 189-90.

role is to be guided by the values prevailing in society, rather than by his or her values.[74]

This subsection focuses on the courts' view of the degree to which their role encompasses 'lawmaking'. The starting point is the ancient controversy over whether courts 'make' law at all. What has become known as the "declaratory" theory posits that judges merely declare preexisting principles; they do not create law and therefore have no need to examine the consequences of their decisions.[75] Assessed both by judicial rhetoric and by actual judicial holdings, the popularity of the declaratory theory in the U.K. has risen and fallen with the times. The period of broad judicial lawmaking began declining at some point in the late nineteenth century,[76] giving way to progressively greater reliance on the declaratory theory. The change was initially reflected in the rhetoric, but by the end of the First World War, the actual results of the cases were becoming increasingly compatible with the rhetoric of restraint.[77]

This climate of judicial restraint persisted at least until the 1950's or early 1960's.[78] Since that time, it has

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74. Cardozo, note 35 above, at 105-07 (but ascribing relatively little practical significance to that distinction: ibid., at 105-06, 108-11).
75. See, e.g., Blom-Cooper & Drewry, note 1 above, at 13; Griffith, note 2 above, at 175; E.W. Patterson, Jurisprudence -- Men and Ideas of the Law (1953), at 571-77; R.A. Wasserstrom, The Judicial Decision (1961), at 12-38; Zander, note 18 above, at 211-12.
76. Palley, note 1 above, at 59; Stevens, note 18 above, at 77-104; see also Jaffe, note 5 above, at 1-30.
77. Palley, note 1 above, at 60-61.
78. Griffith, note 2 above, at 210; Palley, note 1 above, at 62-63; Paterson, note 1 above, at 154; Stevens, note 18 above,

become clear that British judges in fact create law[79] and more acceptable for them to acknowledge this aspect of their role.[80] Nonetheless, some support for the declaratory theory lingers,[81] and it remains common for many British judges to officially espouse a declaratory approach while reaching results that can be characterised only as creative lawmaking.[82]

American judges, in contrast, have fewer qualms about conspicuously creating law. More deeply influenced by the legal realists, American judges have been more prone to acknowledge the choice element present in many judicial decisions.[83] Judicial lawmaking has been especially evident in constitutional matters, but it extends to statutory interpretation and common law development as well.[84]

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78. (continued) at 589, 615-17; ibid., at 599 and passim (changes particularly dramatic in public law); cf. Jaffe, note 5 above, at 5 (1966 Practice Statement of House of Lords important evidence of change).

79. Blom-Cooper & Drewry, note 1 above, at 13; Farmer, note 28 above, at 172; Jaffe, note 5 above, at 5-8; Palley, note 1 above, at 64, 67-69. See also the 1966 Practice Statement, [1966] 3 All E.R. 77, in which the House of Lords announced its power to depart from precedent in appropriate cases.

80. See, e.g., Lord Edmund-Davies, Judicial Activism (1975) 28 Current Legal Problems 1; Lord Radcliffe, note 35 above, at 212-16; Stevens, note 18 above, at 589 (House of Lords); Zander, note 18 above, at 224 (same).

81. See the sources cited in Stevens, note 18 above, at 622-23. See also Dworkin, note 35 above.

82. This disparity between declaratory rhetoric and creative results has been noted, explained, or criticized by various writers: see, e.g., Abel-Smith & Stevens, note 23 above, at 172; Griffith, note 2 above, at 180; Hart, note 1 above, at 12-13, 150; Palley, note 1 above, at 63-64; Paterson, note 1 above, at 187-88; Seidman, note 1 above, at 529-30.

83. Zander, note 18 above, at 230. See also K.C. Davis, Administrative Law Treatise (2d ed., 1978), ss. 2.17, 2.18; Jaffe, note 5 above, at 2.

84. Ibid., at 2-5.

Emphasis on the lawmaking aspect of a judge's role is often associated with judicial 'activism,' a term that, as one writer has noted, has been used to convey several distinct meanings: decisionmaking that is wider than necessary, or extending the scope of existing rules, or considering the 'social, political and economic consequences' of a particular decision.[85] These three 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 its decision. In each of those respects, most observers regard American judges as more 'activist' than British judges.[86]

In the U.K., part of the explanation for the conservative results of the immigration cases appears to be the more general

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85. Palley, note 1 above, at 55 n.1. Professor Palley points out that the term 'activism' logically could be, but ordinarily is not, used to denote a restrictive application of law; an English judge would typically view that type of 'activism' as compatible with his or her role.

Other definitions could also be used. For example, assuming a court is willing to consider the social, political, and economic consequences of its decisions, another measure of activism could be the extent of the court's willingness to deviate from public opinion. Lord Devlin, note 21 above, 39 Mod. L. Rev. at 2, however, defines activist lawmaking as that which merely keeps pace with the consensus in society and dynamic lawmaking as that which proceeds without a current consensus. He describes the U.S. Supreme Court as dynamic and argues that such a role would be inappropriate for a British court (ibid., at 6). Whether he is convincing when discounting the degree of lawmaking actually performed by British judges is questionable: see Palley, note 1 above, at 63. Finally, in the public law area, it would seem reasonable to define activism as reflecting also the degree of deference a court gives to the administrative body whose decision is being challenged; in that sense, judicial 'activism' is the opposite of judicial 'deference'.

86. E.g., ibid., at 55; see also Jaffe, note 5 above, at 2-5.

restraint with which British judges view their role. Often the rhetoric foreshadows the result, as in the royal prerogative cases, most of the habeas corpus cases concerning illegal entrants, and the cases considering whether the Immigration Rules have the force of law. In many of those cases the courts have explicitly acknowledged their perception of a limited judicial role. In some cases, however, the rhetoric has diverged from the results. In the natural justice cases, for example, the courts now commonly articulate a duty to act fairly, only to interpret the substantive content of that duty so narrowly, in the immigration context, as to render it almost devoid of practical application. Similar patterns appear in those immigration cases involving the failure to exercise discretion. The I.A.T. decisions discussed earlier reveal that members of that body also take a restrictive view of their own role.[87]

The cases suggest that, in the immigration area, the invocation of the royal prerogative will cause the courts to perceive their roles especially narrowly. In those cases, the fact that the royal prerogative has been asserted as authority for immigration action has induced the courts both to infer the existence of a foreign policy element and to assume that this element either severely restricts their role or eliminates it entirely. By analogy to the American constitutional cases,

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87. See ch. I, s. H above. See also Farmer, note 28 above, at 232 n.11 (tribunal chairmen commonly describe role of tribunal as providing cheap, simple, and informal justice).

it is also possible that the restrained role perception emerging from the royal prerogative cases helped set the tone for later cases presenting issues generated by the existence of legislative powers.[88]

Finally, since today a judicial decision in favour of an immigrant ordinarily means reversing the I.A.T., it is possible that the courts narrow their role further out of a reluctance to set aside the decision of a statutory tribunal that has been invested with broad statutory powers and that has accumulated great expertise in immigration law and practice. The opinions in the immigration cases do not mention the existence of the I.A.T. as a basis for a narrowing of the judicial role, and the extent to which this has been a factor actually influencing the courts' perceptions of their role cannot be determined, at least not without empirical study. But the question of whether the statutory system of adjudicators and the I.A.T. should affect the judicial role is a vital one, and is examined in the final chapter.

In the United States, the disparity between the statutory interpretation cases and the constitutional cases again raises difficulty. Here, the interaction of attitudinal variables and role perception might be crucial. In statutory interpretation cases, judicial activism generally translates into a purposive, rather than a literal, approach to deciphering the legislative

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88. See ch. I, s. F above.

intent.[89] Most of the case law presenting statutory interpretation issues in American immigration law has involved the construction of statutory language providing a defence to exclusion or deportation, and that is true in particular of the case law considered in this thesis.[90] Thus, in this area, consideration of the ameliorative legislative purpose ordinarily inures to the benefit of the alien. Accordingly, activism will tend generally to produce a 'liberal' result.

The rhetoric is generally consistent with this activist role perception. Even apart from the ameliorative nature of the particular statutory provisions at issue in most of the illustrative cases, the courts have ordinarily heeded the Supreme Court's direction that all doubts concerning the meaning of a deportation provision be construed in favor of the alien.[91] The need for a liberal construction has been held to be especially great when, as is true of the cases studied

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89. This view would be most akin to adopting that definition of activism emphasising the consideration of social, political, and economic consequences flowing from a particular holding. The three major approaches to statutory interpretation, lying on a continuum from literality to purpose are the literal rule (plain meaning regardless whether result sensible), the golden rule (plain meaning unless consequence so absurd that legislative intent could not have been to insist on literal interpretation), and the mischief rule (Heydon's Case (1584) 76 Eng. Rep. 637, at 638 (Ex.)): see E. Bodenheimer, J.B. Oakley, & J.C. Love, An Introduction to the Anglo-American Legal System (1980), at 125-26; Zander, note 18 above, at 37-39.

90. See Ch. II, s. D above.

91. See pp. 244-45 above. But see the recent Supreme Court decisions in Phinpathya and Wang, pp. 257-58, 270-71, respectively.

here, the provision is remedial.[92]

For those reasons, when an issue of statutory interpretation concerns immigration, the substantive attitudes of a liberal American judge will be at their most influential level when they are accompanied by an assertive perception of role. For an American judge with conservative attitudes toward immigration, attitude and an assertive role perception -- in this context a purposive approach to an interpretation of ameliorative statutory language -- are likely to conflict. Even here, however, maxims decreeing a liberal statutory interpretation might strengthen the weight placed on role perception to the point where it prevails over attitude, thus explaining the generally liberal results produced in the statutory interpretation cases by a judiciary of mixed substantive ideology.

The next question, then, is why the assertiveness of the American federal courts has failed to prevent uniformly conservative results in the constitutional cases.[93] As noted earlier, the broader constitutional language would, if

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92. E.g., Gallardo v. INS, 624 F.2d 85, at 87 (9th Cir. 1980); Sik-Hung Chan v. INS, 610 F.2d 651, at 654 (9th Cir. 1979); Kamheangpatiyooth v. INS, 597 F.2d 1253, at 1256 (9th Cir. 1979). Again, however, see Phinpathya and Wang, pp. 257-58, 270-71, above, respectively.

93. A theoretical possibility is that, once the statutory interpretation rulings and the constitutional rulings had taken hold, their perpetuation occurred in tandem. A liberal statutory interpretation might reflect the court's knowledge that the plenary power doctrine would prevent a constitutional attack on a provision construed to produce a severe result. Conversely, courts might believe that the liberality of the statutory interpretation cases reduces the need to overrule or narrow the plenary power doctrine. The written opinions provide no evidence of that possibility, however, and it must remain only a theoretical explanation.

anything, seem to present greater opportunity for the mixed attitudinal variables to operate. Moreover, since the plenary power doctrine has effectively foreclosed constitutional review by the lower courts, the only constitutional cases in which actual choices exist are the Supreme Court cases -- and the Supreme Court has the greatest lawmaking power of all and perhaps the broadest perception of its own role.

One possible answer is that, ironically, the Supreme Court has viewed its role in the constitutional cases as being narrower than in the statutory interpretation cases. First, to hold a statute unconstitutional, the court must invalidate an action approved by both houses of Congress and signed by the President -- all democratically elected leaders. That fact has not prevented such judicial action in other contexts. In the immigration cases, however, there has been a tendency, analogous to that observed in the British royal prerogative cases, to assume that foreign policy is implicated and to assume further that the infusion of a foreign policy element renders constitutional review inappropriate. This point is considered more fully below.[94] Second, for judges with conservative views toward immigration, this narrow role perception by a judiciary usually inclined toward activism in constitutional matters might operate to reinforce the effect of attitude. For judges liberally inclined on the merits, the

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94. See ch. V, s. D. below.

narrow view of the proper judicial role in those cases might conflict with, but ultimately prevail over, substantive attitude.

Finally, part of the judicial role is observance of stare decisis. The more support the plenary power doctrine accumulated, the more entrenched it became, as Justice Frankfurter's statement in Galvan v. Press revealed.[95] Even an activist judge with liberal attitudes might hesitate before voting to dislodge a line of authority so long and so undeviating.

Role perception has been treated here as an 'external' factor affecting judicial decisions. 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.[96] It is in the American constitutional cases that the fusion of doctrine and role perception is the most visible. The prominent doctrinal issue in those cases is the appropriate standard of review -- i.e., the standard by which the court should determine whether the legislative action is valid. Thus, a court's perception that its role in constitutional immigration cases is limited can be translated into legal doctrine setting forth a narrow standard of review or even nonreviewability.

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95. See p. 318 above.
96. See Palley, note 1 above, at 55.

Contemporary Social and Political Forces[97]

It has been argued, and this argument will be accepted here, that a court's decision can be affected by the contemporary political forces operating in society.[98] 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 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 in order at this point. First, immigrants have generally been unpopular in both the U.K. and the U.S. Whether

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97. For a thoughtful description of the philosophical forces historically affecting the totality of immigration law (not just the case law), see P.H. Schuck, The Transformation of Immigration Law (1984) 84 Col. L. Rev. 1.

98. See generally Griffith, note 2 above, at 55-171 (author provides numerous examples of judicial decisions influenced by, inter alia, prevailing social and political forces). See also Palley, note 1 above, at 57 (courts aware judgments might be scrutinised 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 35 above, at 106-11 (judicial lawmaking should reflect moral notions prevailing in society); Lord Devlin, note 21 above, 39 Mod. L. Rev. at 2-6 (arguing that British judges should not make law without a consensus) (but see note 65 above); T. Prosser, Politics and Judicial Review: The Atkinson Case and Its Aftermath (1979) Pub. L. 59, at 83.

for cultural, economic, political, or environmental reasons, various immigrant waves have typically received at least mixed, and more commonly hostile, public reactions.[99] Equally important for present purposes, a sharp increase in the volume of immigration, though clearly not the only important factor, has historically caused the level of anti-immigrant sentiment to escalate rapidly.[100]

That latter phenomenon is significant here, since, not surprisingly, periods in which the courts are deciding large numbers of immigration cases are typically those of high-volume

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99. In the U.S., that was true even in colonial days: M.R. Davie, World Immigration (1936), at 35-36; R.L. Garis, Immigration Restriction (1927), at x, 17-18. See also P. Gleason, The Melting Pot: Symbol of Fusion or Confusion? (1964) 16 Amer. Q. 20. 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, at 580, 456 P.2d 645, at 654, 79 Cal. Rptr. 77, at 86 (1969); Sei Fujii v. State, 38 Cal. 2d 718, at 740-52, 242 P.2d 617, at 632-39 (1952) (per Carter J., concurring); cf. Faruki v. Rogers, 349 F. Supp. 723, at 729 (D.D.C. 1972) (noting frequent oppression of immigrants). The common reasons for this general antipathy are summarised in J. Bentley, American Immigration Today (1981), at 14-16; Gainer, note 61 above, at 212; Garrard, note 59 above, at 3-5. See generally T.J. Curran, Xenophobia and Immigration, 1820-1930 (1975); E.V. Rostow, The Japanese American Cases -- A Disaster (1945) 54 Yale L.J. 489; Tribe, note 37 above, at 1053-54.

100. Most of the major immigration periods are discussed below. In addition, English public reaction to Irish immigrants in the nineteenth century has been tied to the public perception of increased volume: Gainer, note 61 above, at 212; see generally S. Gilley, English Attitudes to the Irish in England, 1780-1900, in C. Holmes (ed.), Immigrants and Minorities in British Society (1978), at 81 and passim. See also J.P. May, The Chinese in Britain, 1860-1914, in Holmes, above, at 111 and passim.

immigration, as the discussion below will show.[101] 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,[102] which in turn produces higher numbers of excluded or deported immigrants.[103]

Thus, unhappily for immigrants, the periods in which their large numbers make their presence all the more unpopular tend to be those very periods in which they are most frequently before the courts. Further, the precedents established in those cases constrain the courts even during future periods of relative quiet. These factors, offered here as general commentary on the political atmosphere permeating immigration cases, will now be examined in the contexts of the historical forces specific to the time periods during which the most significant groups of immigration cases were decided.

The British Cases

The activity of the British courts in the area of immigration has been concentrated into two roughly defined time periods, both characterised by high-volume immigration:

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101. The correlation is not perfect, since political factors other than high volume can spur litigation. The McCarthy era cases (pp. 310-18 above, pp. 386-88 below) and the Iranian cases (pp. 326-29 above, pp. 393-94 below) are examples.
102. See pp. 380-86 below.
103. See, e.g., W.C. Van Vleck, The Administrative Control of Aliens (1932), at 19.

from the late nineteenth century to about the 1920's, and from the mid-to-late 1960's until the present. During the first of those periods, the immigration cases tended often to involve the royal prerogative, either directly or indirectly.[104] In those cases, executive power to restrict the movement of aliens was constantly being tested.

The political era spanning those decisions can be regarded as beginning with the mass persecution of the Russian Jews in 1881,[105] and continuing with recurrences in Russia and elsewhere in eastern Europe.[106] These 'pogroms' resulted in massive Jewish migration to several countries, including the U.K.[107] As the numbers grew, anti-alien[108] sentiment grew too.[109] The popular mood was evidenced by, and culminated

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104. See pp. 134-47 above.
105. Gainer, note 61 above, at 1; Garrard, note 59 above, at 23; L.P. Gartner, The Jewish Immigrant in England, 1870-1914 (1960), at 41-49; C. Roth, A History of the Jews in England (3d ed., 1964), at 269; C.H.R. Thornberry, Law, Opinion, and the Immigrant (1962) 25 Mod. L. Rev. 654, at 656.
106. See, e.g., Garrard, note 59 above, at 29.
107. In addition to the sources cited in note 105 above, see P. Foot, Immigration and Race in British Politics (1965), at 86; V.G. Kiernan, Britons Old and New, in Holmes, note 100 above, at 53; Roth, note 105 above, at 269-70; C.H.R. Thornberry, Dr. Soblen and the Alien Law of the United Kingdom (1963) 12 Int'l & Comp. L.Q. 414, at 428.
108. How much of the animosity was directed at the aliens qua aliens, and how much reflected anti-Semitism, is subject to dispute: see Gainer, note 61 above, at 107-28, especially at 118; Garrard, note 59 above, at 56-65; Gartner, note 105 above, at 278; P. Hewitt, The Abuse of Power (1982), at 188; C. Holmes, J.A. Hobson and the Jews, in Holmes, note 100 above, at 127-28, 130, 148-52.
109. See Foot, note 107 above, at 103-06; Garrard, note 59 above, at 23-47, 56-65; Holmes, note 108 above, at 148-52; C. Jones, Immigration and Social Policy in Britain (1977), at 72-88; Thornberry, note 105 above, at 656-57; see generally

in, a series of statutes imposing more and more restrictions on aliens.[110]

The anti-alien atmosphere that grew in strength throughout this period was intensified by the First World War.[111] As several courts and commentators have observed, a wartime environment, or for that matter any situation perceived as a serious threat to national security, generally produces judicial restraint when executive power is challenged.[112]

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109. (continued) Gainer, note 61 above. Various complaints were lodged against the new immigrants: see Gainer, 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, note 105 above, at 276 ('sweating' practice in industry), 278 (racial objections); Kiernan, note 107 above, at 53 (lowering wages and taking up housing). Some of the animosity was undoubtedly tempered either by genuine sympathy (Gartner, at 275) or by embarrassment at being perceived as racially prejudiced or as uncharitable to people fleeing violent persecution (Garrard, at 5-10, 203-09; C. Jones, above, at 72).

Anti-Chinese feeling in Australia during the era in which Musgrove (pp. 136-38 above) was decided is outlined in Macdonald (1983), note 29 above, at 12-13. See also R. Plender, International Migration Law (1972), at 48.

110. The first major statute restricting the entry of aliens was the Aliens Act 1905. The political environment surrounding its enactment is described in Gainer, note 61 above, at 6-16; Garrard, note 59 above, at 23-47; Macdonald (1983), note 29 above, at 8; Thornberry, note 107 above, at 428. Further anti-alien sentiment resulted in the Aliens Restrictions Act 1914: see Gainer, at 199-207; Hewitt, note 108 above, at 188; Thornberry, at 431.

111. The result was the Aliens Restriction (Amendment) Act 1919: see Foot, note 107 above, at 104; Gainer, note 61 above, at 208; Kiernan, note 107 above, at 53; Thornberry, note 105 above, at 657.

112. See, e.g., de Smith, note 23 above, at 32, 290-91; J.A.G. Griffith, Administrative Law and the Judges (1978), at 13. For judicial language explicitly acknowledging the effect of wartime or national security on judicial decisions, see, e.g., R. v. Sec. of State for Home Affairs, ex p. Hosenball [1977] 1 W.L.R. 766, at 778 (C.A.); R. v. Inspector of Leman St. Police Station, ex p. Venicoff [1920] 3 K.B. 72, at 80 (Div. Ct.); R. v. Sup't of Chiswick Police Station, ex p. Sacksteder

In immigration cases, a more specific anti-alien sentiment engendered by war serves to fortify this general tendency to restrict civil liberties. During the First World War, this source of anti-alien opinion might have developed in two ways: The antipathy toward the Jewish immigrants could be traced partly to their association in the public mind with anarchist movements, especially feared during wartime;[113] and resentment toward alien enemies can ripen into a more general hostility toward aliens as a group.[114] Whether because of a general inclination to limit civil liberties in wartime, or because of wartime antagonism toward aliens in particular, the war figured noticeably in several of the immigration cases decided during this era.[115]

A final observation about the period from the 1880's to the 1920's is that it roughly coincided, either causally or fortuitously, with the period in which the British courts were just beginning to develop a more restrained view of their

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112. (continued) [1918] 1 K.B. 578, at 590 (Div. Ct.) (per Scrutton L.J.). This factor was undoubtedly at work also in the alien enemy cases (see pp. 159-60 above). It might similarly have figured in the unusually deferential wartime immigration decisions. The American decisions also reveal great restraint in wartime (see pp. 387-88 below). See also J.L. Cable, Loss of Citizenship, Denaturalization, The Alien in Wartime (1943), at 84-100.

113. Gainer, note 61 above, at 99-107. For a description of similar political forces in the U.S. during this period, see J. Higham, Strangers in the Land (2d ed., 1963), at 194-233; M.S. Seller, Historical Perspectives on American Immigration Policy: Case Studies and Current Implications (1983) 45 L. & Contemp. Prob. (No. 2) 137, at 150-51.

114. Higham, note 113 above, at 208.

115. See especially the explicit recognition of wartime effects in Venicoff and Sacksteder, note 100 above.

role.[116] In light of that factor, and given the political forces generated first by large scale immigration and then by the First World War, it is not surprising that the immigration cases of this era reached such uniformly conservative results.

