Title

The Effect of Institutional Arrangements and Operations on Judicial Behavior in American Immigration Law—1883-1893 and 1990-2000

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This research project is a study of the effects of overarching institutional rules and structures on the behavior of judges[2] in the United States Supreme Court and the Federal Circuit Courts of Appeals of Appeal in immigration cases. These structures can either take the form of abstract cognitive structures, such as patterns of rhetorical legitimation specific to an institution, or the form of concrete arrangements and practices of an institution, such as the tripartite design of the federal government. The study spans two time periods, 1883-1893 and 1990-2000. Although at first glance the two periods seem dissimilar, I demonstrate that the modes of legal reasoning appearing in legal opinions that were first formulated in the historical period still appear in the contemporary period, thus illustrating the remarkable consistency and staying power of judicial norms and structures.

The point of departure in this study is the idea that it is fallacious to think in terms of an undifferentiated institution called "the courts." By focusing on separate levels of the judiciary and looking at the evolution of the immigration issue in different levels of the judiciary one can clearly identify *distinct* criteria by which various levels of the judiciary respectively determine whom to admit and exclude from the national polity via immigration rulings. That initial

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[2] Although members of the Supreme Court are commonly referred to as Justices, for the sake of simplicity, I refer to members of the Supreme Court and Circuit Courts of Appeals as "judges."

finding, that separate levels of the court employ dissimilar modes of legal reasoning to assess immigration questions, guides the central research question of the dissertation: What explains the differences in the patterns in legal reasoning used by the Supreme Court and the Circuit Courts of Appeals in immigration cases?

The approach to explaining judicial behavior taken in this dissertation is not to focus on individual level behavior of the judges or to study their decision making in a vacuum. Theda Skocpol, one of the leading scholars of institutional development, has described the courts as "profoundly rhetorical institutions bound to be affected by moral understandings deeply embedded in categories of political discourse[3]." In other words, the courts are bound by the shared norms and values of the national community. The courts are also institutions bound by a distinctive set of rules that proscribe rules, procedures, and rhetorical structures that constitute the possible range of judicial behavior. Therefore, judges must attempt to resolve the conflict between institutionally proscribed norms of judicial behavior and still have regard for broader societal norms derived from cultural understandings within the national community. Immigration law provides an opportunity to study the interaction of overarching norms, and external factors on judicial behavior.

Although the larger dissertation project examines the interaction and effect of both cognitive and concrete structures on judicial behavior, this paper focuses on the latter physical structures that are the rules and operations of the two courts. In this paper I outline three rules and operational conventions of the two courts and show how each of these affects the modes of legal reasoning adopted by each court. [This argument begins on page 20 after I lay out the puzzle, research design and methods.]

The Puzzle—An Incongruent Pattern of Judicial Behavior in Immigration Law

American immigration law is characterized by a particular pattern of judicial behavior. In cases dealing with deportation, exclusion (the prevention of an alien from being admitted to the US), and in cases where aliens have legally challenged government operations and procedures, the Supreme Court tends to cite Congressional plenary power over the subject as it defers to the "political" branches of government. Conversely, the Federal Circuit Courts of Appeals tend to focus on procedural due process issues and are less likely to be deferential to the other branches of government or federal administrative agencies.

At the Supreme Court level, immigration law is commonly regarded as an anomaly or a "constitutional oddity" in the context of broader American public law because of the lack of inter-branch conflict in this area and also due to the relatively low levels of scrutiny applied by the Supreme Court to federal government actions in immigration matters. Citing Congressional plenary power in this area of law and a concern for national sovereignty, the Supreme Court has systematically deferred to Congress on immigration matters and has "declined to review federal immigration statutes for compliance with substantive constitutional constraints" despite the fact that the power to regulate immigration per se is not a constitutionally enumerated power of Congress.[4] Because of these characteristics, this area of law has been characterized as a "special