The more recent high-volume immigration to the U.K. has had its source in the Commonwealth. The infusion of coloured Commonwealth immigrants began attaining significance in the 1950's,[117] reaching a peak in the two or three years preceding enactment of the Commonwealth Immigrants Act 1962.[118] As the numbers grew, this immigrant wave became steadily more unpopular.[119] The 1962 Act, which created the first legal obstacles to Commonwealth immigration, has been followed by progressively stricter legislation.[120]

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116. See Palley, note 1 above, at 59-61.
117. D. Wood, Part I of J.A.G. Griffith et al. (eds.), Coloured Immigrants in Britain (1960), at 3.
118. See J.M. Evans, Immigration Law (2d ed., 1983), at 14-15; Foot, note 107 above, at 15-16; Hewitt, note 108 above, at 190; C. Jones, note 109 above, at 133-54; Thornberry, note 105 above, at 658 (increase due possibly to expanding labour market and possibly to fear of imminent restrictions).
119. See, e.g., Evans, note 118 above, at 2; Foot, note 107 above, at 25-79 (political climate in Smethwick); Gainer, note 61 above, at 212; Moore & Wallace, note 58 above, at 2-4, 26; Wood, note 117 above, at 3, 219-25. Racial tension exploded into urban riots in 1981: see Hewitt, note 108 above, at 215. One of the earliest and most influential works examining race relations in the U.K. (and predating the era discussed here) was K. Little, Negroes in Britain (1st edn., 1948, now 2d edn., 1972). See also B.A. Hepple, The Race Relations Act 1965 (1965) 29 Mod. L. Rev. 306; I.A. Macdonald, Race Relations and Immigration Law (1969); G.C.K. Peach, West Indian Migration to Britain (1968); E.J.B. Rose et al, Colour and Citizenship, A Report on British Race Relations (1969). For other studies of the demographic and economic effects of immigration to Britain, see generally the sources cited on p. 1 n.1, above.
120. See Commonwealth Immigrants Act 1968; Immigration Act 1971; British Nationality Act 1981.

Thus, the patterns in both major immigration periods have been similar. A large influx of immigrants met popular resistance that in turn led to statutes curbing immigration by mechanisms departing dramatically from previous practice. Subsequent legislation expanded the restrictions. More frequent litigation occurred as immigrants challenged orders excluding or deporting them. And, during these periods of strong anti-immigrant opinion, the courts tended overwhelmingly to return decisions in favour of the government in close cases. If one accepts the general thesis that contemporary political forces are apt to influence judicial decisionmaking, then it seems likely that the political forces discussed here contributed to the results of the British immigration cases.[121]

The American Cases

Chinese immigrants began arriving in California in earnest around 1850, when labour was in short supply. By 1869, however, the labour market had become glutted and the presence of the Chinese unwelcome.[122] The migration continued nonetheless, and anti-Chinese prejudice intensified.[123] In 1882,

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121. See Grant & Martin, note 58 above, at 356. See also Macdonald (1983), note 29 above, at vi (arguing that a new public mood was responsible for the turnaround of the House of Lords in Khawaja, p. 27 n. 77 above).
122. See F.F. Chuman, The Bamboo People: The Law and Japanese-Americans (1976), at 3-4. The completion of the trans-continental 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 labour: ibid.
123. Ibid., at 4, 7-9; Curran, note 99 above, at 78-90; E.E. Ferguson, The California Alien Land Law and the Fourteenth Amendment (1947) 35 Cal. L. Rev. 61, at 62-63; O. Handlin,

responding to nativist sentiment, Congress passed the Chinese Exclusion Act, the first statute restricting entry on racial grounds.[124]

During the 1880's, a new wave of immigrants started coming to California from Japan.[125] The Japanese immigrants became the main target of anti-Asian prejudice,[126] and were sometimes lumped together with the Chinese in propaganda that warned of the 'Yellow Peril'.[127] 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.[128] In 1924, Congress reacted by prohibiting the entry of all Japanese immigrants.[129]

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123. (continued) Immigration as a Factor in American History (1959), at 167; M.R. Konvitz, The Alien and the Asiatic in American Law (1946), at 11-12; Seller, note 113 above, at 153; W.L. Tung, The Chinese in America 1820-1973 (1974), at 1-2, 8 and passim. For a contemporary account of the anti-Chinese feeling, see M.E.B. (R.) S. Coolidge, Chinese Immigration (1909).

124. Act of 3 Aug. 1882, 22 Stat. 214. See Chuman, note 122 above, at 7-8; F.S. Abrams, American Immigration Policy: How Strait the Gate? (1983) 45 L. & Contemp. Prob. (No. 2) 107, at 108.

125. Chuman, note 122 above, at 11.

126. Ibid., at 11, 15-19; Curran, note 99 above, at 91-92; Ferguson, note 123 above, at 63-73; Handlin, note 123 above, at 167; M. Herman, The Japanese in America 1843-1973 (1974), at 6 and passim; J.A. Huizinga, Alien Land Laws: Constitutional Limitations on State Power to Regulate (1980) 32 Hastings L.J. 251, at 252-53; Konvitz (1946), note 123 above, at 22, 157-58; D.O. McGovney, The Anti-Japanese Land Laws of California and Ten Other States (1947) 35 Cal. L. Rev. 7, at 13-14.

127. Chuman, note 122 above, at 73-77.

128. Ibid., at 19, 42.

129. The Act of 26 May 1924, 43 Stat. 153, s. 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 to citizenship.

This era of public hostility, first to the Chinese immigrants and then to the Japanese, coincides roughly with that in which the Supreme Court adopted and solidified the plenary power doctrine.[130] The litigants in almost all these cases were Asians, a fact not lost on some of the Supreme Court justices.[131]

The Supreme Court decisions of the early 1950's, discussed earlier, breathed new vigour into the plenary power doctrine. Many of the aliens in those cases had been charged with having various ties to the Communist party. In such cases, the most obvious political force to consider is the contemporary national preoccupation with Communism. Although anti-Communist sentiment in the United States had begun building much

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130. The first Supreme Court case in which an alien challenged the constitutionality of a federal immigration statute was the Chinese Exclusion Case, 130 U.S. 581 (1889). See pp. 286-301 above.

131. See especially Fong Yue Ting v. United States, 149 U.S. 698, at 743 (1893) (Brewer J., dissenting) (acknowledging that the particular statute was 'directed only against the obnoxious Chinese', who were a 'distasteful class', but fearing that the precedent would affect other groups in the future); Chinese Exclusion Case, 130 U.S. 581, at 598 (1889)(Field J., writing opinion of Court)(Chinese witnesses have 'loose notions . . . of the obligations of an oath'); Chew Heong v. United States, 112 U.S. 536, at 579 (1884) (Bradley J., dissenting from liberal statutory interpretation)('Chinese of the lower class have little respect for the solemnity of an oath'). Probably the most vitrolic attack on the Chinese as a race, and the most explicit judicial appeal to the will of the people, was Justice Field's dissent in Chew Heong, 112 U.S. at 560-78. The dissent should be read in its entirety. Whether its tone reflects Justice Field's perception of public opinion, his own personal attitude toward Chinese immigration, or both, it seems clear that external factors were influencing him. This consideration is especially relevant because, five years later, Justice Field authored the Court's opinion in the Chinese Exclusion Case.

earlier,[132] it reached its peak during the McCarthy era.[133] During the early 1950's, much anti-Communist legislation was enacted by Congress.[134] That the same powerful political forces had some effect on the judges deciding at least one major free speech case outside the realm of immigration seems likely.[135] The rhetoric of the immigration cases decided during this period suggests that these forces may very well have been in operation there as well.[136]

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.[137] This hostility became apparent after the Second World War,[138] and might simply have been part of the traditional anti-alien backlash accompanying a major war.[139] The hostility might have reflected also a publicly perceived association of aliens with subversive causes, flowing from the traditional public refusal to tolerate in aliens the same degree of political radicalism tolerated in the native-born.[140] And some part of the anti-alien atmosphere might

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132. See M.R. Konvitz, Expanding Liberties (1966), at 110-16.
133. Ibid., at 120-21.
134. See ibid., at 134-42.
135. Ibid., at 122, discussing Dennis v. United States, 341 U.S. 494 (1951). But see analysis of the Smith Act cases, Konvitz (1966), note 132 above, at 123-34.
136. See pp. 310-18 above.
137. M.R. Konvitz, Civil Rights in Immigration (1953), at 123-26.
138. Ibid., at 123.
139. See notes 113, 114 above.
140. Konvitz (1953), note 137 above, at 122; see also D.M. Reimers, Recent Immigration Policy: An Analysis, in B.R. Chiswick (ed.), The Gateway: U.S. Immigration Issues and Policies (1982), at 28.

have been due to racial fears, as evidenced by the statements offered to support the national origins quota system embodied in the restrictive Immigration and Nationality Act of 1952.[141]

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. It was probably to be expected that in Galvan v. Press,[142] decided in 1954, the Court would at the very least decline the invitation 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.

From the 1960's 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 the doctrine.[143] This judicial conservatism in this sub-area of immigration law cannot be attributed to a general conservatism in society, for during much of that period -- specifically the early-to-mid 1960's -- political liberalism on many important issues flourished. The 1964 Civil Rights Act

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141. Act of June 27, 1952, Pub. L. 82-414, 66 Stat. 163. See Reimers, note 140 above, at 25-27.
142. 347 U.S. 522 (1954). See p. 318 above.
143. 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 on pp. 332-38 above.

became law during the early stages of President Johnson's Great Society program, which was characterised by a new appreciation both for civil rights in general and for equal economic opportunities in particular. The contrast invites an inquiry into why the plenary power doctrine has been allowed to continue.

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.[144] One possible explanation, therefore, is simply that these factors have prevailed over the general liberalism dominant during some of this time period.

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144. In Boutilier v. INS, 387 U.S. 118 (1967), the charge against the alien was homosexual conduct, which, despite the liberalism of the 1960's, 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 tolerate in aliens the same level of political unorthodoxy it will tolerate in citizens (see p. 382 above).

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 perennially unpopular, at least during this century. That is not to say that the general public has always favoured restricting the then prevailing immigration policy, for there have certainly been periods in which immigration has been encouraged as economically beneficial.[145] 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.[146] The liberalism of the 1960's had its limits, and it was inevitable that when challenges to Congressional or Presidential control over immigration arose, 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 1930's, although the numbers of Mexican immigrants to the United States remained

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145. E.g., the American colonists encouraged immigration (see pp. 290-92 above). In the 1850's, Chinese immigrants were needed in California to work in the orchards, on farms, in mines, in transportation, and in manufacturing: Chuman, note 122 above, at 3-4. During the Second World War, Mexican braceros were imported to build railroads and to work in the fields: Bentley, note 99 above, at 37.

146. The 1965 amendments that finally abolished the national origins quota system 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 140 above, at 33.

low,[147] prejudice and discrimination were common.[148] Today, now that Mexico is by far the single largest source of annual immigration,[149] prejudice toward both Mexican aliens and even American citizens of Mexican ancestry has become rampant.[150]

Further damaging 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.[151] About 2/3

147. M.D. Morris & A. Mayio, Brookings Institution, Curbing Illegal Immigration (1982), at 6.
148. See C.E. 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 J.R. Garcia, Operation Wetback, The Mass Deportation of Mexican Undocumented Workers in 1954 (1980), especially at 143-44 (public association of 'wetbacks' with crime, poverty, and disease).
149. See Bentley, note 99 above, at 38.
150. Ibid., at 40-42 (in Southwest); M. Bronfenbrenner, Hyphenated Americans -- Economic Aspects (1983) 45 L. & Contemp. Prob. (No. 2) 9, at 25; P. Martin & M.F. Houstoun, European and American Immigration Policies (1983) 45 L. & Contemp. Prob. (No. 2) 29, at 44; J.A.R. Nafziger, An Immigration Policy of Helping Bring People to the Resources (1979) 8 Denver J. of Int'l L. & Policy 607; J. Samora, Los Mojados: The Wetback Story (1971), at 98-105 (exploitation of illegal Mexican entrants); Smith, note 67 above, at 3; see also Study, Consular Discretion in the Immigrant Visa-Issuing Process (1978) 16 San Diego L. Rev. 87, at 142 & n.366.
151. Abrams, note 124 above, at 112-13; L.F. Chapman, A Look at Illegal Immigration: Causes and Impact on the United States (1975) 13 San Diego L. Rev. 34, at 34-35; A.F. Corwin, The Numbers Game: Estimates of Illegal Aliens in the United States 1970-1981 (1983) 45 L. & Contemp. Prob. (No. 2) 223; Fogel, note 67 above, at 72; G. Halsell, The Illegals (1978), at 4; Manulkin & Maghame, note 67 above, at 43-45; Morris & Mayio, note 147 above, at 1; G. Salinas & I.D. Torres, The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis (1976) 13 Houston L. Rev. 863, at 866; Schuck, note 97 above, at 41-42; SCIRP, note 67 above, at 37; Smith, note 67 above, at 3. Studies of the total numbers of illegal aliens and the numbers of Mexican illegal aliens have been criticised as sloppy: J.A. Bustamante, Immigrant from Mexico: The Silent Invasion Issue, in R.S. Bryce-Laporte (ed.), Sourcebook on the New Immigration (1980), at 139-44.

of the illegal entrants are believed to be Mexican.[152] For various reasons, illegal alien workers can be and often are employed at substandard pay and under substandard conditions.[153] 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 labourers.[154] Moreover, even apart from economic concerns, these mass violations of federal law trigger law enforcement concerns that further tarnish the public image of aliens.

Although the recent batch of plenary power doctrine cases decided by the Supreme Court have 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 unfavourable to immigrants, as can be seen from the earlier discussions of the broad legislative reactions to various immigrant waves entering both the U.K. and the U.S. This climate can induce judicial conservatism either because a judge's personal attitude might itself be shaped by

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152. Morris & Mayio, note 147 above, at 4.
153. See, e.g., Bentley, note 99 above, at 152-55; Fogel, note 67 above, at 66; Samora, note 150 above, at 98-105.
154. Bentley, note 99 above, at 152-55; Salinas & Torres, note 151 above, at 864. See also J.A.R. Nafziger, A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States (1977) 56 Ore. L. Rev. 63, at 69-72 (arguing that undocumented Mexican aliens cause only minimal displacement of American workers).

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 effect vis-a-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. In the Iranian cases,[155] for example, the issues included the constitutionality of administrative regulations directed exclusively at Iranians. The courts recognised broad I.N.S. power to make decisions arguably furthering the President's foreign policy aims, including the power to discriminate against aliens from a designated country or countries. When it is considered that contrary dispositions were available, that in at least one case -- Yassini -- a contrary conclusion on the constitutional issue was seemingly the stronger one,[156] that the panel in Yassini was composed of three judges ordinarily regarded as quite liberal,[157] and that the sweep of the courts' conservative opinions were broad, the results might seem surprising. The surprise disappears when the depth of the public outcry against

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155. See pp. 326-29 above.
156. See pp. 327-29 above.
157. The panel in Yassini consisted of Judges Tuttle, Tang, and Hug.

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 invalidating a retaliatory action of the executive branch.

The adverse public attitudes toward immigration in recent years do not, of course, explain the liberal results of the statutory interpretation cases, many of which involved aliens from Mexico. It might be that narrow constructions by lower courts of language contained in the Immigration and Nationality Act neither cuts as wide a swath, nor attracts the same degree of public notice, as would a Supreme Court decision declaring an Act of Congress unconstitutional. If that is so, then the importance of contemporary political forces as a factor shaping judicial decisionmaking would be less in statutory interpretation cases than in constitutional cases, and might simply be offset by the attitudinal and role perception variables analysed earlier.

Conclusions

Judges often have realistic choices open to them in deciding cases. This section has offered possible explanations as to why judges in the U.K. and the U.S. have made the particular choices they have when deciding immigration cases.

Judicial freedom of choice is constrained by several factors. These constraints dictate that the specific legal doctrines advanced by a court in its written opinion not be overlooked as the actual reasons for the results reached. In addition, more general doctrinal factors are at work in the

immigration cases. They are considered in chapter V, section E below.

Many writers have now shown, however, that factors other than the legal reasoning formally offered in the opinions frequently contribute to judicial decisions. Among these factors are the backgrounds, attitudes, and role perceptions of individual judges, and the contemporary political forces prevailing in society. The dubious persuasive value of the legal reasoning advanced in some of the immigration cases decided in both the U.K. and the U.S., together with the systematic tilts reflected in the results of the cases, make it especially unlikely that the immigration area is exempt from these forces.

In some cases, the influence of one or more of these 'external' factors is evidenced by the text of the written opinions. In other cases, the influence of these factors can only be inferred (a) by the general tendency of courts to take such factors into account; (b) from the fact that application of the particular attitudes, role perceptions, and contemporary political forces to the facts of the particular cases would be consistent with the actual results; and (c) in some cases, by the weakness of the legal reasoning formally provided to justify the result -- i.e., by process of elimination. These extralegal factors, reinforced by both general and specific doctrine, may help to explain why, in immigration cases, the courts have deviated so frequently from general principles of public law.

B. General Similarities and Differences Between the British Immigration Cases and the American Immigration Cases

Whether particular immigration decisions of administrative bodies are reviewable in court is largely determined by the applicable statutory provisions. In the U.K. the detailed set of rules with which the 1971 Act enumerates the classes of decisions appealable to the statutory authorities, when combined with the courts' supervisory jurisdiction over administrative tribunals, have covered most types of decisions authorised by the statute. Those appeal provisions, however, leave a large number of decisions outside their scope.[158] In the United States, in contrast, almost all the administrative decisions relating to exclusion and deportation are reviewable in court.[159]

There is one extremely important exception. As noted earlier,[160] while British law permits both administrative and judicial review of visa denials, American law does not. In the United States, where no statutory provision dictates such a result, the bar to judicial review has been imposed voluntarily by the courts. That gap in the American rules is perhaps the most important difference between the U.K. and the U.S. with respect to the reviewability of immigration decisions.

Several observations about scope of review can also be made. Review of factual decisions has been relatively

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158. See p. 442 above.
159. See pp. 223-25 above.
160. See pp. 225-35 above.

infrequent in immigration cases. In the U.K., one exception has been the habeas corpus cases involving the removal of illegal entrants. Many such cases have exhibited judicial restraint surpassing even the usual deference to factfinding by administrative bodies. Other British immigration cases have contained language suggesting the inapplicability of even the 'no-evidence' test.[161] American law generally permits courts to review administrative decisions under a 'substantial evidence' standard.[162] Deportation decisions are reviewed for 'reasonable, substantial, and probative evidence.'[163] Differences between the last two standards are not apparent, and the number of American immigration cases raising issues as to the sufficiency of the evidence is too small to permit meaningful conclusions.

A more specific difference in review of factual findings concerns claims of citizenship. In the United States much greater protection is afforded in both exclusion and deportation proceedings when the individual defends by claiming citizenship. In such cases a de novo judicial trial will ordinarily be required.[164] No comparable distinction is drawn in British law.

Other differences in the scope of review relate to errors of law. The unusually restrained posture of the U.K. courts in

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161. See p. 25 above.
162. See p. 223 above.
163. 8 U.S.C. s. 1105a(a)(4).
164. See pp. 239-40 above.

those natural justice cases dealing with aliens can be constrasted with the occasional willingness of the American courts to invalidate on procedural due process grounds the administrative decisions made under the immigration laws.[165]

Interpretation of immigration regulations is both more important and more frequent in the U.K. than it is in the U.S., for reasons given earlier.[166] The British courts have generally declined to read the Immigration Rules as conferring binding rights. Their interpretation of those Rules and of other regulations has embodied the same conservatism as that reflected in their interpretation of Parliamentary enactments, and can be contrasted with the liberal statutory construction tendencies of American courts.

That contrast, the gulf between British and American courts in their review of decisions interpreting statutory provisions, is probably the most striking of the differences relating to judicial review of immigration decisions between the two countries. The cases examined in chapter I revealed relatively little inclination on the part of the British courts to interfere with the statutory interpretation adopted by the administrative officials. In the United States precisely the opposite has occurred. The American courts have often either stretched or narrowed statutory language, where possible, to avoid subjecting aliens to treatment that the courts have

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165. Compare ch. I, s. C above (U.K. natural justice) with pp. 313-14, 331-32 above (U.S. procedural due process cases).
166. See pp. 240-41 above.

regarded as unduly harsh. The difference in judicial approaches has not been matched by any noticeable difference between the approaches of the I.A.T. and the B.I.A., both of which have exhibited great deference to interpretations adopted by the government.

In immigration cases, the American courts have been their most restrained on constitutional issues. The British courts also recognise a presumption of constitutionality, and it was suggested above that this presumption might partially explain a few of the British immigration decisions.[167]

On review of discretionary decisions, courts in both countries have exhibited great deference to the administrative bodies whose decisions have been challenged. One possible difference between the approaches in the two countries has been that the British courts have been more consistent within the area of discretion under the immigration laws. That difference is reflected particularly in the cases interpreting broad statutory terms, such as the 'public good' clause, to confer highly discretionary powers on the decisionmaker. The American courts have been less consistent when applying such provisions.[168] In addition, the American courts have shown relatively little uniformity in reviewing for the failure to exercise discretion, particularly when the failure stems from the allegedly erroneous determination that the statutory prerequisites were not satisfied. Also giving rise to

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167. See ch. I, s. G above.
168. See ch. II, s. E above.

unpredictable responses have been questions concerning the specific grounds on which an abuse of discretion will be found.[169]

In addition to the similarities and differences between the courts of the U.K. and the U.S. on specific categories of questions, there is a further similarity that requires comment. In both countries, there has been an unusually high number of immigration cases in which the courts have merged certain conceptually distinct issues. Some such examples have been of a recurring nature.

The most common example has been the failure to distinguish between a complete substitution of judgment by the reviewing court, and the application of some lesser but still substantial intermediate standard of review. In the United States, for example, the Supreme Court has at least twice turned back challenges based on substantive due process by stating it would not substitute its judgment for that of Congress.[170] Yet in each case the substantive due process argument had required nothing more than review for reasonableness, a much narrower standard than substitution of judgment.

The effect of that technique is to make it appear as if the alien is asking for something clearly greater than what he or she has a right to receive. The tendency in those cases has

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169. Ibid.
170. See the discussions of Harisiades and Fiallo, pp. 315-17 and 320-24 above, respectively.

then been to reject the exaggerated form of the argument, ignore the possibility of an intermediate standard, and thus deny the requested relief.

In the U.K., the Mughal decision reflects an analogous approach. A returning resident who had been excluded argued that the immigration officer should have disclosed certain documentary evidence. Stating that the officer was not required to 'conduct a trial', one judgment rejected the argument without considering whether natural justice dictated at least the divulging of adverse evidence.[171]

In the American constitutional cases, the Supreme Court has frequently failed to distinguish among three issues: the power of a nation to regulate immigration, the internal allocation of power between the federal government and the states, and the allocation of power, within the federal government, between the Legislature and the Judiciary. The unfortunate effect of that failure has been described earlier.[172] In the U.K., as discussed above,[173] the Privy Council has failed to distinguish between the first two of those issues.

Other cases of issue blurring have concerned the distinction between whether a body may exercise a particular power, and whether it has done so. In Venicoff,[174] for example, an alien ordered deported had argued he did not fall

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171. [1973] 3 All E.R. at 807-08 (per Scarman L.J., as he then was).
172. See ch. III above.
173. See p. 140 above.
174. [1920] 3 K.B. 72 (Div. Ct.).

within the 'public good' clause contained in the Order in Council issued by the Home Secretary. Rather than focus on whether that Order should be applied to the particular alien, the Divisional Court stated only that the Home Secretary had the power to issue the Order. In the United States, a similar result was reached in Pena,[175] where the appellate court, rather than ask whether Congress had intended to withhold judicial review of visa denials, was content to conclude that Congress could constitutionally do so. Still another lapse in the visa denial cases has been the failure to distinguish between review within the administrative agency and review by the courts, a failure that has arguably led to erroneous results in several instances.[176]

The above discussion reveals both similarities and differences between judicial review of immigration decisions in the U.K. and that in the U.S. To the extent that the approaches have differed, a number of explanations are possible. Undoubtedly, some differences are fortuitous. Others, as discussed in the previous section, flow from external factors. This section will explore two other potential sources of the differences between the British and the American immigration cases: differences in constitutional systems and public law, and differences in both the general structure and specific provisions of the immigration statutes.

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175. See p. 234 above.
176. See p. 233 above.

Differences in the Systems of Government and Public Law

Some of the important differences between the laws of the two nations considered here stem from special relationships external to the domestic governmental structure. Of the latter, the two most significant are the U.K.'s relationships to the Commonwealth and to the E.E.C.

The British position in the Commonwealth has had obvious effects on the nation's substantive immigration law. Also affected, however, have been the standards of judicial review. The sharply differing review accorded aliens and Commonwealth citizens in Schmidt and Baghwan, respectively, is noted below.[177] In addition, when the provisions of a law vary in their application to different countries, the tendency for courts to view those provisions as closely connected to foreign policy might be expected to increase.[178] Possibly such a factor has been partly responsible for the more restrained approaches of the British courts in this area.

The U.K.'s position in the Commonwealth has also heightened greatly the technical complexity of the immigration laws. The concept of patriality (now right of abode), the distinctions between aliens and Commonwealth citizens, and the many transition provisions accompanying the gradual erosion of those distinctions, have certainly complicated the law. That higher degree of technicality in the U.K. might further explain why the British courts have been more willing to defer to the

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177. See p. 417 below.
178. See pp. 326-29 above, 486-87 below.

expertise of a specialised tribunal than have the American courts.

Membership in the E.E.C. has injected a number of new issues into British immigration law. As discussed above, the British courts have tended toward conservative results in the free movement cases, particularly in comparison with the European Court.[179] Whether they can be said to have acted assertively or deferentially depends on the point of reference. In hesitating to find statutes, rules or regulations, or individual decisions violative of Community law, the British courts have again shown great deference to the interpretations adopted by British governmental bodies. At the same time, their tendency to decide Community law issues themselves rather than refer them to the European Court reveals little deference to the Community institutions.

The other differences discussed here are all internal ones. One concerns the federal/state structure of government in the United States, a characteristic to which the U.K. has no real counterpart.[180] In the U.S., the effect of federalism has been to raise a whole set of constitutional issues not applicable in the U.K. In addition, as discussed earlier,[181] the standards for reviewing federal and state regulation of aliens have diverged dramatically. Most important for present purposes, it has been argued here that the existence of

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179. See ch. I, s. I above.
180. But cf. devolution in Scotland and Wales, and the division of each of the four 'nations' into counties.
181. See pp. 343-45 above.

federalism questions has inadvertently led to judicial abdication of the constitutional review of Congressional legislation controlling immigration.[182]

Perhaps the most critical difference has related to the question of supremacy. In the U.K., Parliament is the ultimate authority.[183] In the U.S. the Constitution is the ultimate authority, and the Supreme Court has held that a court is empowered to invalidate Congressional action that the court deems violative of the Constitution.[184]

That fundamental difference creates in the U.S. an entire, huge body of case law without a real U.K. parallel.[185] That law has been of special interest in the subject of immigration. The relevance of constitutional law to the differentiation between U.K. and U.S. judicial review of immigration decisions has been greatly muted by the plenary power doctrine. Still, the American constitutional review for compliance with procedural due process has exceeded that in the U.K. for conformity with the rules of natural justice.

Other possible effects of the American Constitution in this area have been on statutory interpretation. Courts generally attempt to construe ambiguous statutory language so

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182. See ch. III above.
183. See, e.g., H.W.R. Wade, Administrative Law (5th ed., 1982), at 26-31; Edinburgh & Dalkeith Ry. v. Wauchope (1842) 8 E.R. 279 (H.L.); R. v. Jordan [1967] Crim. L.R. 483 (Div. Ct.). This sovereignty must of course be considered in light of Community law: see, e.g., S.A. de Smith, Constitutional and Administrative Law (4th ed., by H. Street & R. Brazier, 1981), at 88-91.
184. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
185. But cf. ch. I, s. G above (presumption of constitutionality).

as to avoid constitutional doubts,[186] and that tendency might partly explain the American courts' relatively liberal interpretation of immigration legislation.

The relationship between the legislative and the executive branches of government has also profoundly affected immigration law in the two countries. In numerous respects that relationship is closer in the U.K. than it is in the U.S. The monarch in the U.K. is bound by convention to appoint as Prime Minister the leader of the largest party in the House of Commons. The other Ministers, also appointed by the monarch, will be whomever the Prime Minister recommends. All Ministers must themselves be members of either House of Parliament.[187] Thus the first point to note is that the selection of all the Ministers rests ultimately on the composition of Parliament. In the United States, by contrast, the President is independently elected by the people.[188] As a result, the probability of a serious ideological rift between the legislative and executive branches is less in the U.K. than in the U.S. It follows that, with all other factors constant, Parliament would be less hesitant than Congress to delegate broad discretionary powers to the executive branch. In immigration law, that general principle is reflected in the U.K. practice of investing the Home Office with much more

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186. See pp. 243-44 above.
187. see, e.g., P.J. Dalton & R.S. Dexter, Constitutional Law (1976), at 21; de Smith, note 183 above, at 173.
188. U.S. Const. art. II, s. 1, cl. 2 (technically through 'electors' now elected by the people).

important discretionary authority than that possessed by the American I.N.S., a practice more specifically described previously.[189] Therefore, as was also noted earlier,[190] the proportion of immigration cases in which the challenged decision involves substantial discretion will be higher in the U.K. than in the U.S.

The connection between the Legislative and Executive branches is closer in the U.K. than it is in the U.S. for the additional reason that Parliament may oust the government from office by a vote of no confidence.[191] In the United States the Congress has no such power and, because the President serves a fixed four-year term,[192] the political check on the executive branch is weaker. The British courts therefore have slightly less reason than their American counterparts to review immigration decisions intensely, and it is possible that fact has been reflected in such cases. In addition to lacking as great an incentive to review assertively, the existence of broad discretionary language in the British statutory provisions reduces the capacity of a court to conclude confidently that the will of Parliament has been contravened.

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189. See pp. 240-41 above.
190. See note 189 above.
191. See Dalton & Dexter, note 187 above, at 21; de Smith, note 183 above, at 28, 129. Defeat of a major proposal might also force the Government to go to the electorate, although today the pressure to do so does not seem quite as strong as in former times. For a variety of reasons, the Government is in any case usually able to obtain Parliamentary support for its proposals: de Smith, note 183 above, at 29. But see pp. 86-87 above (rejections of Immigration Rules).
192. U.S. Const. art. II, s. 1, cl. 1. But cf. art. II, s. 4 (impeachment).

Very few of the differences between British and American courts in immigration cases can be traced to legal doctrine governing judicial review. However two doctrinal differences should be noted briefly. One is that between the no-evidence test for reviewing non-jurisdictional findings of fact in the U.K., and the substantial evidence test for reviewing fact-finding in the U.S. The effect of that difference has already been noted.[193]

The second difference concerns review of errors of law. In the U.K., the general rule is that an administrative error of law can be reviewed only if it goes to jurisdiction or appears on the face of the record.[194] For reasons given earlier,[195] however, that limitation no longer presents a significant obstacle to review of immigration decisions. Still, it has been argued that relegating a class of decisions to review when other important decisions are subject to appeal might cause the reviewing court to be less assertive in finding errors of law.[196]

Differences in the Immigration Statutes

Some of the differences in both the substantive and the procedural provisions of the immigration laws of the U.K. and the U.S. have themselves resulted from differences in the forms of government of the two nations. Thus the many distinctions drawn by the U.K. statute between aliens and Commonwealth

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193. See pp. 236-37 above.
194. See p. 16 above.
195. Ibid.
196. de Smith, note 23 above, at 138.

citizens lack an analogue in U.S. law. Similarly, that the discretion possessed by the Home Office greatly exceeds the powers delegated to the I.N.S. can be traced to structural differences in the overall relationship between the legislative and executive branches. Other differences not necessarily resulting from such fundamentals can be detected.

Within the Home Office, the immigration officers have been granted limited, but still very broad, discretion to exclude immigrants.[197] In the U.S., however, an immigration officer may exclude only those aliens who fall within the specific categories enumerated by the statute.[198] As a result, it is more difficult for a British court to set aside an exclusion order than it is for an American court.

With respect to deportation, the American statute lists 19 fairly specific grounds.[199] In the U.K. there exist only three specific grounds, supplemented by the 'public good' clause.[200] Once again, the American courts have a more solid footing on which to determine that the I.N.S. has erred.

Another difference concerns the rank of the decisionmaker. Whereas British law entrusts deportation decisions to the Home Secretary,[201] American law delegates that power to much lower ranking officials called 'district directors'.[202] It is possible that the personal responsibility of a high official

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197. See generally H.C. 169 (1983), s. I.
198. Gegiow v. Uhl, 239 U.S. 3 (1915).
199. 8 U.S.C. s. 1251(a).
200. Immigration Act 1971, ss. 3(5), 3(6).
201. Ibid., s. 5(1). But cf. ibid., s. 6 (judicial recommendations).
202. 8 C.F.R. s. 242.1(a).

accountable to Parliament has affected isolated British cases, but for reasons considered below,[203] it seems doubtful the effect is very widespread.

Finally, the British I.A.T. is a statutory body not subject to dissolution by the Home Secretary.[204] In the U.S., the B.I.A. is an administrative creation that the Attorney General is free to dissolve.[205] The highest American administrative tribunal to have ruled on the case is therefore more likely to have been subject to political pressures, as discussed below.[206] That aspect might further help to explain the enhanced level of judicial review asserted by the American courts in comparison with those of the U.K.

C. Specific Factors Influencing the Scope of Judicial Review Within the Sphere of Immigration Law

Section A of this chapter compared judicial review of immigration decisions with judicial review of other public law decisions. Section B compared British judicial review of immigration decisions with American judicial review of immigration decisions. This section will examine factors potentially causing variations within the field of immigration law.

For purposes of this thesis, the term 'immigration law' was defined in its strictest sense to exclude certain bodies of law that do in fact have special effects on immigrants. Thus, no

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203. See p. 425 below.
204. Immigration Act 1971, ss. 12-21.
205. 8 C.F.R. ss. 3.1(b)(1,2) (1978).
206. See pp. 449-51 below.

attempt has been made to cover the law governing acquisition or loss of nationality; criminal prosecutions for immigration-related offences; or general rights and obligations of immigrants outside the context of admission and expulsion.[207] Nonetheless, before distinctions within the field occupied by the strict definition of immigration law are examined, a few comparative comments about the omitted areas will be ventured.

In general, the courts have been more reluctant to interfere with exclusion or expulsion than to set aside decisions on acquisition or loss of nationality. Some examples were offered earlier.[208] Even within the group of American exclusion and deportation cases, the Supreme Court has imposed greater procedural constraints when the defence has been a claim of citizenship.[209] The present statute reinforces that principle by requiring a de novo judicial trial when an individual raises a non-frivolous citizenship claim in either exclusion or deportation proceedings.[210]

The Privy Council's decisions in Shareef and Ryan,[211] conferring procedural protection on applicants for citizenship, can be juxtaposed with the deferential holdings in almost all the other natural justice cases concerning immigration. And in

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207. See p. 4 above.
208. See pp. 346-47 above.
209. See the discussions of Kwock Jan Fat and Ng Fung Ho, pp. 213-214 above.
210. 8 U.S.C. s. 1105a(a)(5).
211. See pp. 57-58 above.

Phansopkar,[212] Lord Denning M.R. actually required the Home Office to maintain separate queues for intending immigrants asserting patriality and those seeking mere leave to enter, in order to avoid subjecting patrials to undue delay.

Another factor influencing the scope of review has been the existence of a punitive element, particularly when the sanction has been expressly denominated as criminal. That tendency comports with the normal practice of requiring greater procedural safeguards in criminal prosecutions.[213]

In the U.K., the court's holding in Bhagwan, interpreting a criminal provision not to apply to the alleged illegal entrant who had challenged it, might be an example of the greater scrutiny applied to imposition of a criminal sanction.[214] In the U.S., the difference in scrutiny between civil and criminal penalties has already been described.[215]

In the American constitutional cases, a further distinction can be drawn. The Supreme Court has generally shown less hesitation to scrutinise federal regulation of aliens in matters outside the ambit of immigration than it has when reviewing immigration legislation. The rationality requirements imposed in the former cases[216] have not been

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212. See pp. 119-21 above.
213. See p. 343 above.
214. See pp. 114-15 above.
215. See p. 343 above.
216. See p. 345 above.

applied to the latter, which have been controlled by the plenary power doctrine.

The remaining factors considered here operate within the sphere of immigration law, as that term has been defined here. Many of those factors commonly appear in conjunction with each other, rather than in isolation. In some such cases, these factors may operate in opposing direction, thus obscuring the observations of clear judicial patterns.

The specific factors detailed below will be seen to fit within four broad categories: the importance of the individual interests at stake, the importance of the governmental interests, the nature of the decision itself, and the identity of the official or the agency whose decision is being challenged. Although many of the factors fit more than one of those descriptions, that grouping will be a convenient way in which to think of the various influences at work.

Factors Relating to the Importance of the Individual Interest

It has been argued in this thesis that courts have generally been extremely restrained in reviewing most types of immigration decisions. Nevertheless, both the depth of that restraint and the likelihood of departure from it have varied with the courts' perceptions of the importance of the individual interests involved. That tendency can be analogised to other areas of law.[217]

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217. See, e.g., Tribe, note 37 above, at 1002-11 (fundamental interest intensifies equal protection review).

(1) One factor affecting individual interest is the application/forfeiture distinction discussed earlier.[218] In many respects, a deportation order is scrutinised more carefully than an exclusion order. In the U.K., that philosophy is reflected in the statutory appeal system. An exclusion order based on 'public good' grounds is non-appealable; a deportation order based on 'public good' grounds is appealable except when premised on national security, foreign affairs, or political considerations.[219] Similarly, the Court of Appeal in Schmidt held that an alien applying for an extension of leave cannot invoke the natural justice requirements. At the same time it was said obiter that an alien being deported before expiration of the original leave had a 'legitimate expectation' of which the alien could not be unfairly deprived.[220]

In the United States the statute enumerates narrower substantive grounds for deportation than for exclusion.[221] The Supreme Court has held that doubts in deportation statutes must be resolved in favour of the alien,[222] and that the government must prove deportability by clear, unequivocal, and convincing evidence.[223] No such rules have been articulated with respect to exclusionary provisions.[224] Contrasts

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218. See pp. 40-43, 69-70 above.
219. Compare Immigration Act 1971, ss. 13(5), 15(3).
220. See p. 62 above.
221. Compare 8 U.S.C. ss. 1182(a)(exclusion), 1251(a)(deportation).
222. See pp. 244-45 above.
223. See pp. 237-38 above.
224. By analogy, the Supreme Court has reviewed loss of citizenship more vigourously than denials of applications for citizenship. E.g., when construing statutes removing

between exclusion and deportation have also influenced the Supreme Court in many of its constitutional decisions.[225]

(2) A second factor still occasionally influencing judicial review of immigration decisions is the distinction between a 'right' and a 'privilege'.[226] The older British cases resting on the absence of a common law 'right' either to enter or remain in the country[227] have not been overruled. Several recent cases seem affirmatively to have bolstered that distinction,[228] although in one case Templeman L.J. rejected suggestions by the Divisional Court that one asserting a privilege has no right to be heard.[229] In contrast, where

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224. (continued) citizenship, doubts must be resolved in favour of the claimant: Schneiderman v. United States, 320 U.S. 118 (1943). The Court has also required the 'clear, unequivocal, and convincing' evidence test in denaturalization (though not expatriation) cases (see p. 139 n. 92 above), and has imposed on the government the burden of proving voluntariness in expatriation cases (Nishikawa v. Dulles, 356 U.S. 129 (1958)). None of those rules has been recognised in cases concerning the acquisition of citizenship. The constitutional cases concerned with acquisition and loss of citizenship reveal a similar pattern: see pp. 346-47 above.

225. See especially Landon v. Plasencia, 103 S.Ct. 321, at 329 (1982). Commentators who have acknowledged the relevance of this distinction to procedural issues have nonetheless urged that the distinction not be treated as conclusive: e.g., T.A. Aleinikoff, Aliens, Due Process and 'Community Ties': A Response to Martin (1983) 44 U. Pitt. L. Rev. 237, at 238-39; H.M. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic (1953) 66 Harv. L. Rev. 1362, at 1392-93; cf. Developments in the Law, Immigration Policy and the Rights of Aliens (1983) 96 Harv. L. Rev. 1286, at 1308-09.

226. See generally Evans, note 118 above, at 329, 415, 421.

227. See pp. 136-47 above.

228. See the discussions of Amin, Zamir, Azam, and Schmidt.

229. See the discussion of Santillo, p. 66 above.

the courts have perceived the alleged infringement of what they have regarded as "rights," as in Phansopkar, Shareef, and Ryan, they have responded assertively to protect the holder of those rights. And the European Court has aggressively expanded what it views as the fundamental 'right' of free movement.

The American courts, like the British courts, have been especially restrained in those immigration cases where attention has focused on the absence of a right. This consideration appears to have contributed to the doctrine that visa denials are unreviewable.[230] In Knauff, the Court denied constitutional review to an excluded alien who had had no 'right' to enter.[231] The right/privilege distinction was revived recently in Landon v. Plasencia.[232]

(3) The status of the particular person might also affect the way in which a court regards the individual interest, and therefore the standard of review. One aspect of this factor is the distinction between migration rights and citizenship rights, discussed above. The preference shown to citizens vis-a-vis aliens, as well as that accorded British patrials (now people with right of abode in the U.K.) vis-a-vis non-patrials, might be viewed in either of two ways. One possibility is that the courts have placed a higher value on the interest one has in asserting citizenship. Another is that the courts have regarded the citizen as a person whose legal status commands a greater entitlement to judicial protection.

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230. See pp. 229-30 above.
231. See pp. 310-13 above.
232. 103 S.Ct. 321, at 329 (1982).

The U.K. Court of Appeal in Schmidt further distinguished between aliens and non-patrial Commonwealth citizens.[233] Applying the right/privilege distinction, and persuaded by the fact that only Commonwealth citizens enjoyed a statutory right to enter the U.K. upon proving that the specified requirements were met, Lord Denning M.R. held that the Home Secretary had no duty to act fairly when deciding whether to admit aliens. In contrast, the desire to avoid derogating from the common law right of all Commonwealth citizens to enter Britain contributed to the liberal interpretation adopted in Bhagwan.[234] Application of the act of state doctrine might also turn on the alien/Commonwealth citizen distinction.[235]

Another status distinction has been that between legal and illegal entrants. In the U.K., the statute itself provides lesser procedural safeguards for alleged illegal entrants than for immigrants whose original admissions were lawful,[236] although the difference has recently been narrowed.[237] In the U.S., there are differences in constitutional review between state regulation of lawfully admitted aliens and that of illegal entrants,[238] though again the differences have

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233. See pp. 61-65 above.
234. See p. 115 above.
235. See the opinions in A.-G. v. Nissan [1970] A.C. 179 (H.L.) and Johnstone v. Pedlar [1921] 2 A.C. 262 (H.L.).
236. See pp. 26-27 above.
237. See Khawaja v. Sec. of State for the Home Dept. [1983] 1 All E.R. 765 (H.L.).
238. See De Canas v. Bica, 424 U.S. 351 (1976).

recently been reduced.[239]

Within the class of lawfully admitted aliens, U.S. Supreme Court cases have frequently distinguished further. In Mathews v. Diaz,[240] for example, the court held that Congress could constitutionally restrict social benefits to those aliens who had been residents for several years. The Court reasoned that, as an alien's ties to the country grow stronger, he or she becomes more deserving of a share in the nation's resources. The relevance of community ties has been discussed, in different ways, by several writers.[241] Finally, in still other cases the court has distinguished between resident and non-resident aliens.[242]

(4) One commentator has argued that, until the Supreme Court's 1952 decision in Harisiades v. Shaughnessy,[243] the court had limited its recognition of the plenary power doctrine

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239. Plyler v. Doe, 102 S.Ct. 2382 (1982); see also Schuck, note 97 above, at 54-58.
240. 426 U.S. 67 (1976).
241. E.g., Aleinikoff, note 225 above; Schuck, note 97 above. But see D.A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond (1983) 44 U. Pitt. L. Rev. 165 (focusing on the alien's level of commitment to the society).
242. Compare, e.g., Johnson v. Eisentrager, 339 U.S. 763 (1950)(non-resident alien enemies lack standing to sue in federal court) with Ex p. Kawato, 317 U.S. 69 (1942)(resident alien enemy may ordinarily sue in federal court). See also Fong Yue Ting v. United States, 149 U.S. 698, at 734-37 (1893) (Brewer J., dissenting, arguing that in international law domiciled aliens have greater rights than aliens only temporarily present).
243. 342 U.S. 580 (1952).

to exclusion cases and to those deportation cases in which the alleged ground for deportability rested on a defect in the alien's initial entry. That factor is thoroughly examined in the original commentary.[244]

(5) Personal feelings about the worthiness of the particular individual or the class of which the individual is a member have undoubtedly affected the outcome of several cases. In the U.S., the unusually hostile attitude of the B.I.A. in Karl, toward an alien who had taken a motorcycle trip to Mexico, has been noted earlier.[245] In Azam, Lord Denning M.R., reasoning that people alleged to have defied the immigration laws should not be able to invoke other laws on their behalf, and describing the landing of illegal entrants as an 'invasion',[246] held that alleged illegal entrants were therefore unprotected by the rules of natural justice. In a similar vein, Lord Denning M.R. in another case held that an immigration officer need not obey the rules of natural justice when deciding whether a returning resident has met a statutory condition for his admittance. He stated, "Only too often the people who have done wrong seek to invoke 'the rules of natural justice' so as to avoid the consequences."[247] In Zamir, Lord Wilberforce found it 'unavoidable to mention' that the

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244. See the Hesse articles, p. 315 n. 130 above.
245. See pp. 250-51 above.
246. R. v. Gov'r of Pentonville Prison, ex p. Azam [1973] 2 All E.R. 741, at 753 (C.A.), aff'd, [1973] 2 All E.R. 765 (H.L.).
247. R. v. Sec. of State, ex p. Mughal [1973] 3 All E.R. 796, at 803 (C.A.).

immigrant had obtained a forged birth certificate, even though that allegation had been disputed, had never been adjudicated, and in any case bore no legal relevance to the particular issue before the court.[248] Antipathy toward the alien might also have been a factor in R. v. Secchi,[249] where the magistrate was unable to conceal his disapproval of the particular immigrant's lifestyle.

Factors Relating to the Importance of the Governmental Interest

Many of the individual interests listed above can be viewed as the mirror images of the corresponding governmental interests. Thus, the individual's interest in entering a country might conflict with the government's interest in excluding the person. An individual's interest in avoiding criminal sanctions might conflict with the government's interest in imposing punishment. Other factors already examined could be described in a similar fashion. The following two governmental interest factors therefore supplement those corresponding to the individual interest factors considered above.

(6) The presence of special considerations such as national security, particularly in wartime, have obvious effects on a court's willingness to set aside governmental

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248. Zamir v. Sec. of State for the Home Dept. [1980] 2 All E.R. 768, at 771 (H.L.).
249. See p. 206 above.

action. These have been discussed earlier.[250]

(7) Given the general theme that foreign policy considerations in immigration cases warrant restricting the normal scope of judicial review, one might expect deference to be especially great when the presence of foreign policy elements is most probable. One type of statute that might be felt especially likely to involve foreign policy judgments would be that which operates only upon the nationals of one particular foreign country. However the cases discussed in this thesis do not reveal a clear pattern in that direction.