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[3] Thede Skocpol. *Protecting Soldiers and Mothers.* (Cambridge, MA: Harvard University Press, 1995), 371.
[4] Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review.* 6 (1985):25, 255. The closest reference to congressional power to regulate immigration is found in Article I Section 8 Clause 4, which gives Congress the power to regulate naturalization**.** Nowhere in the American Constitution is it explicitly stated that Congress has the power to regulate immigration policy more broadly.

subspecies", "a maverick", or "a wild card" within broader public law[5]. Peter Schuck describes the strange status of immigration law this way:

> Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedures, and the judicial role…In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith and individual entitlement is at the nadir.[6]

In contrast to other areas of public law, such as those dealing with issues of federalism or the proper scope and exercise of federal power versus the sovereignty of states, one finds no such intra-branch struggles in immigration law[7]. Indeed, one should *expect* conflict between branches in a government system deliberately designed as a tripartite system of separate powers and a split-level federalist system in which federal and state governments share power.[8] Underlying the odd position of immigration law at the Supreme Court level is the division of labor between Congress and the Supreme Court. Moreover, this phenomenon of Court deference to Congress is not a historical artifact; it is a phenomenon that continues to the present time.[9]

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[5] Stephen H. Legomsky, "Immigration Law and the Principle of Plenary Congressional Power." *The Supreme Court Review*, 255, Stephen Legomsky, "Ten More Years of Plenary Power: Immigration, Congress, and the Courts." *Hastings Constitutional Law Quarterly*. 22(1995): 925, and, Peter H. Schuck, "The Transformation of Immigration Law." *Columbia Law Review***.** 84 (1984): 1.

[6] Peter Schuck, "The Transformation of Immigration Law", 1.

[7] Schuck has noted "one searches the immigration cases in vain for a titanic intra-branch struggle like those that have occurred in other areas of public law." Peter Schuck, , "The Transformation of Immigration Law," 18.

[8] The founders of the republic certainly anticipated conflict when they deliberately built in checks and balances into the system to make sure that one branch would not overwhelm the others and to ensure that state government would have some level of autonomy from the national government. See the debates in *Federalist Papers* especially *Federalist* 49, 54, and 78. The other area of law that is marked by a lack of intra-branch conflict is foreign policy.

[9] See *The New York Times*, Sunday, June 27, 1999, Section 4. "Supreme Court—The Justices Decide Who's in Charge" Page 1 and page 4 by Linda Greenhouse. Greenhouse notes immigration remains an area of law in which the Court "gave considerable deference to the Government" in sharing Congress and the Administration's narrow view of rights of non-citizens in two cases: Reno *v. American-Arab Anti-Discrimination Committee*, and *Immigration and Naturalization Service v Aguirre*. This situation contrasts starkly to the ongoing battle on the doctrine of federalism in which the recent Court session reconfigured the Federal-state balance of power, prompting Walter Dellinger, Acting Solicitor General earlier in the Clinton Administration, to assert, "This is a Court that doesn't defer to government at any level." Greenhouse summed up the recent Supreme Court term by indicating

The pattern at the circuit court level is quite different. The treatment of immigration cases in the Circuit Courts of Appeals is not so anomalous compared to other areas of law. Given the doctrine of precedent or *stare decisis*, one would expect the lower courts to follow the Supreme Court's lead in deferring to Congress and finding for the government. At the minimum, one may expect these courts to show the same level of concern and recognition for national sovereignty and Congressional plenary power that the high court so often cites in immigration cases. In fact, one does not find doctrinal consistency between the Supreme Court cases and circuit court cases.