It is true that in the U.S. the early exclusion and deportation cases generally involved statutory provisions directed solely at Chinese aliens, and that those cases exhibited extreme deference to the political branches.[251] Moreover, the American cases concerning Iranian students have revealed great restraint.[252] Yet, as discussed in the section on constitutional law, the many Supreme Court decisions applying the plenary power doctrine in subsequent years dealt almost always with statutory provisions applicable worldwide, and no significant softening was apparent.

Factors Relating to the Nature of the Decision Itself

(8) The general categorisation of a decision as factual, legal, or discretionary undoubtedly has had tremendous impact

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250. See pp. 381-82 above. See also Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982).
251. E.g., the Supreme Court decisions in the Chinese Exclusion Case, Fong Yue Ting, and Lem Moon Sing.
252. See pp. 326-29 above.

on the scope of review. Despite the many problems potentially arising in classifying borderline cases, the A.P.A. in the United States has certainly prescribed greatest review for interpretations of law, next greatest for findings of fact, and least review for the exercise of discretion.[253] The immigration cases analysed throughout this thesis are consistent with this general administrative law principle.

Even in the U.K., where the classification of a decision as factual, legal, or discretionary is not dispositive of the precise scope of review, it can generally be said that when a question is one that would clearly be considered an interpretation of law, review tends to be the most intensive. In contrast, the immigration cases in which the courts have reviewed strictly discretionary decisions have revealed the least judicial inclination to set aside the administrative action.

(9) When the challenged decision is an interpretation of law, the scope of review may depend on the level of the legal action that is claimed to be erroneous. The courts seem generally to show greater restraint as that level increases. Thus, in the American constitutional cases, the courts have been more assertive in reviewing administrative actions than they have in reviewing the constitutionality of statutory provisions.[254] In particular, as the recent decision in

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253. 5 U.S.C. s. 706.
254. See pp. 332-33 n.196 above.

Mow Sun Wong has shown,[255] the criteria for assessing the sufficiency of a governmental interest asserted to justify discrimination on the basis of alienage are more demanding when the discrimination has been accomplished by administrative action than they are when Congressional or Presidential action is being reviewed.[256] In the British cases, the presumptions of regularity and constitutionality are also consistent with this pattern.[257]

(10) The distinction between substantive and procedural decisions has clearly affected the American constitutional cases in immigration law. Whereas the plenary power doctrine has precluded almost all review of substantive statutory provisions, the same has not been true of procedural provisions, especially in the context of deportation.[258] In the U.K., however, the most restrained of all the cases have been those dealing with natural justice.

(11) Another factor, applicable only to the United States, is the distinction between federal and state action. While federal regulation of aliens has been subjected to the most minimal review, state regulation has ordinarily engendered extremely great scrutiny. Given the constitutional

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255. See pp. 328-29 above.
256. Cf. the narrow role perception of American judges in immigration cases presenting constitutional issues (p. 375 above).
257. See ch. I, s. G above.
258. In ch. III above, compare the substantive decisions in Turner, Harisiades, Galvan, Mandel, and Fiallo with the procedural decisions in Yamataya, Wong Yang Sun, and Chew.

subordination of state action to federal action,[259] this factor might be viewed as another aspect of the observation that review is generally lessened as the level of legal action claimed to be erroneous increases. The state/federal dichotomy has already been examined in the discussion of constitutional immigration claims.[260]

(12) It might be thought, in light of the emphasis that the immigration cases have placed on the importance of preserving the legislative power to make important policy judgments, that the courts would be their most restrained when the potential impact of their decisions in the greatest. Yet, strangely, those cases stand out as being among the few in which real assertiveness has been manifest. The principal U.K. example would be the Court of Appeal's decision in Phansopkar,[261] requiring the government to create separate queues for the issuance of patriality certificates and entry clearances. In the U.S., the Fleuti cases and the cases adopting expansive interpretations of section 212(c) have had tremendous impact in increasing the defences available in both exclusion and deportation proceedings.[262] The injunction decreed in Silva v. Bell affects hundreds of thousands of aliens.[263]

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259. See pp. 276-77 above.
260. See pp. 343-46 above.
261. See pp. 119-21 above.
262. See pp. 246-58 above.
263. 605 F.2d 978 (7th Cir. 1979).

Factors Relating to the Identity of the Decisionmaker

(13) Possibly the rank of the person whose decision is being challenged sometimes affects the intensity of judicial review. That possibility could be viewed as a corollary of the idea that review becomes more deferential as the level of legal action claimed to be erroneous increases. In the U.K., deportation decisions are in theory made personally by the Home Secretary, who is accountable to Parliament. Occasional cases have pointed out that the Home Secretary has given a matter his personal attention.[264] Apart from those infrequent cases, however, review of deportation decisions has not been more restrained than that of other immigration decisions. One possible explanation is that the slightly more assertive role dictated by the prospect of deportation, as distinguished from exclusion,[265] has offset any deference attributable to the high position of the Home Secretary. In addition, the courts might sense that, as discussed earlier, the actual deportation decision is made by lower ranking officials in practice.[266]

(14) It might be thought that a high degree of technicality in a particular provision would militate toward judicial abdication in favour of a body possessing expertise in the special area.[267] The immigration cases do not seem to

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264. See, e.g., R. v. Sec. of State for Home Affairs, ex p. Hosenball [1977] 1 W.L.R. 766, at 777, 778, 783 (C.A.); cf. In re H.K. [1967] 2 Q.B. 617, at 632 (Div. Ct.)(Home Secretary has now agreed to give case personal attention).
265. See pp. 61-64, 69-72 above.
266. See pp. 127-28 above.
267. See p. 463 below.

reflect such a pattern, however. In the U.K., the most deferential posture has been assumed in the natural justice cases, where the principles involved have been ones with which judges might be expected to be the most familiar. In contrast, the least restrained approaches have been in the cases construing complex regulations and statutes with which the administrative officials might be thought to have acquired greater familiarity.

In the U.S. a similar paradox can be observed. The plenary power doctrine operates to reduce judicial intervention in the one area in which the judges' expertise greatly exceeds that of the administrative officials: constitutional interpretation. Yet, in the statutory construction area, where the highly technical immigration provisions make broad judicial review more difficult, the American courts have been their most assertive.

CHAPTER V

THE ROLE OF THE COURTS IN IMMIGRATION CASES: A PRESCRIPTIVE ANALYSIS

In both the United Kingdom and the United States, major individual decisions of administrative bodies are generally subject, in varying degrees, to some form of judicial review. Chapter IV, drawing on previous discussion, sought to show that, with only one notable exception,[1] the courts of both countries have conceived with unusual restraint their role in reviewing immigration cases. This role conception was advanced as one principal explanation for the conservative results of those cases.

In this chapter, the vantage point shifts. Rather than examine the descriptive question of what the courts have perceived their own role to be, this chapter will address the prescriptive question of what the role of the courts ought to be in immigration cases. It will be respectfully submitted that the special judicial deference presently characterising most categories of immigration cases is unwarranted.

Many scholars have considered in depth the general question of what the role of the courts ought to be in a democratic society. Many others have studied the only slightly narrower problem of the judicial role in reviewing administrative action. On those subjects, philosophies diverge. Underlying values affect both analyses and conclusions. The discussion

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1. See ch. II, s. D (American statutory interpretation cases).

below draws heavily from those sources, but it does not ask the reader to accept the values implicit in any one of the particular competing philosophies on judicial review of administrative action. Nor does it attempt to prescribe still another generalised view of the role of the courts in a democracy or even a generalised view of the courts' role in reviewing administrative action. Rather, the goal here will be to establish that, whatever one's personal philosophy on these general questions, the case for judicial review is not weakened by the fact that the subject matter involves immigration. Even one who favours relatively restrained review of administrative action can conclude that there is no reason to single out immigration cases for special deference.[2]

The analysis here will proceed in five steps: Section A will survey the major general arguments commonly advanced either to support or to oppose judicial review of administrative action. The remaining sections will assess the extent to which special features of immigration cases require qualification of those arguments. Section B considers the relationship between the courts and the administrative tribunals, with principal emphasis on those tribunals that decide immigration cases. Section C, recognising that the purposes of constitutional and non-constitutional review do not coincide, will examine some additional considerations specific

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2. In fact, the selective deference displayed in immigration cases, resting as it does on judicially preferred values and policies (see Chapter IV), is arguably a classic example of judicial activism.

to the American constitutional cases. In section D, one special theme frequently surfacing in immigration cases -- the American political doctrine and its British analogues -- is examined as a possible justification for judicial deference. Section E will identify and evaluate other special themes emerging from the reported immigration cases.

A. General Arguments For and Against Judicial Review of Administrative Action

Serious modern debate over judicial review centres not on whether there should be judicial review of administrative action at all, but on how much there should be. Should a particular administrative decision be subject to judicial review? If so, how much deference ought to be accorded to the challenged decision? To address those problems, it is necessary to examine the purposes and the costs of judicial review of administrative action.

Several preliminary observations are necessary. First, not all the arguments summarised below are unique to judicial review or to public law. Some relate to judicial decisionmaking generally, although the present concern is solely with their application to public law. Second, even within the area of public law, the considerations change when review is for constitutionality, as discussed in section C below. Finally, both the validity and the weight of some of these competing arguments will vary according to the scope of review being contemplated. Thus an argument against judicial substitution of judgment does not necessarily counsel against

all judicial review; a particular objection might be met simply by narrowing the scope of review.

Judicial Review and Democracy

Judges enjoy a high degree of independence. In the United Kingdom, it is theoretically possible to remove a judge for incapacity or misbehaviour, or on address of both houses of Parliament,[3] but no judge has been removed in this century.[4] Nor are there any indications that governmental officials have attempted to influence the outcomes of pending cases.[5] Similarly, in the United States, federal judges are appointed for life to serve 'during good behaviour', and their salaries cannot be reduced once they are in office.[6] This relative[7] freedom from political interference is often hailed as vital to the protection of minority rights.[8]

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3. Administration of Justice Act 1973, s. 12; Supreme Court of Judicature (Consolidation) Act 1925, s. 12; Appellate Jurisdiction Act 1876, s. 6.
4. P.J. Dalton & R.S. Dexter, Constitutional Law (1976), at 32; M. Shapiro, Courts (1981), at 111.
5. Ibid. Shapiro argues that English judges are not truly independent because they are subordinate to Parliament and therefore to the executive branch when it acts intra vires (ibid., at 65-125). He concedes, however, that English judges have a high degree of 'freedom from day-to-day interference by the government in particular cases' (ibid., at 124).
6. U.S. Const. art. III, s. 1.
7. As discussed below, the degree of political insulation should not be exaggerated.
8. See, e.g., two recent articles by Lord Hailsham of St. Marylebone, The Lord Chancellor and Judicial Independence (1980) 11 Cambrian L. Rev. 40; Democracy and Judicial Independence (1979) 28 U. of New Brunswick L.J. 7; cf. L.L. Jaffe, English and American Judges as Lawmakers (1969), at 32-33 (judicial role in protecting minority rights).

The advantage of judicial independence seems clearest when the court's role is conceived to be the resolution, according to fixed legal principles, of the particular dispute before it. Viewed in that light, a decision by a body free of political influence might be seen as consistent with the rule of law. But in the process of deciding the case, the court pronounces principles of general applicability. In doing so, it makes law.[9] As demonstrated earlier, it is unrealistic to think that such judicial lawmaking can be accomplished without reference to values and policy choices. Thus, the judicial independence that is seen as an asset when emphasis is placed on the court's arbitral role is thought by many to be a liability when emphasis shifts to the court's lawmaking role. Since independence can be visualized as the converse of accountability, and since lack of accountability is merely one of the features arguably making judicial review undemocratic, it will be convenient to examine here the argument that judicial review runs counter to the aims of democratic society.[10]

One respect in which judicial lawmaking is sometimes said to be undemocratic is that judges[11] are not popularly

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9. See pp. 368-70 above. But see R. Dworkin, Taking Rights Seriously (1977).
10. See generally A.M. Bickel, The Least Dangerous Branch (1962); R.A. Dahl, A Preface to Democratic Theory (1956); H.E. Dean, Judicial Review and Democracy (2d ed., 1967); G. Sartori, Democratic Theory (1965); H. Wechsler, Principles, Politics, and Fundamental Law (1961).
11. Reference here is limited, in the case of the United States, to federal judges.

elected.[12] In the United Kingdom, the members of the Court of Appeal and the Appellate Committee of the House of Lords are appointed by the Queen upon the advice of the Prime Minister.[13] Other judges are appointed by the Lord Chancellor.[14] In the United States, all federal judges are appointed by the President.[15]

The relevance of the judicial appointment process is diminished, however, by other considerations. First, the administrative bodies whose decisions are subject to judicial review are also appointed by the executive branch (although admittedly that argument does not apply to constitutional review of Congressional decisions by American federal judges). Moreover, in the United States, the appointment of federal judges reflects political and ideological preferences.[16] For those reasons, there is very little about the selection process that makes judicial review of administrative action undemocratic.

A second respect in which judicial review is said to be undemocratic turns on accountability -- a term used here to mean the measure of control possessed by the majority once the decisionmaker has been installed in office. That control can

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12. See, e.g., J.H. Choper, Judicial Review and the National Political Process (1980), at 5; L.H. Tribe, American Constitutional Law (1978), at 48 (referring to constitutional review).
13. Dalton & Dexter, note 4 above, at 175-76.
14. Ibid., at 176.
15. U.S. Const. art. II, s. 2., cl. 2 (Supreme Court); 28 U.S.C. ss. 44 (courts of appeals), 133-34 (district courts).
16. See pp. 357-58 above.

entail both the capacity to supervise the making of specific decisions and, in more extreme cases, the power to relieve the decisionmaker of his or her position. As noted earlier, these two components of accountability make it the converse of independence.

Unlike judges, administrative officials are ordinarily subordinate to other personnel within their particular agencies or departments. The Cabinet officers who head the central government departments in turn are ultimately accountable to popularly elected authorities -- the U.K. Parliament and the U.S. President. And the latter two authorities can, of course, be voted out at the next election. This analysis must be modified when the administrative body whose decision is being reviewed is an independent tribunal, a problem considered in the next section.

Apart from powers to remove administrative officials who make politically unacceptable decisions, there are ways in which the decisions themselves can be superseded. An administrative decision might be overturned by supervisors within the department or by legislation. With one qualification, however, the same is true of decisions by judges. A judicial interpretation of either an administrative regulation or a statute can be nullified by amendment of the regulation or statute. The one major qualification is that, in the United States, a Supreme Court decision holding a statute or regulation unconstitutional can be superseded only by constitutional amendment, a process itself requiring more than

majority support.[17]

In addition to the selection and accountability of the judges themselves, the content of particular decisions might be criticised as anti-democratic. This argument is strongest when applied to American constitutional adjudication (discussed separately below), since a court decision holding a statute unconstitutional invalidates a policy judgment of the people's representatives.[18] Even outside the context of the American constitutional cases, the fact that the court is operating in a democracy can be relevant to whether the court ought to reach a particular conclusion. On this point the question is whether courts, when making law, should feel free to forge ahead of the current consensus.

Lord Devlin favours 'activist' lawmaking, which he defines as lawmaking that keeps pace with changes in the consensus, but opposes, at least for British judges, 'dynamic' lawmaking, which he defines as that which moves ahead of the consensus.[19] He cautions against squandering what he views as a national treasure -- the reputation of British judges for impartiality and independence.[20] Lord Devlin also contends that the major objection to judicial creativity -- that judges are not democratically elected -- is inapplicable to mere activism, the implication being that it does apply to judicial

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17. See Choper, note 12 above, at 6.
18. Ibid.
19. Lord Devlin, Judges and Lawmakers (1976) 39 Mod. L. Rev. 1, at 2-4. But see chap. IV n.75 above.
20. Ibid., at 8.

dynamism.[21] Others, though subscribing to broader views of the judicial role, have also conceded that courts are institutionally incapable of leading when no one is willing to follow their policies.[22]

The opposite viewpoint is that controversial cases are the very ones in which judicial creativity is needed the most.[23] The argument is that the courts should play a leadership role in helping to shape public opinion.[24] Further, as observed by Griffith, the line between consensus and non-consensus opinion is elusive.[25] Finally, as Lord Devlin concedes, the case for judicial dynamism is stronger in the U.S., where a federalist system of government and a Constitution binding on Congress render judicial restraint less practical in many cases.[26]

Two final observations should be made here. First, even judicial review that results in policy at odds with the executive branch is not necessarily anti-majoritarian. Many have attacked the notion of a strict dichotomy between a democratic political process and an undemocratic judicial process. The attacks have been launched at both prongs of that

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21. Ibid., at 9.
22. See, e.g., Jaffe, note 8 above, at 45 (court's position must be 'more or less widely accepted'); Tribe, note 12 above, at 51. Cf. Hon. B.N. Cardozo, The Nature of the Judicial Process (1921), at 106-11 (when making law, judges should subjugate their own idiosyncrasies to the prevailing notions of the community).
23. E.g., J.A.G. Griffith, The Politics of the Judiciary (1977), at 191-92; see also Jaffe, note 8 above, at 33.
24. Ibid., at 33, 48.
25. Griffith, note 23 above, at 191-92.
26. Lord Devlin, note 19 above, at 6.

dichotomy: the legislative and executive branches are not as influenced by public opinion, and the courts are more greatly influenced by public opinion, than is generally assumed.[27]

Second, to be anti-majoritarian is not necessarily to be anti-democratic. Although some do equate majoritarianism with democracy,[28] most modern theorists believe that restraints on the majority do not per se make a government undemocratic.[29] The latter theorists differ over which restraints are essential, though almost all include preservation of voting rights and freedom of expression.[30] Others would regard additional freedoms as essential elements of a democracy.[31] In the United States, the very existence of a constitution resistant to change by a simple majority dispels any notion that pure majoritarianism is universally equated with democracy.

Other Arguments For and Against Judicial Review of Administrative Action

A number of other considerations are sometimes invoked to

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27. See, e.g., Choper, note 12 above, ch. 1; Griffith, note 23 above, at 189-92 (judges part of political machinery); M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (1966), at 31-33; Tribe, note 12 above, at 51. See also pp. 377-94 above.
28. See Choper, note 12 above, at 6, citing Jefferson's writings.
29. See, e.g., Dahl, note 10 above, at 35; Dworkin, note 9 above, at 140-47; Jaffe, note 8 above, at 32-33. See also the authors cited in notes 30-31 below.
30. Choper, note 12 above, at 4-5; H.B. Mayo, An Introduction to Democratic Theory (1960), at 70; C. McCleskey, Judicial Review in a Democracy: A Dissenting Opinion (1966) 3 Houston L. Rev. 354, at 356-57.
31. C.L. Black, The Occasions of Justice (1963), at 74-77; E.V. Rostow, The Supreme Court and the People's Will (1958) 33 Notre Dame Lawyer 573, at 577; cf. W.R. Bishin, Judicial Review in Democratic Theory (1977) 50 So. Cal. L. Rev. 1099, at 1129-37.

strengthen or weaken the case for judicial review. Some such factors concern the institutional fitness of the court to make the decisions judicial review entails. Others concern collateral benefits and detriments of judicial review.

Among the factors affecting judicial fitness to perform the review function is access to information. In one sense, a court has more information than a legislature. A legislature must legislate in general terms;[32] it cannot foresee every contingency potentially affected by a proposed statute. By the time a question of statutory interpretation is presented to a court, the specific facts giving rise to the dispute are known.[33] Those facts might reveal an injustice not contemplated by the legislators. Analogous arguments can be made with respect to the interpretation of administrative regulations and, in the United States, the Constitution.

One counterargument is that the administrative body by whose decision the individual was aggrieved also had the benefit of the factual information specific to the case. Thus, the court will not necessarily be better factually informed than the administrative body. Additionally, there is much information, frequently empirical, that legislatures have and that courts lack.[34]

It is sometimes urged that undue emphasis on a court's lawmaking role tends to produce extreme results. Activism by

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32. See, e.g., B. Abel-Smith & R. Stevens, In Search of Justice (1968), at 90.
33. See, e.g., Bickel, note 10 above, at 26.
34. Lord Devlin, note 19 above, at 11-12.

British judges has often been associated with political conservatism, and activism by American judges has resulted in both extreme liberal and extreme conservative decisions, depending on the particular era.[35] Others might characterise conservative results as stable rather than extreme,[36] or might argue that in any case there is no reason to think administrative decisions are any less extreme.

Other properties have been cited as impairing judicial lawmaking. Courts act only piecemeal.[37] They are not always capable, either legally or functionally, of devising the most effective remedies.[38] And court decisions are typically retroactive,[39] although that difficulty can be alleviated by issuing obiter warnings[40] or, at least in the United States, by making decisions prospective only.[41] Other attributes of courts will be taken up in the next section.

The arguments summarised above have generally rested on factors pertaining to the legitimacy of the courts' assertions of lawmaking powers and the quality of the resulting decisions. Numerous collateral consequences also flow from judicial review.

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35. See generally Jaffe, note 8 above, especially at 85-86, 91-92, 101.
36. E.g., Lord Evershed, The Judicial Process in Twentieth Century England (1961) 61 Colum. L. Rev. 761, at 773-74.
37. See, e.g., Jaffe, note 8 above, at 49.
38. Ibid., at 50-54.
39. Lord Devlin, note 19 above, at 10; Jaffe, note 8 above, at 54.
40. Lord Devlin, note 19 above, at 10.
41. Ibid., at 11 (criticising that technique as too 'legislative'); Jaffe, note 8 above, at 54-55.

It has been argued, for example, that the mere prospect of judicial review encourages rational decisionmaking in the first instance.[42] Under that view, judicial review is valuable not because the judicial decision is likely to be better than the original one in the relatively few cases that get to court, but because the availability of judicial review is likely to make the original decision better than it would otherwise be in the many cases that do not get to court. One counterargument is that judicial review can destroy the morale of the original decisionmaking body and prevent it from developing the necessary competence, creativity, and authority,[43] although one writer maintains that this problem can be avoided or at least diminished by eschewing extremes in the scope of review.[44] A second counterargument is that judicial review simply substitutes an analogous problem, since a court that has the last word is immune from similar rationalising constraints. One who argues that judicial review promotes legislative and administrative rationality thus needs to rely on alternative guarantees of judicial rationality -- e.g., legal training and other 'steadying' factors.[45]

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42. See, e.g., Report of the Committee on Administrative Tribunals and Enquiries, Cmnd. 218 (1957) (Franks Comm. Rpt.), para. 104; Cardozo, note 22 above, at 92-94 (referring specifically to American constitutional review); cf. L.L. Jaffe, Judicial Control of Administrative Action (abridged ed., 1965), at 325 (availability of review is 'constant reminder to the administrator').
43. C.I. Barnard, The Functions of the Executive (1938), at 194.
44. Jaffe, note 42 above, at 324.
45. See generally K. Llewellyn, The Common Law Tradition--Deciding Appeals (1960), at 19-61. See also p. 349 above.

A related argument for judicial review is that it legitimates the original decision. Jaffe argues that the existence of judicial review is 'the necessary premise of legal validity'.[46] To the extent that this argument relies on public opinion, it shades over into an additional, distinct argument -- that judicial review enhances the appearance of justice, thereby bolstering public confidence in the legal system.[47] Others, emphasising the finite limits on the court's ability to command public confidence, have urged courts not to expend their political capital by assuming too great a policymaking role.[48]

Practical time constraints have also been invoked in favour of both judicial review in general and judicial lawmaking in particular. Legislatures, it is argued, simply lack the time to pass all needed statutes -- especially in the United States, where the federal jurisdiction and fifty individual state jurisdictions with heterogeneous needs place great demands on limited legislative resources.[49] Even when a legislature is willing and able to act, the process is slow, particularly when only a minority are affected.[50] When a new and unforeseen situation arises, it might be inefficient to postpone the necessary lawmaking.[51]

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46. Jaffe, note 42 above, at 321. Accord, C.L. Black, The People and the Court (1960), at 34 and passim.
47. E.g., Jaffe, note 42 above, at 325 ('constant source of assurance and security to the citizen').
48. See, e.g., Baker v. Carr, 369 U.S. 186 (1962), at 267 (Frankfurter J., dissenting); Choper, note 12 above, at 2; Lord Devlin, note 19 above, at 8 (but see chap. IV n.75 above).
49. Jaffe, note 8 above, at 69.
50. Abel-Smith & Stevens, note 32 above, at 170.
51. Jaffe, note 8 above, at 21.

Other costs of judicial review are assessed below by way of comparison with certain features of administrative tribunals. These costs include financial expense to the litigants and to the public; delay; formal rigidity; and publicity, sometimes unwelcome.

The next question is whether the fact that the subject matter is immigration alters either the validity or weight of any of the various competing arguments summarised above. One possibility is that immigration decisions (like many other administrative decisions) call for special judicial deference because they are typically subject to review by administrative tribunals in both the U.K. and the U.S. It is therefore necessary to explore the relationship between those tribunals and the ordinary courts, and the effect that that relationship should have on judicial review. That will be done in the next section. The three remaining sections will analyse whether other special problems associated with immigration cases should alter the judicial role.

B. Courts and Administrative Tribunals

In both the U.K. and the U.S., specialised administrative tribunals have been created to resolve individual disputes arising under the immigration laws. The very existence of those tribunals raises a natural question: To what extent do they either eliminate the need for, or at least dictate limits on the intensity of, judicial review? More specifically, to what extent do they already fulfill the purposes, discussed in section A, that judicial review is designed to serve?

The first observation is that there are many decisions and many issues that are beyond the jurisdiction of the administrative tribunals. In the U.K., the statute expressly withholds several categories of cases from the adjudicators and the I.A.T.[52] In the U.S., there is no formal administrative review of consular decisions denying visa applications.[53]

Further, even when decisions are appealable to the administrative tribunals, the power to pass on certain issues is sometimes lacking. In the U.K. that is true with respect to the already very limited statutory right to appeal against a decision removing an alleged illegal entrant.[54] In the U.S., an alien may not appeal on the ground that the I.N.S. regulations are ultra vires the statute.[55] Nor do the administrative tribunals have power to consider the constitutionality of the statute they administer.[56]

In the above categories of cases, the administrative tribunals do not render judicial review unnecessary. But

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52. See, e.g., Immigration and Nationality Act 1971, ss. 13(5), 14(3), 15(3,4). Additional provisions preclude appeals while the immigrant is present in the U.K.: e.g., ibid., ss. 13(3), 15(5), 16(2). See generally J.M. Evans, Immigration Law (2d ed., 1983), at 331-44; I.A. Macdonald, Immigration Law and Practice (1983), at 271-77. See also Amin v. E.C.O., Bombay [1983] 2 All E.R. 864 (H.L.)(refusal of special voucher not appealable).
53. See pp. 225-35 above.
54. See Immigration Act 1971, s. 16.
55. In re Bilbao-Bastida, 11 I. & N. Dec. 615, at 616, 617 (1966); In re Tzimas, 10 I. & N. Dec. 101, at 102 (1962).
56. See, e.g., Dastmalchi v. INS, 660 F.2d 880, at 886 (3d Cir. 1981); Chadha v. INS, 634 F.2d 408, at 414 (9th Cir. 1980), aff'd on other grounds, 103 S.Ct. 2764 (1983). A long line of B.I.A. decisions is consistent with that view: e.g., In re Cortez, 16 I. & N. Dec. 289, at 291 n.2 (1977); In re Cenatice, 16 I. & N. Dec. 162, at 166 (1977); In re Chery and

suppose a tribunal has already passed on all the issues an immigrant wishes to raise. What are the advantages and disadvantages of further review by a court, and to what extent is the analysis affected by the fact that the subject matter is immigration law? The position taken here will be that the tribunals and the courts have attributes that differ at least in degree; that these two types of adjudicative bodies should be envisioned as having different, complementary, roles in fulfilling the objectives summarised in section A; and that they are more effective when working together than either type of body would be if working alone. The approach will be to isolate the differing characteristics of tribunals and courts and then to examine the extent to which those characteristics make judicial review of tribunal decisions beneficial. Throughout this discussion, emphasis will be placed on the tribunals that decide immigration cases.

Attributes of Tribunals and Courts

Anyone attempting to distinguish the so-called administrative tribunals from the ordinary courts faces a number of definitional hurdles. First, the various administrative tribunals differ dramatically from one another with respect to

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56. (continued) Hasan, 15 I. & N. Dec. 380, at 382 (1975); In re Lennon, 15 I. & N. Dec. 9, at 27 (1974); In re Wong, 13 I. & N. Dec. 820, at 823 n.2 (1971); In re Santana, 13 I. & N. Dec. 362, at 365 (1969); In re L., 4 I. & N. Dec. 556, at 557 (1951). The same principle has been applied to other administrative decisions: see, e.g., Johnson v. Robison, 415 U.S. 361, at 368 (1974); Oesterreich v. Sel. Service System Local Bd. No. 11, 393 U.S. 233, at 242 (1968) (Harlan J., concurring); P.U.C. v. United States, 355 U.S. 534, at 539 (1958).

composition, jurisdiction, and procedure.[57] As a result, they are often described by reference to properties they typically, rather than necessarily, possess.[58] It is particularly common to distinguish, though not sharply, between 'court-substitute' tribunals and the more 'policy-oriented' tribunals.[59]

Second, there is no single set of properties that all bodies customarily referred to as administrative tribunals possess and that no courts possess. Many tribunals, particularly the court-substitute tribunals, closely resemble, and serve functions very similar to, courts.[60] Moreover, courts themselves vary widely.[61] Thus, any differences between courts and tribunals are ones of degree and are not fundamental.[62]

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57. See Franks Comm. Rpt., note 42 above, at 36; P.C. Weiler, The Administrative Tribunal: A View from the Inside (1976) 26 U. Tor. L.J. 193, at 197; cf. S.A. de Smith, Judicial Review of Administrative Action (4th ed., 1980, by J.M. Evans), at 19-21 (giving examples). See generally R.M. Jackson, The Machinery of Justice in England (7th ed., 1977), ch. III.

58. E.g., J.A. Farmer, Tribunals and Government (1974), at 184-89.

59. See especially Abel-Smith & Stevens, note 32 above, at 224-28. That distinction was subsequently adopted by other writers: e.g., Farmer, note 58 above, at 189-92; Weiler, note 57 above, at 210-13.

60. C. Palley, Decision Making in the Area of Public Order by English Courts, The Open University, D203, Block II, Part 3 (1976), at 43. For various reasons, including their later historical evolution, these tribunals have not traditionally been called 'courts': ibid. The Franks Committee Report, note 42 above, s. 40, concluded that the tribunals should be regarded as part of the machinery of adjudication, rather than administration. Cf. N.V. Lowe & H.F. Rawlings, Tribunals and the Laws Protecting the Administration of Justice (1982) Pub. L. 418 (applicability to administrative tribunals of offences that can be committed against courts).

61. Farmer, note 58 above, at 189; Palley, note 60 above, at 44.

62. Abel-Smith & Stevens, note 32 above, at 224; P.P. Craig, Administrative Law (1983), at 170; Farmer, note 58 above, at 198.

Third, the very term 'administrative' tribunal is potentially misleading in several respects. As noted by Wade, the word 'administrative' refers not to the source of the power, the type of decisionmaking, the presence of the government as a party, or even to dependence on an administrative department. Rather, the tribunals are 'administrative' only because 'they are part of an administrative scheme for which [in the U.K.] a minister is responsible to Parliament, and because the reasons for preferring them to courts are administrative reasons'.[63] Perhaps the term 'specialised' tribunal would be more accurate, but that term is probably superfluous because all the administrative tribunals have jurisdiction over specialised subject matter, and probably imprecise as a distinguishing factor because some courts, or at least divisions of courts, are also specialised.[64] From this point on, the bodies customarily described as administrative tribunals -- including in particular the adjudicators and I.A.T. in the United Kingdom and the immigration judges and B.I.A. in the United States -- will be referred to simply as tribunals.

With those introductory qualifications, it is possible to compare the attributes typically possessed by tribunals with those typically possessed by courts. Ordinarily, tribunals are faster, cheaper, and procedurally simpler and less formal than

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63. H.W.R. Wade, Administrative Law (5th ed., 1982), at 781-82.
64. See note 75 below.
65. Abel-Smith & Stevens, note 32 above, at 225; Craig, note 62 above, at 6, 171; de Smith, note 57 above, at 20; Franks Comm. Rpt., note 42 above, ss. 38, 406; Jackson, note 57 above,

courts.[65] The procedural informality typically encompasses greater overall flexibility[66] and, in particular, less rigid evidentiary rules.[67] These qualities are especially beneficial in immigration cases. Appellants might be unfamiliar with the English language; in the U.K. the appellant might be outside the country at the time of the appeal;[68] and in the U.S. the alien is frequently unrepresented by counsel.[69] Further, tribunal proceedings are typically less publicised than court proceedings.[70] Although that feature is potentially disadvantageous,[71] an immigrant might welcome it when intimate personal facts require scrutiny. For all these and other reasons, tribunals are frequently seen as more comfortable and more accessible than courts.[72]

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65. (continued) at 162-63; Sir. R. Micklethwait, The National Insurance Commissioners (1976), at 3, 129-30; D. Pearce, Judicial Review of Tribunal Decisions--The Need for Restraint (1981) 12 Fed. L. Rev. 167, at 168; R.S.W. Pollard, Introduction, in Pollard (ed.), Administrative Tribunals at Work (1950), at xii; W.A. Robson, Justice and Administrative Law Reconsidered (1979) 32 Current Legal Problems 107, at 107; H. Street, Justice in the Welfare State (2d ed., 1975), at 3, 9; Wade, note 63 above, at 777; P.C. Weiler, In the Last Resort (1974), at 131; R.E. Wraith & P.G. Hutchesson, Administrative Tribunals (1973), at 259; but cf. ibid., at 163 (formality differences sometimes distorted by failure to compare like with like--e.g., should consider relative informality of English county courts). See also W.A. Robson, Justice and Administrative Law (2d ed., 1947), at 430-31, 439-43.

66. E.g., Robson (1979 article), note 65 above, at 107; Weiler, note 57 above, at 200-05.

67. Robson (1979 article), note 65 above, at 107.

68. See Macdonald, note 52 above, at 271-77.

69. M.A. Roberts, The Board of Immigration Appeals: A Critical Appraisal (1977) 15 San Diego L. Rev. 29, at 41.

70. See, e.g., Abel-Smith & Stevens, note 32 above, at 225.

71. Robson (1947 book), note 65 above, at 454-58.

72. de Smith, note 57 above, at 20; Franks Comm. Rpt., note 42 above, ss. 38, 406; Wade, note 63 above, at 777, 779; Wraith & Hutchesson, note 65 above, at 259.

The characteristics just discussed are procedural. Among the most important differences between courts and tribunals, however, are those pertaining to composition. One characteristic of tribunal members is specialised expertise. Previous specialised experience, often non-legal, is common.[73] Whether people are appointed with prior experience or they acquire it on the job, this specialised expertise is one of the commonly cited reasons for entrusting particular decisions to tribunals.[74] It is necessary to point out, however, that even this difference between courts and tribunals is merely one of degree since courts too are sometimes specialised.[75] The application of the specialist/generalist distinction, both to the general problem of judicial review of tribunal decisions and to the particular question of judicial review of immigration decisions, is considered in detail below.

Another attribute commonly discussed in comparisons of courts and tribunals is degree of independence from the government. In the U.K., tribunals are generally independent of the

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73. Palley, note 60 above, at 43-44; Abel-Smith & Stevens, note 32 above, at 224-25.
74. Abel-Smith & Stevens, note 32 above, at 224-25; Craig, note 62 above, at 6; de Smith, note 57 above, at 20; S.A. de Smith, Constitutional and Administrative Law (4th ed., by H. Street & R. Brazier, 1981), at 541; Farmer, note 58 above, at 180; Franks Comm. Rpt., note 42 above, ss. 38, 121, 406; Jackson, note 57 above, at 164-65; Pearce, note 65 above, at 168-69; Pollard, note 65 above, at xii; Robson (1979 article), note 65 above, at 107; Robson (1947 book), note 65 above, at 443; Street, note 65 above, at 7; Wade, note 63 above, at 779-80; Weiler, note 57 above, at 198-99; Wraith & Hutchesson, note 65 above, at 252-55.
75. Abel-Smith & Stevens, note 32 above, at 225; cf. Robson (1947 book), note 65 above, at 444 (but stressing limited nature of judicial specialisation).

department whose decisions they are reviewing.[76] A central department might provide staff and equipment for a particular tribunal, as the Home Office does for the I.A.T.,[77] but that fact has not been thought to prevent independent decision-making.[78] Adjudicators are appointed and reappointed by the Home Secretary,[79] but again there is no evidence either that the reappointment power has ever been used as a tool for influencing adjudicators' decisions or that adjudicators so perceive it. I.A.T. members are appointed and reappointed by the Lord Chancellor.[80] Thus, although in theory judges with lifetime tenure enjoy greater independence than tribunal members, there is nothing to indicate that in practice members of the immigration tribunals feel any more executive pressure than do judges. Freedom from political interference and freedom from political attitudes are of course separate questions, however; attitudinal factors potentially influencing court and tribunal members have been discussed above.[81]

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76. See, e.g., Franks Comm. Rpt., note 42 above, ss. 25, 40; Mickle-thwait, note 65 above, at 141-43 (National Insurance Commissioners not influenced by Government); Robson (1947 book), note 65 above, at 461-67 (no evidence tribunals any more subject to political interference than courts); Wraith & Hutchesson, note 65 above, at 164.
77. Wraith & Hutchesson, note 65 above, at 165.
78. Ibid., at 164-65; Wade, note 63 above, at 784-85.
79. Immigration Act 1971, s. 12(a); ibid., sch. V, paras. 1, 2(1). The removal of adjudicators prior to expiration of their terms requires the consent of the Lord Chancellor: Tribunals and Inquiries Act 1971, ss. 5(1)(d,e,f), 5(3).
80. Immigration Act 1971, s. 12(a); ibid., sch. V, paras. 6, 8(1).
81. See pp. 353-66 above. For criticisms of adjudicators' attitudes and of the appointment process, see Macdonald, note 52 above, at 270-71 and the sources cited ibid., at 271 nn. 7,8. See also L. Grant & I. Martin, Immigration Law and Practice (1982), at 355. But see Wraith & Hutchesson, note 65 above at 164 (statistical evidence showing I.A.T. approximately as likely to dismiss Home Secretary's appeal against adverse decision of adjudicator as it is

In the United States the degree of independence varies from one tribunal to another.[82] It is fair to say, however, that in general the American tribunals enjoy less independence than British tribunals.[83] Barriers to independence are particularly evident in the case of the immigration tribunals. Immigration judges, until 1982, were part of the I.N.S.[84] They were dependent for their office budgets on the district directors, who are locally responsible for enforcement and prosecution.[85] Former B.I.A. chairman Maurice Roberts and numerous immigration practitioners have attacked the dependence of immigration judges on the I.N.S.,[86] which is one of the two adversaries appearing before them in each case. Immigration judges also have less job security than other

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81. (continued) to allow it). But quaere whether such cases are a representative cross section of all appeals. See also ibid., at 190-91.
82. K.C. Davis, 1 Administrative Law Treatise (2d ed., 1978), ss. 2.7, 2.8, 2.9. A tribunal's freedom from political influence does not seem to be a function of whether it is technically within a government department: ibid., s. 2.8 at 90.
83. Rpt. of Conference at Ditchley Park, Judicial Control of the Administrative Process (per J.F. Garner & A.R. Galbraith, 1969), at 17-19.
84. See 8 C.F.R. ss. 100.3(d), 100.4(e) (1982).
85. M.A. Roberts, Proposed: A Specialized Statutory Immigration Court (1980) 18 San Diego L. Rev. 1, at 8.
86. See note 85 above. Accord, P.J. Levinson, A Specialized Court for Immigration Hearings and Appeals (1981) 56 Notre Dame Lawyer 644, at 645-57; T.S. Barker, A Critique of the Establishment of a Specialized Immigration Court (1980) 18 San Diego L. Rev. 25, at 25; R.E. Juceam & S. Jacobs, Constitutional and Policy Considerations of an Article I Immigration Court (1980) 18 San Diego L. Rev. 29, at 30-31; L. Wildes, The Need for a Specialized Immigration Court: A Practical Response (1980) 18 San Diego L. Rev. 53, at 53 (Roberts' description accurate), 57 (immigration judges unduly fettered by such dependence). See also P.H. Schuck, The Transformation of Immigration Law (1984) 84 Col. L. Rev. 1, at 30-34, 72-73.

administrative law judges,[87] as one immigration judge discovered in an especially extreme case.[88] In 1983 immigration judges were removed from the I.N.S. and made part of a new Executive Office for Immigration Review.[89] The change is an improvement, but the new agency is still located within the Justice Department and thus still subordinate to the Attorney General, who is the nation's principal prosecuting officer in immigration cases.[90]

The position of the B.I.A. members is at least as problematic. In the words of Justice Jackson:

> [T]his Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision.[91]

Supervision of an adjudicative body by a prosecuting official runs counter to the A.P.A. philosophy governing other administrative proceedings.[92] Further, having no fixed terms, B.I.A. members serve at the Attorney General's pleasure.[93] The latter could curtail the powers of the

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87. Roberts, note 85 above, at 17; Levinson, note 86 above, at 648-49.
88. The incident is described in Shaughnessy v. United States ex rel. Accardi, 349 U.S. 280, at 292 (1955) (Black J., dissenting). See also D.O.J. Press Release, 6 April 1955.
89. See 48 Fed. Reg. 8038-40, 8056-57 (25 Feb. 1983).
90. 8 U.S.C. s. 1103(a). See also Roberts, note 85 above, at 18 (D.O.J. is enforcement agency).
91. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, at 269-70 (1954)(Jackson J., dissenting). See also 8 C.F.R. s. 3.1(h)(A.-G. may reverse B.I.A. decision).
92. Marcello v. Bonds, 349 U.S. 302 (1955).
93. 8 C.F.R. s. 3.1(a)(1).

B.I.A. or even dissolve it entirely if he wished.[94] Finally, the B.I.A. depends on the Attorney General for staffing, office space, and supplies.[95] The B.I.A.'s dependency on the Justice Department[96] has prompted commentators to recommend a variety of organizational reforms.[97]

The immediately preceding discussion focuses on actual independence. A related concern is the appearance of independence. As noted earlier, one argument for judicial review is that the courts foster such an appearance. Can the same argument be made for the immigration tribunals? In the U.S., one prominent practitioner has observed that immigration

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94. Roberts, note 69 above, at 30.
95. Roberts, note 85 above, at 12.
96. Since Accardi (p. 267 above), the courts have made clear that the B.I.A. is legally required to exercise its powers independently: e.g., Carrasco-Favela v. I.N.S., 445 F.2d 865 (9th Cir. 1971); Goon Wing Wah v. I.N.S., 386 F.2d 292 (1st Cir. 1967); De Lucia v. I.N.S., 370 F.2d 305 (7th Cir. 1966); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960); Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1956). Both the B.I.A. (In re Vilanova-Gonzalez, 13 I. & N. Dec. 399 (1969)) and the Attorney General (In re B., 7 I. & N. Dec. 1 (1956)) are in accord. See also T.G. Finucane (former B.I.A. chairperson), Procedure Before the Board of Immigration Appeals (1954) 31 Interpreter Releases 30.

Whether the practice follows the theory, however, is not so clear. For disturbing recent evidence that Justice Department influence on the B.I.A. has not entirely disappeared, see Roberts, note 85 above, at 12-13 & n.48.

97. Some have recommended that the B.I.A. be made a statutory body: e.g., C. Gordon, The Need to Modernize Our Immigration Laws (1975) 13 San Diego L. Rev. 1, at 27; Roberts, note 69 above. Others have recommended further that it be made independent of the Justice Department: e.g., J.J. Orlow, Comments on 'A Specialized Statutory Immigration Court' (1980) 18 San Diego L. Rev. 47, at 50-51; Wildes, note 86 above, at 62. That type of arrangement would parallel the British I.A.T. Roberts (note 85 above) and Levinson (note 86 above) propose a statutory immigration court to replace review by the courts of general jurisdiction in immigration cases.

judges, who cross-examine aliens as witnesses, frequently create the impression of bias.[98] That impression is difficult to dispel when the official connection between the immigration judges and the I.N.S. is so close.[99] In the U.K. the appearance of independence may be greater, but even there the public does not always appreciate that the tribunals are independent of the central departments.[100] That is true in particular of the immigration tribunals.[101]

Collective decisionmaking is another composition-related factor sometimes cited as an advantage of tribunals.[102] Here, however, it is important to compare like with like. British adjudicators and American immigration judges are themselves one-person tribunals, no more collective than High Court or federal district judges, respectively. The I.A.T. and the B.I.A. are indeed collective bodies, but so too are those British and American courts that perform appellate functions. Thus, collectivity should not affect the question of whether to entrust a particular immigration decision to a tribunal or a court. As noted below, however, once it is decided to entrust the decision to a tribunal, collectivity is relevant to judicial review.

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98. Wildes, note 86 above, at 58-59.
99. Roberts, note 85 above, at 16; accord, U.S. Comm'n on Civil Rights, The Tarnished Golden Door (1980), at 111.
100. See Pollard, note 65 above, at xv-xvi; Wade, note 63 above, at 785. See also C. Milton, Appellants' Perceptions of the Tribunal Process, in M. Adler & A. Bradley (eds.), Justice, Discretion, and Poverty (1975), at 129, 134.
101. Farmer, note 58, above, at 5-6.
102. Levinson, note 86 above, at 650; Wraith & Hutchesson, note 65 above, at 258 (mistrust of single judge).