The differentiation between the Supreme Court and the circuit court decisions are more than just a question of who is winning and in which court. Upon further examination, the disparity in the legal opinions between the two courts is a qualitative one where the courts employ and emphasize dissimilar modes of legal reasoning. Hiroshi Motomura shows that in a number of deportations and exclusion cases involving nationals from different countries, the Supreme Court sometimes utilized procedural due process rulings as a "surrogates" for substantive constitutional rights. He shows that the Supreme Court (and some Circuit Courts of Appeals) has not made substantive due process rulings, or rulings on the basic rights of an individual that a government may under no circumstance infringe. Instead, the Supreme Court has, on occasion, emphasized procedural due process rulings that require the government go undertake certain procedures before they take away the rights or liberties of an individual. He hypothesizes that the Court used these "surrogates" because the plenary doctrine seems to bar

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that "It was the Court's lack of deference to its ostensibly co-equal branches that was most notable." (Section 4, page 1, columns 2 and 3)

substantive due process rulings.[10] However, he emphasizes that this practice by the Supreme Court is infrequent, unsystematic and unpredictable.

The findings in this dissertation in fact show that it is not just the Supreme Court that occasionally makes procedural rulings and finds in favor of aliens. Among the Circuit Courts of Appeals, this practice is quite common. Articulating a concern for the principle of procedural due process, the Circuit Courts of Appeals have in many instances ruled against the government and for the aliens. The result of the Circuit Courts of Appeals emphasis on procedural due process principles has been that aliens[11] have been successful in their court battles against the government at the circuit court level. This pattern holds across the Fifth, Ninth, and Eleventh circuits. While the Supreme Court only occasionally feels uncomfortable enough about the plenary power doctrine to make statutory interpretations in favor of aliens, the practice is far more common for the Circuit Courts of Appeals.

This empirically observable disjuncture between the Supreme Court and Circuit Courts of Appeals' treatment of immigration is anomalous for several reasons. First, as indicated earlier, it is unusual for lower courts not to follow the precedent set by the Supreme Court in similar cases, especially since the Supreme Court has been consistent in its treatment of immigration questions. Second, the two levels of courts seem to be preoccupied with entirely different sets of concerns when adjudicating immigration cases. On the one hand, the immigration opinions show that the Supreme Court is deferential to Congressional plenary power on the subject and the Court often

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[10] Hiroshi Motomura, Hiroshi. "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation." *Yale Law Journal*. 100 (1990): 545 and Hiroshi Motomura, "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights" *Columbia Law Review*. 92 (1992): 7.

[11] Several cases in the 2001 Supreme Court term, including *Tuan Anh Nguyen v INS*, 99-2071*; INS v St. Cyr*, No. 00-767; and *Zadvydas v David*, et al, No. 997791; indicate a move away from the automatic plenary power

cites immigration as an extension of national sovereignty. On the other hand, the Circuit Courts of Appeals seem more concerned with procedural due process and far less concerned with the issues the Supreme Court finds compelling. Finally, the Supreme Court has in other instances viewed itself as the protector of "discrete and insular minorities."[12] Why has the high court not consistently taken up its self-proclaimed role to defend aliens who, based on their disenfranchisement alone, could be considered a discreet and insular political minority?

Contending Explanations

There is an array of theories that seek to explain judicial behavior. I will lay out two lines of analysis that are specific to immigration law. One is the national sovereignty explanation that holds that the power to exclude or deport aliens is inherent in any nation's sovereignty, and that Congress rightly exercises that power.[13] Peter Schuck supplements the national sovereignty explanation with a cultural dimension. He contends that the Supreme Court defers to Congress on immigration matters because of national consensual understandings of "solidarity and nationhood." He writes, "in a constitutional system marked by an extraordinary degree of political, institutional and social fragmentation, manifestations of solidarity and nationhood can exercise a potent hold over the judicial, as well as the lay, imagination."[14] The fractured decisions from the American judiciary on immigration, however, calls Schuck's

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deference to Congress. At this time it is not clear whether this trend will hold, especially in light of the September 11, 2001 terrorist attack, which I suspect will invigorate the plenary power doctrine.

[12] The Supreme Court stated in the now famous footnote number four in *U.S. v Carolene Products*, 304 U.S. 144 (1938), that the Court perceived the role of the institution as being the guardian of politically weak "discreet and insular minorities." The court saw its role of guardian of minorities as requiring it to submit policies that affected such groups to "more searching judicial inquiry."