The properties described above relate to procedure and to composition. In deciding whether to entrust a particular decision to a tribunal or a court, and if so which tribunal or which court, the legislature also considers the function it wants the body to perform. In particular, tribunals have been regarded by many as better suited than courts for making decisions with heavy policy components.[103] That view rests partly on the belief that tribunals are better equipped to apply flexible standards and thus to exercise discretion.[104] In particular, some have charged at least the British courts with disregarding modern conceptions of social obligation by interpreting social legislation with undue rigidity in order to preserve property rights; tribunals, in contrast, have been explained as reflecting a preference for the accommodation of newer social ideas and as possessing the capacity to innovate in that direction.[105]

Other cited reasons for regarding tribunals as better suited than courts for policy decisions include their specialised expertise and their opportunity to acquire a long-term view of a narrow area.[106] In addition, tribunals'

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103. See, e.g., Robson (1947 book), note 65 above, at 444-52; Wraith & Hutchesson, note 65 above, at 258.
104. de Smith, note 57 above, at 20; Street, note 65 above, at 7-9; Wraith & Hutchesson, note 65 above, at 258.
105. See de Smith, note 57 above, at 20; Craig, note 62 above, at 6; Robson (1947 book), note 65 above, at 430, 439; Robson (1979 article), note 65 above, at 107; Street, note 65 above, at 5-6; Wade, note 63 above, at 791; Weiler, note 65 above, at 134; Wraith & Hutchesson, note 65 above, at 163.
106. Robson (1947 book), note 65 above, at 447-51.

more flexible procedure is frequently viewed as an aid to policymaking.[107] Stare decisis is often invoked as an example of judicial rigidity.[108]

Yet, the dichotomous model of tribunals suited to make policy and courts suited to make law has its limits. To be sure, tribunals do make policy.[109] But it can no longer be denied that courts also make policy.[110] When tribunals do possess more discretion, the differences again tend to be ones of degree.[111]

Further, tribunals routinely make the kinds of decisions traditionally associated with courts. Tribunals hear concrete disputes, frequently apply known rules to facts, and reach conclusions.[112] They are called upon to interpret statutes and prior decisions.[113] Tribunals are not legally bound by stare decisis,[114] but they are bound by past decisions of higher bodies and in practice tend to follow their own precedents as well.[115]

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107. Ibid., at 452-53.
108. E.g., Jackson, note 57 above, at 163; Street, note 65 above, at 6.
109. Palley, note 60 above, at 43; Wade note 63 above, at 779.
110. Cf. pp. 368-70 above.
111. Abel-Smith & Stevens, note 32 above, at 227-28; Jackson, note 57 above, at 156-60.
112. Abel-Smith & Stevens, note 32 above, at 224; Jackson, note 57 above, at 159; Wade, note 63 above, at 781-82.
113. Abel-Smith & Stevens, note 32 above, at 224.
114. de Smith, note 74 above, at 541-42; Farmer, note 58 above, at 173-78; Pearce, note 65 above, at 169; Robson (1947 book), note 65 above, at 452-54; Wraith & Hutchesson, note 65 above, at 274-75.
115. See Abel-Smith & Stevens, note 32 above, at 224; Craig, note 62 above, at 170-71; Farmer, note 58 above, at 173-78; Wraith & Hutchesson, note 65 above, at 274-75.

The immigration tribunals are particularly court-like in the above respects. In the U.K., the adjudicators and the I.A.T. make legal and factual decisions in addition to discretionary ones.[116] Like courts, the I.A.T. is limited to considering the decision being appealed; it may not consider the effect of intervening events.[117] In the United States, the immigration judge must base his or her findings entirely on the evidence presented.[118] The B.I.A. makes its own legal, factual, and discretionary determinations.[119]

One final, practical, aspect of tribunal function is that the increased complexity of society and government has triggered a rapid proliferation of disputes. If the courts had to resolve all such disputes, the volume of work would be intolerable.[120] The absence of tribunals would require an increase in the size of the Judiciary, with the attendant risk of a dilution in quality.[121] Thus, one component of the

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116. Immigration Act 1971, ss. 19 (1,2), 20(1).
117. See the cases cited on p. 114 above.
118. 8 U.S.C. s. 1226(a). See also Levinson, note 86 above, at 652.
119. Garcia v. Bolden, 691 F.2d 1172 (5th Cir. 1982). Cf. 8 C.F.R. s. 3.1(d)(1). B.I.A. decisions are de novo: United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Noverola-Bolaina v. I.N.S., 395 F.2d 131, at 138 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960); In re Vilanova-Gonzalez, 13 I. & N. Dec. 399 (1969); In re B., 7 I. & N. Dec. 1 (A.-G., 1956). But cf. In re T., 7 I. & N. Dec. 417 (B.I.A., 1957)(B.I.A. may choose to place weight on I.J.'s decision).
120. Craig, note 62 above, at 6; Pollard, note 65 above, at xii; Robson (1947 book), note 65 above, at 431.
121. Abel-Smith & Stevens, note 32 above, at 169; Franks Comm. Rpt., note 42 above, s. 39.

tribunals' role is to dispose of large numbers of cases[122] in which judicial resources are unnecessary.

Judicial Review of Tribunal Decisions

Section A surveyed the general arguments commonly invoked in debates over the propriety and wisdom of judicial review of administrative action. Part 1 of this section explored the extent to which courts and tribunals -- particularly immigration tribunals -- possess different properties. By combining those analyses and a few additional considerations, it is possible to examine the benefits and the costs of judicial review of decisions rendered by the immigration tribunals.

One argument against judicial review of tribunal decisions is that it is unnecessary. As applied to immigration, the argument would be that, once the immigration tribunals in the U.K. have already reviewed action taken by the Home Office, or once those in the U.S. have already reviewed I.N.S. action, many of the benefits commonly associated with judicial review and described in section A will already have been advanced to some extent. For example, one of the commonly cited purposes of review by courts is to encourage more rational decisionmaking in the first instance.[123] This purpose will already have

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122. In 1981, British adjudicators disposed of 18,010 cases; the I.A.T. disposed of 598: see Evans, note 52 above, at 363-64. In the United States, in 1982, immigration judges heard 59,171 cases (4,653 exclusion cases and 54,518 deportation cases): (1982) Ann. Rpt. of I.N.S., at 10. The B.I.A. heard 4034: Telephone Conversation with D.B. Holmes, Chief Attorney Examiner, Executive Office for Immigration Review (23 Jan. 1984).

123. See p. 439 above.

been served by the tribunals. Similarly, review by the tribunals already logically serves the legitimating function of keeping Home Office and I.N.S. officials within their jurisdictional limits.[124] Tribunal review of immigration decisions also advances the goal of subjecting the actions to the scrutiny of an independent body, although as noted above this argument carries less force in the U.S. than it does in the U.K.[125] Again, with some limitations, review by the immigration tribunals is designed to enhance the appearance of justice.[126] Finally, just as judicial lawmaking has been defended as a practical recognition of time constraints on legislatures,[127] the same could be said of the voluminous law resulting from published tribunal decisions.

Reinforcing those arguments are claims that judicial review of tribunal decisions is not merely unnecessary, but capable of working affirmative harm. One such claim is that in many ways judicial review nullifies or at least lessens the benefits that prompted the legislature to establish the tribunals in the first place. Tribunals are popular partly because they are fast, cheap, and informal;[128] judicial review adds delay,

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124. See p. 140 above. See also Evans, note 52 above, at 370.
125. Ibid; Craig, note 62 above, at 6. See also pp. 447-51 above.
126. See especially Home Office, Rpt. of the Comm. on Immigration Appeals, Cmnd. 3387 (1967), para. 84. See also Evans, note 52 above, at 370.
127. See p. 440 above.
128. See pp. 445-46 above.

expense, and formality.[129] Tribunals are created also to reduce the strain on the courts;[130] judicial review hinders that goal.

Apart from matters of efficiency, many believe that judicial review is likely to lessen the quality of the resulting decision. The special expertise possessed by tribunals is often invoked in support of this position and will be taken up below in more detail. It is also sometimes argued that tribunals are more likely than courts to reach decisions reflecting the modern social policies of the legislature.[131] Further, many tribunal decisions, including those of the I.A.T. and the B.I.A., are the products of collective deliberation. That ingredient is absent when such decisions are reviewed by a single British High Court or American federal district judge, although collectivity is restored in cases where such judicial decisions are themselves appealed and, in the U.S., when initial judicial review is undertaken by a court of appeals.[132]

There is, moreover, the problem of uniformity. The various adjudicators and immigration judges might reach divergent decisions. One advantage of providing a second appeal to the I.A.T. or the B.I.A. is that the higher appellate authority can harmonise those inconsistencies by pronouncing uniform

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129. See de Smith, note 57 above, at 128; Jaffe, note 42 above, at 326-27; Pearce, note 65 above, at 169; Weiler, note 57 above, at 208.
130. See pp. 455-56 above.
131. See p. 453 above.
132. See 8 U.S.C. s. 1105a(a)(deportation orders).

principles. By analogous reasoning, it has been argued that a single tribunal is better equipped than courts are to achieve consistency.[133] In the U.S. that feature is aggravated by the existence of twelve general circuits among which conflicts frequently arise.[134]

Many of the above arguments, which point up ways in which judicial review can be unnecessary or even harmful, are quite formidable. What benefits of judicial review, if any, override them?

One general argument for judicial review is that it encourages rationality by the body whose decisions are subject to review. That argument can be applied specifically to judicial review of tribunal decisions. But this advantage could presumably be realised by subjecting tribunal decisions to review by higher tribunals rather than to review by courts. That in fact is what is done with decisions by adjudicators and immigration judges. Eventually, some tribunal or court will have the last word. Who is to assure rational decisionmaking by that body? There is no apparent reason to think that a court is more likely to encourage rationality by a tribunal of last resort than the latter is to encourage rationality by a subordinate body.

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133. Street, note 65 above, at 7.
134. In such situations, the B.I.A. must apply one rule in one geographic region and another in other regions: see, e.g., In re Bowe, 17 I. & N. Dec. 488 (1980); In re Fulgencio, 17 I. & N. Dec. 471, at 474 (1980); In re Cienfuegos, 17 I. & N. Dec. 184, at 186 (1979); In re Amado, 13 I. & N. Dec. 179 (1969); In re Lim, 13 I. & N. Dec. 169 (1969).

Similar observations apply to the argument that judicial review validates tribunal decisions by keeping tribunals within their proper jurisdictional bounds.[135] This argument assumes that the statutory limitations on jurisdiction are what the reviewing court interprets them to be. If the tribunal and the court interpret the statute differently, the question is which construction ought to prevail, a question that the validation argument does not address.[136] Moreover, the argument makes no provision for confining the courts themselves within their proper limits.[137]

Finally, even if it is accepted that some measure of judicial control is desirable, that control need not amount to substitution of judgment. Less intensive standards of review are possible.[138]

At this stage of the analysis, then, a convincing basis for judicial review of tribunal decisions remains to be elucidated. It is submitted that three considerations, one of which is limited to the U.S., warrant judicial review of immigration tribunal decisions.

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135. E.g., Jaffe, note 42 above, at 321 (referring to judicial review of administrative decisions in general); Pearce, note 65 above, at 170; Weiler, note 57 above, at 207; Weiler, note 65 above, at 132.
136. Ibid., at 133.
137. Pearce, note 65 above, at 170, citing as examples Anisminic, Ltd. v. Foreign Comp. Comm'n [1969] A.C. 147 (H.L.) (broad interpretation of jurisdictional error); R. v. Northumberland Comp. Appeal Trib., ex parte Shaw [1952] 1 K.B. 338 (C.A.)(revival of error of law on face of record). See also Weiler, note 57 above, at 208.
138. See, e.g., Craig, note 62 above, at 338-47 (e.g. rational basis test in appropriate cases).

The first two have been discussed already. There is evidence that the immigration tribunals in the United States are more subject to the influence of the executive branch than courts are.[139] If that evidence is found persuasive, then judicial review of B.I.A. decisions in the U.S. is useful as a means of assuring consideration of the case by an independent body. As discussed above, that argument does not apply to the British immigration tribunals. Second, as noted by previous writers, provision for judicial review enhances the appearance of justice, since the public does not always perceive the tribunals--including the immigration tribunals--as being entirely independent of the executive branch.[140]

Perhaps the single most important reason for judicial review of tribunal decisions, however, stems from the specialist/generalist distinction. As noted earlier, tribunal members tend to possess or at least acquire specialised expertise, whereas judges are more likely to be legal generalists.[141] As de Smith pointed out, judges' generalist legal knowledge derives from their experience with a variety of statutes and with general legal principles.[142] This generalism has been extolled by many as an important advantage of judicial review; it enables judges to decide cases within a broader conceptual framework and to integrate fundamental legal

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139. See pp. 449-51 above.
140. See pp. 451-52 above.
141. See p. 453 above. It is recognised that the pre-judicial experience of a particular judge might have been confined to a specialised area.
142. de Smith, note 57 above, at 128.

principles into specialised areas of the law.[143] More specifically, such integration has been argued to be especially useful when the purposes of the statutory scheme over which the tribunal has jurisdiction collide with those of another statutory scheme,[144] or where fundamental procedural principles[145] or even fundamental substantive principles[146] are at issue. Several American immigration practitioners have urged that generalist judicial review of immigration decisions be preserved.[147]

That judges ordinarily possess or at least acquire experience with generalised legal principles is one side of the coin. The other, of course, is that tribunal members possess or soon acquire specialised expertise. Many regard that expertise as a strong reason for judicial deference.[148] In the United States, that principle has been applied to mean that courts should defer to the interpretation placed on a statute by the agency charged with administering it, provided

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143. Ibid.; Jaffe, note 42 above, at 327, 589-92; cf. Micklethwait, note 65 above, at 123 (specialists need infusion of 'fresh air'). See also the writers cited in note 147 below. See especially Weiler, note 65 above, at 134-36 (conceding this advantage of generalist review).
144. Jaffe, note 42 above, at 590.
145. For concessions by critics of assertive judicial review, see Pearce, note 65 above, at 181; Weiler, note 65 above, at 135.
146. Ibid., at 135-36; Jaffe, note 42 above, at 591.
147. E.g., Barker, note 86 above, at 27; Juceam & Jacobs, note 86 above, at 34; Orlow, note 97 above, at 50; Wildes, note 86 above, at 57, 60-62. But see Levinson, note 86 above, at 654 (discounting disadvantages of specialised immigration court).
148. Pearce, note 65 above, at 174; Weiler, note 65 above, at 134; D.R. Woodward & R.M. Levin, In Defense of Deference: Judicial Review of Agency Action (1979) 31 Ad. L. Rev. 329, at 332.

only that the agency's interpretation has a reasonable basis.[149] At least in cases where the statutory phrase is broadly worded, similar deference is often displayed by British courts.[150] Such deference is especially common when statutes are highly technical.[151] Those principles, if accepted, favour deference to the immigration tribunals of the U.K. and the U.S. when they construe provisions of the immigration statutes, both of which are laden with technicality.

Specialised tribunal expertise as an argument for judicial deference requires careful examination. Special expertise, whether resulting from pre-appointment experience or

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149. Volkswagenwerk Aktiengesellschaft v. Fed. Maritime Comm'n, 390 U.S. 261, at 272 (1968); N.L.R.B. v. Hearst Publications, 322 U.S. 111, at 130-31 (1944).

There are numerous statements to the effect that an agency's longstanding interpretation of the statute it administers is entitled to great weight: see, e.g., Int'l Brotherhood of Teamsters v. Daniel, 439 U.S. 551, at 566 n.20 (1979); United States v. N.A.S.D., 422 U.S. 694, at 719 (1975). But whether that principle actually affects results is not clear: see especially the cases cited in Daniel, at 566 n.20.

A related principle is that legislative acquiescence in a longstanding administrative interpretation might properly influence the court's conclusion: see, e.g., Red Lion Broadcasting Co., Inc., v. F.C.C., 395 U.S. 367, at 381 (1969); United States v. Correll, 389 U.S. 299, at 305-06 (1967). Strictly speaking, however, that type of influence does not reflect deference to the tribunal; rather, it recognises that legislative inaction in the face of a longstanding tribunal interpretation is evidence that the legislature is satisfied with that interpretation.

150. E.g., Sec. of State for Employment & Productivity v. C. Maurice & Co. Ltd. [1969] 2 A.C. 346 (H.L.), at 361 (per Lord Wilberforce), 363 (per Lord Pearson); Esso Petroleum Co. Ltd. v. Min. of Labour [1969] 1 Q.B. 98 (C.A.), at 109 (per Lord Denning). In both cases, however, the breadth of the statutory language enabled the courts to treat the questions as ones of fact and degree.

151. Woodward & Levin, note 148 above, at 334-35 (U.S.). See also the cases cited in note 150 above. And see de Smith, note 57 above, at 135-36 & n.38.

from on-the-job training, can be either legal or non-legal.[152] If resolution of a particular dispute requires non-legal expertise possessed by the tribunal whose decision is being questioned, a strong case for judicial deference can be made. If a tribunal with special technical expertise makes decisions turning on judgments about land valuation, or medicine, or engineering, or aviation, to use just a few examples, a court should surely hesitate to interfere.[153] Moreover, it can be conceded for purposes of this discussion that deference is also warranted when courts review tribunal findings of fact, even on matters that are not technical in nature. In such cases, the tribunal will ordinarily be better able to investigate, to observe the demeanour of witnesses when credibility is at issue, and to employ its accumulated skills in ferreting out the facts, especially in familiar areas. The same is true, though to a lesser extent, when the dispute is over a mixed question of law and fact.

But when the issue is purely one of law, and the expertise is valuable only because the particular statutory scheme is legally complex, the case for deference is considerably weaker. Interaction of various statutory provisions with each other and with implementing regulations might indeed create conceptual difficulties, but they are precisely the sorts of difficulties that legal training is designed to help resolve. The question thus becomes how much

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152. See p. 447 above.
153. For examples of explicit deference to tribunals with industrial expertise, see the cases cited in note 150 above.

judicial deference the specialised tribunal expertise dictates then. It is submitted here that, in such cases, courts should distinguish between two types of legal expertise--each one defined both by its source and by its benefit.

One type of expertise stems from the tribunal's frequent contact with the statute.[154] That repetition, together with the tribunal's broader exposure to different related parts of the statutory scheme,[155] might well aid the tribunal in developing a strong conceptual understanding. For example, the tribunal's familiarity with the overall scheme might enable it to spot an anomaly that a particular construction would create when combined with a rule previously adopted to resolve a related issue.[156] In such a case, however, the tribunal can communicate its insight to the reviewing court. It need only embody the observation in a written opinion as a reason for its decision. The court will then be in a position to consider the persuasiveness of the argument.

There is a second type of tribunal expertise. The tribunal's immersion in the overall administrative scheme gives it the opportunity to observe the practical consequences flowing from particular interpretations.[157] It might be argued that this experience enables the tribunal to predict more accurately the practical consequences of an interpretation

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154. See, e.g., de Smith, note 57 above, at 128; Woodward & Levin, note 148 above, at 332.
155. See Weiler, note 57 above, at 198, 208.
156. See, e.g., the section 212(c) issues discussed on pp. 260-61 above.
157. Woodward & Levin, note 148 above, at 332.

urged in a pending case.[158] For example, the tribunal might foresee that a particular construction would create a 'loophole' -- i.e., an opportunity for people to take certain actions that would defeat the legislative purpose. In those situations, the case for judicial deference is stronger.

Even there, however, that case should not be exaggerated. The tribunal will often be able to explain why the particular interpretation would lead to the particular loophole.[159] The court might, for purely doctrinal reasons, dispute either the tribunal's description of the legislative purpose or the causal connection between the interpretation and the opportunity to evade that purpose.

That is not to say that deference should never be accorded on questions of law. If the court agrees that the interpretation could theoretically create the identified difficulty, and the only uncertainty concerns the practical magnitude of the problem, there is reason to defer to the tribunal's experience and judgment. In such a case, it might well be impossible for the tribunal to reduce to writing its intuitive feeling, based on past observations, that the impact will be great.

The common thread in the above arguments is that the court should distinguish between communicable and non-communicable expertise. If the insight that results from the tribunal's

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158. See Weiler, note 57 above, at 198.
159. For an example of the type of loophole that a court can consider competently once the problem is pointed out, see the discussion of Subramaniam, pp. 110-11 above.

expertise is capable of transmission, then the tribunal should state it. The court will then be in a position to assess more knowledgably the degree of deference that ought to be accorded the tribunal decision. If the tribunal fails to articulate a communicable insight, the court should reduce the deference it might otherwise have accorded. Apart from whatever prophylactic effect this might have in encouraging tribunals to state reasons, deference should be reduced in such a case simply because the court has less reason to think deference is due. Finally, if the insight the tribunal has is largely intuitive, as might be expected, for example, when the tribunal predicts human behaviour on the basis of its past experiences, greater deference is warranted. There might indeed be borderline cases in which the court is unable to tell whether the insight the tribunal has either explicitly or silently asked the court to accept on faith was in fact communicable. In those cases, it might be that the court can do nothing more than trust its own instincts in determining how much deference is due.

The two strands of thought discussed here in relation to the generalist/specialist distinction can now be combined. Generalist legal knowledge of courts is one reason for judicial review. Specialist expertise of tribunals is a reason for judicial deference, but the degree of deference should reflect the extent to which the relevant insights flowing from that expertise are incapable of transmission. When they can be and are transmitted, the question is not whether a better decision

is likely to come from a specialist or a generalist. A court in such a case will have the combined benefit of the insights resulting from its own generalist experience and from the tribunal's specialised expertise. The court's decision, unlike that of the tribunal, will be the product of both advantages.

This section began by asking to what extent the existence of specialised immigration tribunals dictates limitations on the intensity of judicial review. It has been noted that certain immigration decisions and certain issues raised by those decisions are not reviewed by tribunals at all. Those decisions and issues that have been adjudicated by the tribunals, however, raise questions as to the proper relationship between the tribunals and the courts.

As shown in the first part of this section, courts and tribunals do possess properties that tend to differ in degree. These differences enable courts and tribunals to fulfill complementary functions.[160] Tribunals tend to possess, more

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160. Whether courts supplement tribunals or vice-versa is largely semantical. One writer uses this metaphor:

> If the judges are to be regarded as the regular soldiers in the front line defending the rule of law against those who are attacking it, the tribunals are a second line of defence, like territorials, backing up the regulars and supplementing their work.

Micklethwait, note 65 above, at 143. Judges might indeed be viewed as the primary line of defence, and tribunals as supplementing them, in the sense that courts are superior to tribunals in the legal hierarchy. It would be equally possible, however, to characterise courts as supplementing the work of tribunals, either in terms of numbers of cases adjudicated (see generally Jackson, note 57 above, at 124), or in terms of the chronological order in which cases are heard (tribunal before court). The position taken here is that courts and tribunals complement one another.

so than courts, attributes that permit them to provide fast, cheap, accessible, informal justice in large numbers of cases calling for specialised expertise. There is no point in denying that, when courts review tribunal decisions, the benefits of tribunal adjudication are impaired to some extent. But judicial review has the advantage, illustrated more specifically in the above discussion of generalist and specialist experience, of enabling courts to reach decisions that make use of the positive attributes of both types of adjudicative bodies.

C. Additional Observations Concerning American Constitutional Review

Much of the prescriptive analysis of American constitutional review rests on more general considerations already discussed in section A. Constitutional adjudication in the United States does, however, raise a number of problems that require separate treatment. Many such problems are specific to immigration law and were discussed in chapter III. A few additional considerations will be addressed here.

Unlike other forms of judicial review, where the purpose can be broadly described as effectuating the will of the legislature, the broad purpose of constitutional review of statutes is to assure legislative compliance with a constitutional document. That distinction has several consequences beyond those already described.

As noted earlier, the question whether judicial review is consistent with democracy has three components: selection,

accountability, and content.[161] In all three respects, adjustments are needed when a statute is reviewed for constitutionality -- particularly that of a statute enacted by a state or federal legislature. Selection of judges might be no less democratic than that of administrative officials, who are also appointees, but it is less democratic than that of legislators, who are popularly elected. With respect to accountability, federal judges are less vulnerable to removal than are either legislators or administrators. That feature, it is true, exists regardless of whether the question is constitutional. When a court strikes down a statute as unconstitutional, however, there is lacking even that element of accountability by which the legislature can supersede the decision--as it could, for example, if the question were one of statutory interpretation.[162] Finally, it is on constitutional questions that democracy-based arguments focusing on decisional content are strongest. When a court strikes down a statute as unconstitutional, it explicitly prevents a democratically elected legislature from exercising its will.[163] For all those reasons, the arguments for judicial restraint in a democracy are the most compelling in cases where statutes are reviewed for constitutionality.