[13] Legomsky, "Immigration Law and the Principle of Plenary Congressional Power", 273.

[14] Schuck, "The Transformation of Immigration Law", 17.

conclusion into doubt. Several studies have shown that American courts differed on what protections and benefits should be afforded aliens[15], which in effect is an intra-judiciary disagreement over the rules of membership in the national community. Perhaps there are cracks in the national consensus. This explanation may account for the pattern of outcomes at the Supreme Court level, but it falters when used to explain the behavior of the lower courts. Why were the Circuit Courts of Appeals bound by the different "consensual understandings of solidarity and nationhood" that the Supreme Court and Congress?

In addition, the foreign policy explanation holds that immigration policy is closely associated with American foreign policy and national goals. In turn, foreign policy and national security is viewed as being the province of Congress or the Presidency, not the judiciary. However, the connection between immigration and foreign policy is often tenuous and is not a sufficient explanation for Supreme Court deference in immigration. Louis Henkin thinks that the link made by Justice Field between national security and excluding Chinese laborers in Chae Chan Ping "Seems far-fetched; moreover, preserving national security is not to be found among enumerated powers of Congress or the federal government."[16] Similarly, Alex Aleinikoff indicates that while some immigration actions may be tied to foreign policy or national security, "the bulk of the immigration code has little to do with foreign policy. Consider for instance provisions that create preferences for close family members, exclude persons with contagious

[15] See Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation." and Motomura, "The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights" , 7, and McClain, *In Search of Equality—The Chinese Struggle Against Discrimination in Nineteenth-Century America*., Salyer, *Laws Harsh as Tigers—Chinese Immigrants and the Shaping of Modern Immigration Law, 1995*

[16] Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny." *Harvard Law Review*, 100(1987): 853, 862.

diseases, or deport aliens for having committed serious crimes."[17] The foreign policy explanation seems to be used as a catchall explanation for many Supreme Court actions in immigration even when the facts of the case do not appear to be relevant to national foreign policy. The limited overlap between national security and foreign policy suggest that the motivation for the plenary power doctrine and its perpetuation lies elsewhere.

The Historical Institutional Approach

Recent social science literature has taken a renewed interest in institutions and their political development over time.[18] The historical institutionalist literature of today treats institutional rules and structures as crucial variables that may shape and constitute the behavior of institutional occupants. Historical institutionalists adopt a broader definition of institution than the notion used by old institutionalist who conceived of institutions as formal structures of government as specified by the Constitution. Rogers Smith's defines institutions as, "not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as patterns of rhetorical legitimation characteristic of certain traditions of political discourse or the sort of associated values found in popular belief systems."[19] This broader definition of institutions includes both the physical organization and structure of the courts themselves. Smith's definition also includes less tangible but nonetheless durable structures such as legal

[17] T. Alexander Aleinikoff, "Citizens, Aliens, Membership, and the Constitution," *Constitutional Commentary*. 7:9-34, 12

[18] Orren and Skowronek, "Beyond the Iconography of Order; Notes a 'New Intuitionalism'"311-30 and Theda Skocpol, *Protecting Soldiers and Mothers*. Also, for a masterful account of US immigration policy development using a periodization approach, see Daniel J. Tichenor (forthcoming, Princeton University Press, 2001)

[19] Rogers Smith "The New Institutionalism and Normative Theory: A Reply to Barber." *Studies of American Political Development* (Cambridge University Press, 3(1989): 91.

principles and legal norms. Since all of these features influence judicial behavior, this definition aptly describes courts as institutions and will be used in this dissertation.