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161. See pp. 430-36 above.
162. See Bickel, note 10 above, at 19-20.
163. Ibid., at 16-17. A court that misconstrues a statute similarly thwarts the will of the legislature, but in such cases the legislature is at least free to amend the statute to reinstate its wishes in clear language.

One response--the classical view--is that constitutional review is constitutionally mandated.[164] Another possible response is that constitutional review, whether or not required, is nonetheless permissible and is in keeping with the wishes of the majority.[165]

The argument that requires special mention here, however, relies on neither constitutional compulsion nor majority support. In his famous footnote in United States v. Carolene Products Co., Justice Stone asked

> whether prejudice against discrete and insular minorities may be a special condition, which tends generally to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[166]

That footnote has found expression in the line of Supreme Court decisions invoking strict scrutiny of governmental action creating 'suspect' classifications.[167] It has recently been pressed with renewed vigour, though in different ways, by two leading writers.[168]

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164. See p. 476 below.
165. For the opposing views on this point, compare, e.g., Black, note 31 above, at 70-73, with Bickel, note 10 above, at 20-21; Choper, note 12 above, at 48-55.
166. 304 U.S. 144, at 152 n.4 (1938).
167. See, e.g., Tribe, note 12 above, at 1000-02, 1012-56.
168. John Hart Ely, in Democracy and Distrust (1980), distinguishes between specifically worded constitutional provisions and those that are 'open-textured'. He urges 'interpretivism' for the former and 'non-interpretivism' for the latter. When non-interpretivism is necessary, he would not employ fundamental values. Rather, he advocates a 'representation-reinforcing' theory, in which the court's role in constitutional matters is to assure political representation and to prevent improper discrimination against minorities.

Jesse Choper (see note 12 above) agrees that the function of constitutional review is to protect those aspects of the

Aliens are a paradigm example of a group unable to rely on the political process for protection. They cannot vote.[169] They tend generally to be unpopular.[170] At least certain subgroups of aliens are typically poorer than the general population.[171] And other avenues of political input are blocked by aliens' relative lack of familiarity with such important national institutions as the law,[172] the language,[173] and the customs.[174] Recognising this peculiar

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168. (continued) constitutional scheme that the political process cannot be counted on to protect. He concludes that provisions conferring individual rights require such judicial protection, but that, with some qualifications, the political process adequately protects federalism and separation of powers.

The present concern is with those immigration cases in which the challenges were predicated upon constitutional provisions that confer individual rights. Although the early cases discussed in Chapter III were concerned with federalism, they were relevant only as part of the historical explanation for the subsequent judicial deference in the individual rights cases.

169. In the U.S., individual states set the qualifications for voting in both state and federal elections: U.S. Const. art. I, s. 2, cl. 1. However all states deny aliens the vote: Hampton v. Mow Sun Wong, 426 U.S. 88, at 102 (1976); Wong Yang Sun v. McGrath, 339 U.S. 33, at 46 (1950). See also Ely, note 168 above, at 161; 1 C. Gordon & H.N. Rosenfield, Immigration Law and Procedure (1984), s. 1.38; G.M. Rosberg, Aliens and Equal Protection: Why Not the Right to Vote? (1977) 75 Mich. L. Rev. 1092, at 1092. Disenfranchisement of aliens has withstood constitutional challenge: see Skafte v. Rorex, 553 P.2d 830 (Col. 1976), appeal dis'd, 430 U.S. 961 (1977). In the U.K., the vote is limited to British subjects and Irish citizens: see Representation of the People Act 1949, s. 1(1)(b)(Parliamentary elections); Local Government Act 1972, s. 79(1)(local government elections).

170. See pp. 377-94 above.

171. G.H. Manulkin & B.R. Maghame, A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker (1975) 13 San Diego L. Rev. 42, at 45; Roberts, note 69 above, at 32-33.

172. Wong Yang Sun v. McGrath, 339 U.S. 33, at 46 (1950).

173. Hampton v. Mow Sun Wong, 426 U.S. 88, at 102 (1976). See also Roberts, note 69 above, at 33.

174. See notes 172 and 173 above.

vulnerability, the Supreme Court has repeatedly held that, for purposes of state equal protection claims, alienage classifications are suspect and thus trigger strict scrutiny.[175]

It might be argued that the generosity of the American courts on questions of statutory interpretation fills the void left by aliens' political powerlessness. But the relative liberality affecting statutory interpretation is by no means unanimous.[176] In addition, even for a court inclined to adopt a liberal reading, there are limits to the tensility of statutory text. Finally, a distortion of the legislative wording confuses the case law, at least more so than a straightforward constitutional holding invalidating the particular provision.

The above discussion could quite easily be the starting point for an argument that courts should apply strict scrutiny even when the governmental action creating the alienage classification is a federal immigration statute. Aliens have no more political protection against federal action than they have against state action, particularly in the context of immigration.[177] Further, such factors as immutability of status and history of discrimination also serve as indicia of suspectness,[178] and they seem no less applicable to federal

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175. See cases in ch. III, note 226 above.
176. See p. 245 above.
177. Perhaps they have even less: see Schuck, note 86 above, at 22-23.
178. See, e.g., Frontiero v. Richardson, 411 U.S. 677, at 684-86 (1973); cf. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, at 104-05 (1973) (Marshall J., dissenting).

action than to state action.[179] The goal of this section, however, is more modest. The aim has been merely to establish that nothing about the principal differences between general arguments for judicial review and more specific arguments for constitutional review explains the selective deference exhibited in the immigration cases. There remains the task of examining several special problems raised by immigration cases to determine the extent, if any, to which they qualify or outweigh the factors discussed so far.

D. The American Political Question Doctrine and its British Analogues

As the following discussion will show, one theme figuring prominently in many of the American immigration cases has been the explicit or implicit invocation of the political question doctrine. More specific emphasis has typically been placed on one aspect of that doctrine: judicial deference in cases presenting foreign affairs questions. There is no formal political question doctrine in the United Kingdom,[180] but a number of related principles frequently reflect analogous concerns and produce analogous results. Many such principles have emerged in the British immigration cases.

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179. Given the federal powers to exclude and deport those aliens, however, a federal immigration provision cannot automatically be presumed to have been directed at impermissible ends. Thus, federal alienage classifications provide less reason than state alienage classifications for a court to suspect the legislative motives. 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 suspect impermissible federal motives.

180. See de Smith, note 74 above, at 151.

This section will initially explore the various branches of the American political question doctrine. That analysis will include a discussion of any British analogues and an assessment of the extent to which those general principles warrant judicial deference in immigration cases. Since several branches are often applied to foreign policy questions, it will be convenient to treat foreign policy as a separate unit after the discussion of the individual branches. Next, it will be shown that much of the judicial deference in both American and British immigration cases can in fact be traced to the courts' perceptions that foreign policy elements were present. The remaining discussion will consider both the extent to which immigration cases should be treated as presenting issues of foreign policy and the extent to which the existence of foreign policy elements should generate judicial deference.

The American political question doctrine provides that certain questions, being 'political' in nature, should not be reviewed by courts.[181] The difficulties have centred on the theories underlying the doctrine and on the practical problems plaguing its application. The leading case is Baker v. Carr,[182] in which the Supreme Court, after collecting the most significant political question cases and categorising them by subject matter, distilled the following patterns:

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181. J.E. Nowak, R.D. Rotunda, & J.N. Young, Constitutional Law (1983), at 109.
182. 369 U.S. 186 (1962).

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[183]

The first of the strands recognized in Baker -- the textually demonstrable constitutional commitment -- is consistent even with the classical theory of constitutional review. Under that theory, traditionally associated with Marbury v. Madison,[184] the Supreme Court reviews Congressional and Executive acts for constitutionality because the Constitution requires the Court to do so. Even under so broad a conception of constitutional review, however, the Court will be excused from its duty if the Constitution commits the particular question to one of the other two branches.[185] Nonetheless, apart from the argument, discussed below, that immigration decisions are committed to the political branches because they raise foreign policy concerns, the textual commitment prong has no apparent application to the American immigration cases.

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183. Ibid., at 217.
184. 5 U.S. (1 Cranch.) 137 (1803).
185. F.W. Scharpf, Judicial Review and the Political Question: A Functional Analysis (1966) 75 Yale L.J. 517, at 517-18; Tribe, note 12 above, at 71 n.1; H. Wechsler, Toward Neutral Principles of Constitutional Law (1957) 73 Harv. L. Rev. 1, at 7-9. See, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

A commitment rooted in the text of the supreme American authority, the Constitution, can be analogised, however, to one rooted in a statute enacted by Parliament, the supreme authority of the United Kingdom. Devices by which British courts interpret statutes to withhold judicial review are thus analogous to at least one branch of the American political question doctrine. Ouster clauses, at least if interpreted literally, can be viewed as textually demonstrable statutory commitments of specified issues to the executive branch, although the courts have ordinarily declined to give such clauses their literal meaning.[186] Another common device is to hold unreviewable, other than for bad faith, the exercise of a statutory discretion conferred in subjective terms.[187] The resemblance this device bears to the political question doctrine is especially striking when a court's reason for showing deference is that it perceives the particular statutory power as sensitive.[188] Cases upholding the Home Secretary's power to deport aliens when he 'deems' it 'conducive to the public good' might be explained or arguably justified as applications of that principle. Yet, as noted earlier, for some time the courts have generally avoided literal interpretations of subjectively worded powers. Thus the selective deference manifest in the 'public good' cases cannot be

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186. See pp. 123-24 above. Ouster clauses have not yet been construed in the immigration cases. But see p. 123 n.363 above (nationality applications).
187. See pp. 157-59 above.
188. See, e.g., Chandler v. D.P.P. [1964] A.C. 763 (H.L.).

dismissed on that basis.

Alternatively, the power of a court to label a particular question as one of 'fact and degree' rather than one of 'law' can be viewed as a means of achieving results similar to those produced by the political question doctrine. In such cases, the power to classify can serve the function of enabling a court to withhold review, or at least confine the scope of review, of a question that the statutory text is construed to commit to a Minister or a Tribunal.[189] This device too arguably applies to decisions finding deportation conducive to the public good, since application of such a broad statutory term might be classified as a question of fact and degree, committed to the Home Secretary. Again, however, it is difficult to reconcile such deference with the assertiveness shown in Royco Homes and similar cases.[190]

The traditional principle that an administrative body has the power to err within its jurisdiction[191] might also be viewed as analogous to the textual commitment prong of the political question doctrine. The statutory text on which reliance would have to be placed is the text entrusting that determination to the administrative body. So characterised,

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189. See, e.g., Esso Petroleum Co. Ltd. v. Min. of Labour [1969] 1 Q.B. 98 (C.A.), at 108-09 (per Lord Denning M.R.), 115-16 (Sachs L.J.). See generally de Smith, note 57 above, at 131-33; W.A. Wilson, Questions of Degree (1969) 32 Mod. L. Rev. 361.
190. See pp. 158-59 above.
191. See pp. 14-16 above.

a legislative intent to foreclose review for non-jurisdictional error is tantamount to an intent to entrust exclusively to the administrative body a decision not exceeding jurisdictional limits. The expansive modern interpretations of jurisdictional error and the increased frequency with which errors of law appear on the face of the record render this analogue less important. Still, at least if Lord Denning M.R. is correct,[192] the courts' discretion whether to label an error of law jurisdictional gives them a practical discretion whether to review.

The remaining prongs listed in Baker assume discretionary powers of American courts to refuse constitutional review even when decisions have not been committed by the Constitution to other Departments of the Government. Since proponents of the classical theory of constitutional review reject the notion that courts have such powers,[193] they might stop at this point. For such theorists, the deference in the immigration cases could not be justified on the basis of the remaining Baker factors because the courts lack the power to apply those discretionary prongs at all, and therefore to immigration cases in particular. Many other commentators reject the classical

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192. See p. 82 above.
193. See, e.g., M.E. Tigar, Judicial Power, The "Political Question Doctrine," and Foreign Relations (1970) 17 U.C.L.A. L. Rev. 1135; Wechsler, note 185 above; cf. G. Gunther, The Subtle Vices of the 'Passive Virtues'--A Comment on Principle and Expediency in Judicial Review (1964) 64 Col. L. Rev. 1.

theory,[194] however, and in any case the Supreme Court's recognition in Baker of political questions not predicated on constitutional interpretation implies a similar rejection. The next step, therefore, is to examine the discretionary branches of the doctrine, and any applicable British analogues, to determine whether they justify judicial deference in immigration cases.

The first of the discretionary prongs -- 'a lack of judically discoverable and manageable standards for resolving' the particular question -- has underlain several of the political question cases.[195] Again, apart from foreign affairs questions, the doctrine seems inapplicable to the types of constitutional challenges that have led to judicial deference in the immigration cases. The procedural due process, fifth amendment 'equal protection', and First Amendment arguments discussed in chapter III are no more standardless when applied to immigration cases than they are when applied to other cases.

The greater the decisionmaker's freedom to choose between various alternatives, the less discoverable the standards will be to a reviewing court. Consequently, the closest British analogues to this strand of the political question doctrine are

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194. E.g., Bickel, note 10 above; Scharpf, note 185 above. The discretionary prongs enumerated in Baker can in turn be classified as either prudential or functional: see, e.g., Tribe, note 12 above, at 71-72 n.1. Scharpf argues that functional concerns explain the bulk of the American political question cases: see note 185 above, at 566.

195. E.g., Gilligan v. Morgan, 413 U.S. 1 (1973); Coleman v. Miller, 307 U.S. 433, at 453 (1939).

those principles that call for judicial deference because of the breadth of the decisionmaker's choice. In cases of statutory powers, the narrow scope of review attending decisions on questions classified as fact and degree, or especially those classified as discretionary, are examples. The standards for reviewing either type of decision are narrower than those for reviewing questions of law.[196] The more subjective the grant of discretionary power, the less will be the extent to which the court can discover meaningful standards, and thus the narrower will be the scope of review.[197]

For somewhat similar reasons, the royal prerogative can be visualised as serving a function similar to this prong of the political question doctrine. Since prerogative powers are not created by statute, there is no statutory reference against which to test the propriety of the purposes invoked to support the particular prerogative decision. The result is to render less discoverable any standards by which a court might review the discretionary decision.[198] The perception that justiciable standards are lacking when a highly discretionary

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196. See note 189 above.
197. E.g., Anns v. London Borough of Merton [1978] A.C. 728 (H.L.); see generally Craig, note 62 above, at 485-86, 534-44.
198. See, e.g., Gouriet v. A.-G. [1978] A.C. 435 (H.L.), at 482 (per Lord Wilberforce), 524 (per Lord Fraser of Tullybelton). See also B.A. Hepple, Aliens and Administrative Justice: The Dutschke Case (1971) 34 Mod. L. Rev. 501, at 517 & n.80 and sources cited therein (issue nonjusticiable when policy considerations cannot be contained within traditional and acceptable principles and standards).

power is non-statutory figured in Bhatti and Amin, discussed earlier.[199]

But even that analysis cannot justify the extreme judicial restraint in the British immigration cases. That a definitive list of permissible purposes cannot be extracted from the source of the power -- either the prerogative or the particular statutory provision conferring the power -- does not mean that no sources are available. In both Duke of Chateau Thierry and Soblen, for example, the courts rejected plausible arguments that the purposes underlying the challenged discretionary decisions were inconsistent with other expressions of Parliamentary intent.[200]

The remaining strands recognised in Baker also have little applicability to the immigration cases, apart from foreign affairs concerns. 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 that this strand focuses on the presence of a policy element, it would seem subsumed within the previous strand, since a wide policy element would make it 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, but again, apart from foreign affairs, it has no

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199. See pp. 162-63 below. See also R. v. I.A.T., ex p. Sohal [1981] Imm. A.R. 20 (Div. Ct.) (effect of deportation order on local community relations nonjusticiable because 'political').
200. See pp. 148-53 above.

apparent applicability to the immigration cases.[201] The same is true of the last two prongs -- an unusual need for adherence to an existing decision and the possibility of embarrassment from conflicting pronouncements.[202]

The above discussion reveals the absence of domestic concerns that would justify the special deference displayed in the immigration decisions. Rather, at the heart of this longstanding judicial deference has been the courts' view that immigration is intimately bound up with foreign policy and hence that judicial interference would be inappropriate. Vague references to foreign policy have surfaced in several of the American plenary power cases.[203] The view that the courts have in fact been influenced by their perceptions of foreign policy ingredients has prompted others to describe at least some of the plenary power cases as applications of the political question doctrine.[204] Analogous observations can

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201. Certainly the mere fact that the decision of a coordinate branch is being invalidated does not bring that clause into operation; otherwise constitutional review would never be appropriate. The example given in Baker to illustrate this branch of the political question doctrine is the judicial reluctance to scrutinise a statute for compliance with formal prerequisites to enactment. See, e.g., 369 U.S. at 214, citing Field v. Clark, 143 U.S. 649, at 672 (1892). For British analogues, see de Smith, note 74 above, at 91-101; Wade, note 63 above, at 27-28.

202. E.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

203. See Kleindienst v. Mandel, 408 U.S. 753, at 766 n.6 (1972); Galvan v. Press, 347 U.S. 522, at 530 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, at 588-89 (1952); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, at 542 (1950); Fong Yue Ting v. United States, 149 U.S. 698, at 705-06 (1893).

204. E.g., M.R. Konvitz, Civil Rights in Immigration (1953), at 44; Scharpf, note 185 above, at 579-81; Mathews v. Diaz, 426 U.S. 67, at 81-82 (1976); Narenji v. Civiletti, 617 F.2d 745, at 747-48 (D.C. Cir. 1980).

be made about several of the most deferential immigration decisions in the U.K. For example, concern with foreign affairs led to invocation of either the prerogative or the act of state doctrine or both in several of the early cases,[205] and especially in the later cases involving alien enemies.[206]

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 policy; and that decisions affecting foreign policy require judicial restraint. Both assumptions deserve examination.

The connection between immigration and foreign policy rests ultimately on the fact that an immigration decision operates on the subject of a foreign state.[207] Because a foreign state may intervene diplomatically on behalf of its nationals,[208] it is true that an adverse decision carries the potential for international tension. Even a decision favourable to the immigrant could undercut the bargaining power of the decisionmaking state in its negotiations with the state of which the immigrant is a national.[209]

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205. See pp. 136-47 above. See also Ali (D.M.) v. I.A.T. [1973] Imm. A.R. 33 (C.A.) .
206. See pp. 159-60 above. Cf. Soblen, pp. 150-53 above; Hosenball, p. 67 above.
207. But cf. stateless persons.
208. See pp. 499-501 below.
209. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, at 591 (1952). Cf. Hampton v. Mow Sun Wong, 426 U.S. 88, at 104 (1976) (barring aliens from federal civil service permits President to bargain for reciprocal concessions).

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 refrain from interfering with the legislative or executive branches. There might even be particular provisions that fit that description in all fact situations to which they could conceivably be applied. But to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy considerations that the usual scope of judicial review would hamper the effective conduct of foreign relations is to ignore reality.[210] In Fiallo, for example, the Supreme Court expressly acknowledged 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'.[211] Nor did the Second Circuit precipitate a world crisis when it held in Francis[212] that the availability of section 212(c) relief could not constitutionally be conditioned on the alien having left and returned to the United States.

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210. Even the governments themselves seem to discount the foreign policy aspects of individual immigration decisions. In the U.S., principal control of immigration is vested in the I.N.S., which is part of the Justice Department; the State Department, which handles foreign policy, has very limited involvement in immigration: compare 8 U.S.C. s. 1103(a) with ibid., ss. 1104(a), 1201. In the U.K., primary implementation of the immigration laws rests with the Home Office, not the Foreign Office.

211. 430 U.S. at 796.

212. See pp. 260-61 above.

Yet, in those and other plenary power cases, the courts' blanket technique of mechanically labelling immigration cases as rooted in foreign policy considerations that rendered constitutional review improper precluded consideration of whether foreign affairs were actually affected. For the reasons given above, that technique is subject to criticism. It is submitted here that 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 impair the nation's smooth handling of foreign policy.

That criterion is, of course, easier to state than to apply. Still, several factors might be available for a court to consider. Submissions by the government should be weighed. In the United States, the legislative history of the particular statute is often revealing.[213] That a statutory provision deals only with immigrants of selected nationalities, and not with immigrants or aliens generally, is strong evidence of a legislative focus on international relations. In the United States, the early plenary power cases dealt principally with statutory provisions limited to Chinese, and later Japanese, immigrants.[214] Foreign policy was clearly reflected in the Presidential order and administrative regulations challenged in the Iranian cases.[215] In the United Kingdom a court might, depending on the particular issue presented, treat a provision

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213. E.g., Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970).
214. See ch. III above.
215. See pp. 326-29 above.

dealing solely with E.E.C. nationals, or with citizens of Commonwealth countries, or with citizens of Ireland[216] as incorporating government policies in the field of foreign relations.

Even when a particular immigration case is believed likely to present foreign policy considerations, a court should not automatically invoke the political question doctrine or one of its British analogues. There has indeed, as observed in Baker, been occasional rhetoric in American opinions suggesting that courts may never review the propriety of executive or Congressional acts in the field of foreign relations.[217] There have also, admittedly, been many cases in which the foreign policy ramifications have in fact induced the courts to withhold review.[218] The same has been true in the U.K., where the act of state doctrine has rendered numerous decisions affecting foreign affairs nonjusticiable.[219]

In neither country, however, have the courts gone to the extreme of refusing to review all decisions having possible effects on foreign policy. In the U.S., significant judicial

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216. Cf. Evans, note 52 above, at 33-34 (British relationships with other countries influence immigration policy).
217. See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297, at 302 (1918), cited in Baker, 369 U.S. at 211 n.31.
218. E.g., Goldwater v. Carter, 444 U.S. 996, at 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, 369 U.S. at 213-14 (summarising cases refusing to review determinations of whether armed hostilities had ceased). The latter decisions are analogous to R. v. Bottrill, ex p. Kuechenmeister [1947] 1 K.B. 41 (C.A.).
219. See pp. 143-46 above.

assertiveness has been displayed in several cases presenting questions of human rights violations by foreign governments,[220] publication of the Pentagon papers,[221] certain passport issues,[222] certain military matters,[223] loss of citizenship,[224] and even the legality of a Presidential Order seizing steel mills to avoid disruption of a war effort.[225] 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 its citizens and a foreign state or its citizens.[226] A federal statute provides specifically for suits against aliens, including alien diplomats.[227] The commentators, too, are in broad agreement that not all matters affecting foreign policy are nonjusticiable.[228]

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220. 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).
221. New York Times Co. v. United States, 403 U.S. 713 (1971).
222. E.g., Aptheker v. United States, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).
223. 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 martial law). But see Chappell v. Wallace, 103 S.Ct. 2362 (1983); Feres v. United States, 340 U.S. 135 (1950).
224. See pp. 346-47 above.
225. Youngstown Sheet and Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579 (1952).
226. U.S. Const. art. III, s. 2.
227. 28 U.S.C. s. 1251.
228. See generally L. Henkin, Foreign Affairs and the Constitution (1972). See also Scharpf, note 185 above, at 585, 587.