Even as political scientists embrace historical institutionalism, many have pointed out that there are several different threads in this approach. One is the focus on the simultaneous evolution of normally (and seemingly) unrelated sequences.[20] This conceptual approach involves the identification of independent and enduring structural roles and norms within the boundaries of a single institution and their interaction with "other persistent patterns" not necessarily within that same institution. As noted by Orren and Skowronek, the aim of this approach is not to focus on the political significance of the "relative autonomy" of the enduring structures in the institution as much as to concentrate on the interaction between those structures and other processes and patterns.[21]

The conceptual approach used in this dissertation borrows from the historical institutionalist framework. I maintain that judicial behavior in immigration becomes clear and explicable only when studied through the lens of historical institutionalism.[22] Distinct institutional norms are in conflict with of aliens' claims at the Supreme Court level but in support of these same claims at the circuit court level. By identifying what these enduring structures are, and at which level of the judiciary they are located in, I then argue that two distinct sets of institutional norms are at work in influencing the behavior of the Supreme Court and Circuit Courts of Appeals. These norms cause the respective levels of the judiciary to adopt specific modes of reasoning in adjudicating cases. For example, the notions of plenary power and

[20] Paul Pierson, "Not Just What, but *When*: Timing and Sequence in Political Processes" *Studies of American Political Development*. 14 (spring 2000): 92.
[21] Orren and Skowronek, "Beyond the Iconography of Order; Notes a 'New Intuitionalism', 326.
[22] I am paraphrasing from Smith. "Political Jurisprudence, the 'New Institutionalism', and the Future of Public Law."

national sovereignty as understood by the Supreme Court in immigration cases is a stable one that better explains judicial behavior in this area of law than the policy or ideological preferences of individual judges.

While analysis of all the cases in the study reveals that the Supreme Court frequently cites national sovereignty and plenary power as justifications for the government's exclusion and deportation of immigrants, there was not a single mention of these reasons as justifications in circuit court cases in 1883-1893 and fewer than twenty notations in 1990-2000.

Research Design and Methods

Case Selection and Time Period

The empirical portion of the study involves interpretative content analysis of a total of 1, 727 legal opinions on immigration from the Supreme Court and the Federal Circuit Courts of Appeals of Appeal in two time periods, 1883-1893 and the 1990-2000. The main purpose of comparing two time periods is that overarching structures such as legal principles and institutional norms can only be uncovered over time, and not in a single snapshot moment of analysis. As Skocpol observed, this type of historically grounded investigation is a means by which scholars are "not just looking at the past, but looking at *process over time."*[23] Although at first glance the two time periods seem dissimilar, the modes of legal reasoning formulated in the historical period lay the groundwork for almost identical modes appear in the contemporary cases. This similarity illustrates remarkable degree of consistency and continuity in judicial reasoning over time.

Extending the time frame of the study also allows for a larger number and range of cases that in turn provides for more variation in outcomes of social experience in the data.[24] The two time periods allow a comparison of the development of immigration law in the courts while also varying the ethnic and racial backgrounds of the aliens as well as the specific facts of the cases. In addition, the time frame encompasses moments of restriction and non-restriction. The historical period, 1883-1893, reflects the ten-years following the passage of the Chinese Exclusion Act in 1882, a highly restricitonist era in American immigration history. The 1990s period encompasses a time of openness following the Immigration Act of 1990 and a period of restriction beginning in 1996. The premise in employing this diachronic approach is that institutional norms and legal principles are enduring, transcendent structures whose "relative autonomy" means "they cannot be explained completely by reference to external political, social, or economic factors."[25] These legal norms and principles influence judicial behavior in fairly predictable ways regardless of the time period, nationality of the aliens or the specific fact pattern of the cases.

The set of cases for the historical period includes all the Supreme Court and Circuit Courts of Appeals' opinions from 1883-1893 on immigration, a total of eight opinions from the Supreme Court and 27 from the Circuit Courts of Appeals.[26] In the modern period, the data consists of all the Supreme Court cases on immigration, a total of 17 cases.[27] The modern