Although British examples are fewer, cases in which courts reviewed decisions with foreign policy effects can be found. In Laker Airways v Dept. of Trade,[229] for example, neither the fact that the Government was invoking a power arising under a treaty nor the fact that the decision would affect international air routes[230] dissuaded the court from reviewing assertively. And even when foreign affairs objectives justified action taken by the Crown, the courts have frequently reviewed to determine whether the Crown was at least required to compensate aggrieved propertyowners.[231]

The above discussion makes clear that, in both the U.K. and the U.S., some questions affecting foreign policy have been reviewed and some have not. As the U.S. Supreme Court made clear in Baker, 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'.[232] To the extent that the American plenary power doctrine and at least the early applications of the British royal prerogative assume that immigration matters necessarily generate the kind of foreign policy problems that defy judicial resolution, the cases have avoided the individualising wisely prescribed, and have resorted

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229. [1977] 2 All E.R. 182 (C.A.).
230. But see Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948).
231. See, e.g., A.-G. v. Nissan [1970] A.C. 179 (H.L.); Burmah Oil Co. v. Lord Advocate [1965] A.C. 75 (H.L.); A.-G. v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 (H.L.); cf. Walker v. Baird [1892] A.C. 491 (P.C.).
232. 369 U.S. at 217.

to the 'semantic cataloguing' soundly rejected, in Baker.

But if cataloguing 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'.[233] Standards defying judicial 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.[234] When reviewing the constitutionality

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233. Ibid., at 211.
234. See Alvarez v. District Director, 539 F.2d 1220 (9th Cir. 1976); Dunn v. I.N.S., 499 F.2d 856 (9th Cir. 1974).

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 it lacks the standards, as well as the information and expertise,[235] to evaluate. Similarly, if the facts of a particular immigration case raise an issue demonstrably committed to a coordinate branch -- in the U.S., a constitutional commitment to either Congress or the executive, and in the U.K. a statutory commitment to the executive -- then the particular issue, though not necessarily the entire case, should be held nonjusticiable.

The last factor that Baker associates with foreign policy is a special 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 in the United States, 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[236] federal.[237] An analogous

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235. See Narenji v. Civiletti, 617 F.2d 745, at 747-48 (D.C. Cir. 1980).
236. Chy Lung v. Freeman, 92 U.S. (2 Otto.) 275 (1875); Henderson & Henderson v. Wickham, 92 U.S. (2 Otto.) 259 (1875).
237. Chinese Exclusion Case, 130 U.S. 581 (1889), citing two other cases that emphasised the need for a uniform federal policy: Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Cohens v. Va., 19 U.S. (6 Wheat.) 264 (1821).

result would occur in the U.K. if local governments were allowed to establish conflicting immigration policies, but that issue does not appear ever to have arisen.

In the United States a split of authority among courts of equal rank can also create the problem of conflicting decisions simultaneously in effect. Under the American immigration laws, that problem could occur either at the district court level or at the court of appeals level.[238] The problem is no more likely to occur in immigration cases than in any other area of federal law,[239] however, and when it does, the most logical remedy would be a conclusive decision from the Supreme Court. Nor does judicial reversal of either an executive decision or, in the U.S., a Congressional decision, create the problem of conflicting decisions in effect at the same time. As observed in I.N.S. v. Chadha,[240] once a decision is invalidated by a court, the spectre of 'multifarious pronouncements' raised in Baker[241] does not come about.[242]

The second way in which official pronouncements can differ is the case in which only one authoritative pronouncement is outstanding at a given point in time, but in which the pronouncement 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

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238. See 8 U.S.C. s. 1105a(a,b).
239. That point has been made by others: Barker, note 86 above, at 26-27; Wildes, note 86 above, at 63.
240. 103 S.Ct. 2764, at 2780 (1983).
241. 369 U.S. at 217.
242. But cf., the problem of Punton's Case, pp. 20-21 above.

decision or, in the U.S., a legislative decision, will be overturned. Although the problem exists in the case of any reviewable decision, it assumes special importance in matters affecting foreign affairs, where final decisions might be needed promptly.[243] Thus, if a particular immigration case raises an issue that for some special reason requires a prompt final resolution, the court should consider holding the issue nonjusticiable. One of the issues raised in Bottrill -- whether armed hostilities had ceased -- is arguably such an example.[244]

A final 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.[245] 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 case. 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

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243. E.g., Goldwater v. Carter, 444 U.S. 996 (1979); R. v. Bottrill, ex p. Kuechenmeister [1947] 1 K.B. 41 (C.A.)(issue as to cessation of hostilities).
244. See note 243 above. That armed hostilities continue, however, does not necessarily mean that a court should refuse to review the legality of a detention order or a deportation order.
245. See pp. 487-89 above. See especially Henkin, note 228 above, ch. 10; Note, Constitutional Limits on the Power to Exclude Aliens (1982) 82 Col. L. Rev. 957, at 973-74.

the individual right, it would seem reasonable to consider not only the importance of the right the immigrant is asserting, 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, including whether the person was lawfully admitted and, if so, whether as a permanent resident or a temporary visitor.

This section can now be summarised briefly. The political question doctrine accounts for much of the judicial restraint in the American immigration cases. That doctrine has numerous branches, many of which rest on purposes, and have effects, analogous to those of several principles of British law. Those analogues include statutory discretion conferred in subjective terms; ouster clauses; decisions classified as fact and degree; errors of law within jurisdiction; the royal prerogative; and the act of state doctrine.

No domestic concerns systemic to immigration cases justify the application of the American political question doctrine or its British analogues. If the deference in immigration cases is to be justified on the basis of those principles, the justification must therefore rest on policies pertaining to foreign affairs. Foreign relations concerns have indeed 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 a judicial resolution would interfere with foreign policy. To make that determination, a court might consider any submissions by the Government, legislative history in the United States, and whether the particular provision the court is either interpreting or reviewing for validity 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 enough. Thus, in immigration cases, even when review might realistically be expected to affect foreign policy, the could should 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.

E. Other Theories of Judicial Deference in Immigration Cases

The purpose of this chapter has been to examine what the role of the courts ought to be in immigration cases. More specifically, the question has been whether the special deference the courts have ordinarily conceived their role to require is justified. To answer that question, it was first necessary to survey the general arguments for and against judicial review of administrative action. That was done in section A. In the rest of this chapter, the question has been whether immigration cases possess features that alter the general arguments and call for special restraint. The feature examined in section B was the apparatus for appeals to administrative tribunals. Section C identified the major democracy-based arguments that require modification when applied to American constitutional review, and concluded that those modifications reveal no basis for the selective deference in immigration cases. Section D examined probably the most commonly articulated rationale for judicial deference in immigration cases: foreign policy, recognised as a frequent catalyst of 'political questions' in the U.S. and of several analogous principles producing judicial restraint in the U.K.

This section will assemble and critique a host of other, miscellaneous, arguments for special judicial deference in immigration cases. For the most part, the statements from which these arguments can be inferred have appeared in the American constitutional decisions. Since those cases have established the most dramatic and the most explicit departures

from the usual standards of judicial review, it is not surprising that they have been the ones in which the need for explanation has been felt to be the most paramount. Nonetheless, although many such statements were made for the limited purpose of supporting judicial deference on American constitutional questions, most of the discussion here will consider their general applicability to immigration cases in both the U.K. and the U.S. With that in mind, five additional theories for special judicial restraint will now be considered.

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. Under this approach, the view seems to be that the alien aggrieved by the action of a government official has little cause for complaint because in any case his or her very presence in the country is a gratuitous bonus.

That philosophy has emerged in various forms. Several American constitutional cases have spoken of the aliens having 'come at the Nation's invitation',[246] or of the country's 'hospitality' to aliens,[247] or of aliens' status as 'guests'.[248] In his concurring opinion in Schmidt, Widgery

246. Carlson v. Landon, 342 U.S. 524, at 534 (1952).
247. Landon v. Plasencia, 103 S.Ct. 321, at 325 (1982); Foley v. Connelie, 435 U.S. 291, at 294 (1978); Fiallo v. Bell, 430 U.S. 787, at 796 (1977); Harisiades v. Shaughnessy, 342 U.S. 580, at 587 n.11 (1952).
248. Mathews v. Diaz, 426 U.S. 67, at 80 (1976).

L.J. (as he then was) introduced a slight variant of the guest theory. He maintained that, just as a landlord need not explain a refusal to extend a lease, so the Home Secretary need not explain a decision refusing to extend an alien's leave to remain in the U.K.[249] Under that analogy, the nation's immigration laws represent the exercise by the 'owners' of the nation's property of their collective right to use the property as they please.[250] Previous discussion has observed that much of the judicial deference in both the U.K. and the U.S., and much of the assertiveness of the European Court, seemed to rest on the distinction between a 'right' and a 'privilege.'[251] The classification of an interest as a privilege is still another form of the guest theory.

The general demise of the right/privilege distinction has been chronicled in other sources.[252] Those sources contain

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249. Schmidt v. Sec. of State for Home Affairs [1969] 2 Ch. 149, at 173 (C.A.).
250. Schuck (note 86 above, at 6-7) argues that the emergence of restrictive American immigration laws reflected in part the philosophy of individual autonomy to which the American legal system was then committed. Under that philosophy, obligation was based principally on consent. He draws an effective analogy between the landowner's right to exclude trespassers and the nation's right to exclude aliens. Note, however, that Widgery L.J. (as he then was) offered his analogy as a justification for judicial restraint. Schuck offers his argument only as an historical explanation for the adoption of a restrictive immigration policy. See also R.L. Garis, Immigration Restriction (1927), at 30 (right-privilege distinction invoked in Congressional debates over Naturalization Act of 1798).
251. See p. 219 below.
252. See pp. 40, 311-12.

powerful arguments against making the distinction determinative of whether procedural review is available. It should be added here that, like the other forms of the guest theory, the right/privilege distinction fails to distinguish between the nation as a whole and its constituent parts. That a nation has unlimited power to exclude and to expel aliens does not mean that the courts should refrain from determining whether the exercise of such power in an individual case comports with the legal directives that the nation as a whole has elected to establish.

The Unfair Advantage Theory

One idea advanced in Harisiades was that a permanent resident alien derives advantages from two sources of law: international law and the domestic law of the host country.[253] It noted that in international law an alien may request his nation to intervene diplomatically and may not be forced to participate in a war against his own nation.[254] The implication was that an alien could not expect to enjoy the same domestic rights as a citizen, because the alien would then have two sets of rights and therefore be at an unfair advantage.

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253. Harisiades v. Shaughnessy, 342 U.S. 580 (1952). Cf. R. v. Sec. of State for the Home Dept., ex p. Ayub [1983] 3 C.M.L.R. 140 (Div. Ct.), at 149 (suggesting U.K. citizen might be barred from exercising E.E.C. rights against U.K. because doing so would create simultaneous E.E.C. and international law rights) (obiter).

254. Ibid., at 585-86. Accord, Foley v. Connelie, 419 F. Supp. 889, at 897-98 (S.D.N.Y. 1976), aff'd, 435 U.S. 291 (1978). See also C. Harper, Immigration Laws of the United States (3d ed., 1975), part VII, s. 1a, at 567; Convention Respecting the Laws and Customs of War on Land, 18 Oct., 1907, art. 23,

There are several answers. First, the court would not have had 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, either in the U.K. or in the U.S. The presence of those legal disabilities has not been thought to preclude imposing on aliens the additional disabilities borne by citizens.[255]

One might also question the practical significance of the alien's international law right to request diplomatic intervention from his or her country. 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

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254. (continued) reproduced in 36 Stat. 2277, at 2302. Cf. de Smith, note 74 above, at 155; D.L. Keir & F.H. Lawson, Cases in Constitutional Law (6th ed., by Lawson & D.J. Bentley, 1979), at 69-74.

255. Aliens in both the U.K. and the U.S. are subject to a wide range of disabilities beyond those borne by citizens, even apart from vulnerability to exclusion or deportation. See generally D. Carliner, The Rights of Aliens (1977); de Smith, note 74 above, at 426-27; Gordon & Rosenfield, note 169 above, ss. 1.30-1.46; B.A. Hepple, Race, Jobs, and the Law in Britain (2d ed., 1970), especially at 270-72; A.P. Mutharika, The Alien under American Law (1981); C.E. Roh & F.K. Upham, The Status of Aliens under United States Draft Laws (1972) 13 Harv. Int'l L.J. 501; Rosberg, note 169 above, at 1110-11.

then accede to that request. It seems doubtful that such a procedure adequately substitutes for judicial protection.

Finally, even if the alien's international law rights were of as much practical import as protection by the domestic law of the host country, no basis is perceived for requiring the alien to make an election.[256] That the alien would have the opportunity to ask his or her country to ask the host nation to provide favourable 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.

The Allegiance Theory

Among the rationales offered by the Supreme Court in Hariasiades to support its limited reading of an alien's constitutional protection was its statement that 'So long as the alien elects to continue the ambiguity of his allegiance, his domicile here is held by a precarious tenure'.[257] 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. Both components are worth analysing.

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256. 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.
257. Harasiades v. Shaughnessy, 342 U.S. 580, at 587 (1952).

With respect to the first component, the Court's reference to aliens electing to continue their status implies that a decision not to acquire naturalization 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, lack of English language proficiency, or failure to meet some other prerequisite.[258] In such 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, the decision can reflect a reluctance to renounce one's native citizenship rather than an 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.[259] That the United States government drafts resident aliens into the military[260] further illustrates its faith in their loyalty.

If, however, the Court was referring to allegiance in its legal sense, a different analysis is necessary. It is true

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258. In the U.S., see 8 U.S.C. ss. 1421 and passim. In the U.K., see British Nationality Act 1981, ss. 6,18,49, sch. I.
259. See also S. Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel (1959) 69 Yale L.J. 262, 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).
260. See generally Mutharika, note 255 above, ch. 7; Roh & Upham, note 255 above.

that allegiance and protection have traditionally been described as interdependent.[261] Perhaps that interdependence accounts in part for the particular restraint shown by the British courts when the immigrants have been aliens rather than British subjects.[262] It has long been recognised, however, that at least friendly aliens do bear at least temporary allegiance to the countries in which they reside,[263] although admittedly it is not clear to what extent that relationship continues when aliens are physically outside the country.[264]

Finally, even if it were true that permanent resident aliens lack allegiance to the government of their country of

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261. See P. Cane, Prerogative Acts, Acts of State and Justiciability (1980) 29 Int'l & Comp. L.Q. 680, at 690-92; de Smith, note 77 above, at 155, 431-34; see generally H. Lauterpacht, Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens (1947) 9 Camb. L.J. 330; G.L. Williams, The Correlation of Allegiance and Protection (1948) 10 Camb. L.J. 54.

A variant of this argument is put forward by Martin, who argues that the level of procedural protection the country owes the alien should depend in part on the strength of the alien's commitment to the national community: see D.A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond (1983) 44 U. Pitt. L. Rev. 165. But see T.A. Aleinikoff, Aliens, Due Process and "Community Ties": A Response to Martin (1983) 44 U. Pitt. L. Rev. 237, at 244 (level of procedural protection should be based on strength of alien's ties to community).

262. See Evans, note 52 above, at 423 (connecting courts' view that Crown has prerogative exclusion power with correlation between allegiance and protection).

263. E.M. Borchard, Diplomatic Protection of Citizens Abroad (1915), at 11. However their obligation is decribed as allegiance only in the limited sense that they have a duty to obey the nation's laws: ibid. See also Fong Yue Ting v. United States, 149 U.S. 698, at 735-37 (1893)(Brewer J., dissenting), citing further sources. In addition, see the authorities cited in note 264 above and Note, Constitutional Limitations on the Naturalization Power (1971) 80 Yale L.J. 769, at 778-79.

264. See Cane, note 261 above, at 690-92; de Smith, note 74 above, at 155; Williams, note 261 above.

residence, it is questionable whether that factor should reduce the scope of judicial protection. Sensible policymaking 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 standard of review when such a person is aggrieved by governmental action.

The Inherent Power Theory

Another theory employed to justify judicial deference in the immigration cases has been invoked, with striking similarities, in both countries. As discussed earlier, the United States Supreme Court has held that the Congressional power to regulate immigration is inherent in sovereignty, and thus not dependent on a constitutional grant. In the U.K., the courts have held that at least the power to exclude aliens is inherent in the Crown -- i.e., it is a prerogative power -- and thus not dependent on a statutory grant. In each country, the history preceding the adoption of the inherent powers theory had been ambiguous. In each country, the courts performed a logical leap from the nation's power in international law to exclude aliens, to the same power of one organ of the government under domestic law. And in each country the particular organ held to possess that power -- Congress in the U.S., the Crown in the U.K. -- was a subordinate authority normally dependent on an affirmative grant from the supreme authority -- the Constitution or the Parliament, respectively. Those developments

were traced and evaluated earlier.[265]

The additional point to note here is that, even assuming the courts were correct in recognising those inherent powers, judicial deference does not follow.[266] Some of the most restrained American immigration decisions have recited the sovereignty theory with varying degrees of explicitness.[267] None, however, have tried to reconcile the results with Wong Kim Ark, discussed earlier,[268] in which the Supreme Court subjected to the affirmative constitutional limitations a sovereign power to determine citizenship categories. Indeed, if even the enumerated powers are subject to constitutional limitations,[269] the case for limiting a merely implied power is stronger still.[270] As discussed earlier,[271] the same general objection applies to the principle rendering prerogative discretion in the U.K. unreviewable.

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265. See p. 140 (U.K.), ch. III (U.S.), above. See also Landon v. Plasencia, 103 S.Ct. 321, at 330 (1982).
266. See also Henkin, note 228 above, at 25; Constitutional Limits, note 245 above, at 970-71.
267. E.g., Fiallo v. Bell, 430 U.S. 787, at 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, at 766 (1972); Carlson v. Landon, 342 U.S. 524, at 534 (1952); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, at 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, at 587-88 (1952); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, at 542 (1950). See especially the discussion of the Chinese Exclusion Case, pp. 286-301 above.
268. See p. 347 above.
269. Monongahela Navigation Co. v. United States, 148 U.S. 312, at 336 (1893).
270. See Fong Yue Ting v. United States, 149 U.S. 698, at 738 (1893) (Brewer J., dissenting).
271. See pp. 142-43 above.

The Extraterritorial Theory

One other theory of limited applicability is that an alien cannot invoke the American Constitution in exclusion proceedings because the Constitution lacks extraterritorial effect.[272] Yet the Supreme Court has on several occasions applied the Constitution to acts of American government officials outside U.S. territory.[273] Further, even in the exclusion cases, the Supreme Court has frequently suggested that procedural due process applies to returning residents.[274]

Finally, since federal power derives from the Constitution, it is contradictory to uphold a statute having extraterritorial effect while denying 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.

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272. See, e.g., Ng Fung Ho v. White, 259 U.S. 276, at 282 (1922)(obiter); Lem Moon Sing v. United States, 158 U.S. 538, at 547-48 (1895); Fong Yue Ting v. United States, 149 U.S. 698, at 738 (Brewer J., dissenting). See also Schuck, note 86 above, at 18-21 (classical view that excluded aliens lack constitutional protection), 62-65 (signs of change).

273. See, e.g., the military court-martial cases cited in Henkin, note 228 above, at 327 n.42. Henkin observes that an alien abroad, at least if non-resident, has not been given constitutional protection. The only examples given are Johnson v. Eisentrager, 339 U.S. 763 (1950), in which the complainant was an alien enemy, and the plenary power doctrine cases themselves: see Henkin, at 327 nn.71,72. See also Constitutional Limitations, note 245 above, at 980-82.

274. Kwock Jan Fat v. White, 253 U.S. 454 (1920) (citizenship claimant). Cf. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), construing an administrative regulation to extend procedural safeguards to returning residents in exclusion proceedings. In Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, at 214 (1953), the court acknowledged that the Chew interpretation had been adopted to avoid constitutional doubts. And see now Landon v. Plasencia, 103 S.Ct. 321 (1982).

CONCLUSION

The purpose of this thesis has been to analyse the role of the courts in cases arising under the immigration laws of the United Kingdom and the United States. The first three chapters focused respectively on the British cases, the American non-constitutional cases, and the American constitutional cases. By examining the results, the techniques, and the rhetoric of representative immigration decisions, those chapters provided the empirical basis for the more detailed conclusions reached in the last two chapters. In chapter IV, descriptive patterns of judicial review were isolated, and possible explanations for those patterns were offered. The final chapter, prescriptive in nature, advanced arguments as to what the judicial role ought to be in immigration cases, relative to other cases.

Several general features distinguish the decided immigration cases from other cases in public law. The results in the immigration cases have been distinctively conservative, a term used in this thesis to mean favouring the government over the immigrant on issues that could reasonably have been decided either way. In addition, both the results and ordinarily the rhetoric illustrate the courts' own perceptions that their role requires exceptional deference to the governmental entities whose decisions are being reviewed. There are, of course, individual decisions that do not fit this mold.

In the United Kingdom, both the conservatism and the restraint have characterised practically every major category of immigration case. Those features are especially striking in the habeas corpus cases brought by alleged illegal entrants, in the natural justice cases, and in the cases reviewing discretionary decisions--particularly those in which the royal prerogative has figured. When interpreting immigration provisions in statutes or subordinate legislation, the British courts have tended to favour literal approaches over purposive ones. The same patterns can be found in the decisions of the I.A.T. Precisely the opposite has been true, however, of the European Court of Justice. The prominent general features of that Court's decisions have been liberal results, very little deference to the interpretations adopted by the national courts, and, in particular, heavy emphasis on the purpose of the drafters and on the practical consequences.

The American courts have similarly tended toward exceptional conservatism and deference in the most important cases--those presenting constitutional issues. The same has been true on questions of reviewability, the principal context being the reviewability of consular decisions denying visa applications. The one major deviation from these patterns has been in the field of statutory interpretation, where the American courts have been generally liberal, assertive, and extremely purposive. The opposite has been true of the B.I.A.

Both doctrinal and external explanations for these patterns have been offered. The doctrinal factors are sometimes unique

to the particular case; when that is so, the pertinent doctrine has been included in the discussion of the case. Other doctrinal factors, being specific to particular sub-groups of cases, have generally been analysed in the discussion of the sub-group. Examples are the factors affecting natural justice, the status of the Immigration Rules, the prerogative, the free movement provisions of the E.E.C., the American visa denial cases, and the American constitutional cases. Still others have broader application, transcending sub-groups. They were analysed in the last two sections of chapter V.

The external factors influencing judges in immigration cases were studied in chapter IV.A. The three principal factors have been attitudes, role perceptions, and contemporary political forces. It has been submitted that, of these three, the most crucial has been the judges' perceptions of their own roles. That factor is sometimes explicit--the American constitutional decisions and the British prerogative and 'public good' decisions being prime examples--but is ordinarily implicit. It has, moreover, affected the application of the other two major external influences.

These same factors might also explain some of the differences between the approaches of the British courts in immigration cases and those of the American courts. But other factors are also at work. They include fundamental differences in the two systems of government and differences in the structures of the immigration laws.

It has also been shown that immigration law cannot be viewed monolithically. Within the realm of immigration law, and within each of the two countries studied here, there has been great variation from one type of immigration case to another. Fourteen factors affecting the intensity of review have been assembled. They have been categorised as concerned with the importance of the individual and governmental interests involved, the nature of the decision itself, and the identity of the authority whose decision is being challenged.

Finally, the general arguments commonly invoked in favour of judicial review are not weakened, and those against judicial review are not strengthened, by the fact that immigration law is involved. Whether attention is directed to the relationship between courts or tribunals, to special considerations in the American constitutional cases, to the political question doctrine and its British analogues, or to a host of miscellaneous theories emerging from the immigration cases, no basis for systematic deference in immigration cases is apparent. It is true that immigration cases tend often to present problems affecting foreign policy. But the argument advanced here has been that, as in other areas of law, that factor should be deemed relevant only to the extent that it applies to the individual case. In making that determination, a court should be guided by practical reality and not by legal fiction.