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[23] Theda Skocpol and Paul Pierson, "Historical Institutionalism in Contemplator Political Science" Paper presented at the 2000 American Political Science Association annual conference. (Washington, DC: August 30- September 2, 2000), 9. Original emphasis.
[24] Skocpol and Pierson, "Historical Institutionalism in Contemplator Political Science", 9
[25] Robert W. Gordon, "Critical Legal Studies Forum: Critical Legal Histories" in *Stanford Law Review* 36 (1984) :57, 102.
[26] The cases were obtained using the Lexis/Nexus database with the search term "immigration" with the relevant time constraints.
[27] The cases were obtained using the Lexis/Nexus database with the search term "immigration" and "exclusion" or "deportation" with the relevant time constraints.

sample also includes all immigration cases dealing with exclusion and/or deportation from the Fifth circuit (146 cases) and the Eleventh circuit (72 cases) as well as a random sample of these same types of cases from the Ninth circuit (1,457 cases). It was necessary to limit the cases in the modern period to immigration cases having to do with exclusion or deportation because there are more than a thousand immigration cases every year in some of these circuits.[28] I use exclusion and/or deportation cases as proxy indicators of how the courts have chosen to define membership in the national community because in these cases, the courts must literally decide whether an individual is physically allowed to remain in the US or whether they should be removed or denied entry. Also, since the Ninth circuit adjudicates more than 3,000 cases during the decade of the 1990s, I was required to employ a random sampling procedure by reading every other case. This random sampling procedure works because the specific facts of the cases are less important than the patterns of reasoning that develop across time, across cases, and in different levels of the court.

The Fifth, Ninth, and Eleventh circuits are used to vary the ideological mix of the courts. This also allows for an assessment of the attitudinal/behaviorial model. These courts also provide the largest number of cases. The Ninth circuit alone adjudicates roughly one-half of all immigration cases in the US, and the Fifth Circuit is responsible for the second largest number of immigration cases. Also, the selection of these two circuits allow for testing the theory that "liberal" circuits, like the Ninth Circuit, are more likely to find for aliens and against the

[28] In fact limiting the sample to immigration cases having to do with exclusion or deportation captures roughly three-fourths of *all* immigration cases. An example of the kinds of cases that were excluded using this selection criteria were cases involving the enforcement of employer sanctions against US employers hiring illegals or cases involving, cases that less clearly required the courts to make a decision on community membership.

Government than conservative circuits, like the Fifth Circuit.[29] A sample of cases from the Eleventh circuit was added to the collected data in order to include a circuit that does not have a particular reputation for being either conservative or liberal. Also, due to its geographical location, the Eleventh circuit presumably adjudicates cases of aliens of different nationalities (Haitian and Cuban) than those of the Ninth and Fifth circuits (Mexican, Asian, Southeast Asian, and Middle Eastern). The addition of the Eleventh circuit allows for further variance of some factors that could potentially affect judicial behavior.

Methods

The primary data in the study is the set of 1,727 legal opinions. I analyzed the content of these opinions for the judges' modes of reasoning to demonstrate patterns in the judges' modes of reasoning. Why use legal opinions in the first place and what kinds of evidence did I hope to unearth from these opinions? The considerations here were not only logistical and practical, mainly that it may be impossible to actually interview all the Supreme Court and circuit court judges, but as Robert Gordon indicates:

> [Case law and treatise literature] are among the richest artifacts of a society's legal consciousness. Because they are the most rationalized and elaborated legal products, you'll find in them an exceptionally refined and concentrated version of legal consciousness. Moreover, if you can crack the codes of these mandarin texts, you'll often have tapped into a structure that isn't' at all peculiar to lawyers but that is the prototype speech behind many different dialect discourses in society.[30]

[29] See *Almanac of the Federal Judiciary* (ed. Christine Housen and Mean Chase) Vol 2(2000-2) Aspen Law and Business. The Almanac reports "The fifth Circuit is still one of the most conservative courts in the country despite the influence from recent Clinton appointees according to lawyers interviewed." (5th Circuit, 1). The *Almanac* also reported that there was a split among the lawyers interviewed on the reputation of the Ninth Circuit as a liberal court. Some attorneys thought the Court was "diverse" and "moderate." Others thought the Ninth Circuit was "very liberal court as a whole. They are very suspicious of the government. I think the court is very liberal." (9th Circuit, 4) There is also plenty of anecdotal evidence from immigration practitioners about the reputations of the Ninth and Eleventh Circuits being liberal and conservative respectively.

[30] R. Gordon, "Critical Legal Studies Forum: Critical Legal Histories", 120.

Legal opinions then, may be the *best* source of evidence if one is searching to unravel the relationship between judicial principles and enduring structures, external trends, and judicial behavior.

The first task was to identify and document the kinds of modes of legal reasoning that appear in immigration cases and to see if any patterns to the modes of reasoning in the cases emerged. The cases may or may not contain modes of legal reasoning and some may have multiple reasoning. For the most part these modes of legal reasoning were fairly explicit and easy to spot. For example, in many cases the Supreme Court consistently and explicitly cites Congressional plenary power over immigration or national sovereignty. Similarly the Circuit Courts of Appeals refer to their assessment of whether there were procedural errors or whether the adjudication process was fair in the case. These reasoning were the *justification* or *rationale* cited by the judges in the opinions to explain why they reached the particular legal outcome in each case. More specifically the legal reasoning I documented were rhetorical references to broader societal or political cultural values and beliefs, or references to legal principles and conventions.

Given these criteria, there were also cases where there was no clear mode of legal reasoning presented. In these cases, the judges either did not give a reason for their ruling, or did not refer to ideas that transcended the specific law they were applying to the specific facts of the case before them. By contrast, there were cases where multiple modes of legal reasoning were cited. In such instances I took note of whether these reasoning appeared in the majority or dissenting opinion. I considered the legal reasoning presented in the majority opinion to be the

primary or dominant mode of legal reasoning in that case and those that appeared in the dissent to be secondary modes of legal reasoning.

While identifying the primary modes of legal reasoning, I also noted the frequency that they would appear, and also the level of the judiciary in which they would manifest themselves. The overall goal of employing content analysis in this manner was to ascertain the nature of the connection between institutional norms and judicial behavior and whether these connections occurred in predictable patterns.

As previously noted, the most commonly reoccurring modes of legal reasoning had to do with Congressional plenary power and national sovereignty that occurred in the Supreme Court and many references to procedural due process in the Circuit Courts of Appeals. Other reasoning that appeared in the opinions, albeit not with any frequency or consistency, were also documented. For example, in the historical Supreme Court opinions, one mode of legal reasoning was based on contemporaneous understandings of race in which the Court articulated the un-assimilability of certain racial and ethnic groups. Another rationale was economically based in which certain immigrants allegedly constituted unfair economic competition for American workers. Additional reasoning was based on class and argued that Chinese merchants were desirable immigrants while Chinese laborers were not, and religion, arguing that the exclusion law could not have intended to exclude a church rector since the US is a Christian nation.

After identifying and discussing the genealogy of the modes of reasoning that most often occurred, I show that these modes appear consistently across a range of cases and across time. By doing this I point out where and when these patterns hold. The modes of legal reasoning that reoccur at the Supreme Court level along with those at the Circuit Courts of Appeals level were

analyzed and juxtaposed against "short term" modes and were temporally specific and case specific. In so doing, I show the connection between reoccurring modes of legal reasoning that are institutionally based and the influences of temporarily occurring phenomena.
Ultimately, the research design of this dissertation with its attention to two different levels of the judiciary, its inclusion of a large number of cases, and its analysis across two time periods, shows the existence and persistence of structures, as illustrated by reoccurring modes of legal reasoning. Moreover, it illustrates not only how these structures operate autonomously in the different courts, but also in tandem across time.

Concrete Structural Norms and Operations

In another chapter, I examined the origins of national sovereignty and due process, the two main ideological frameworks used by circuit court judges and Supreme Court justices in immigration cases. While national sovereignty grants sweeping powers to the federal government to exclude and deport aliens, procedural due process urges attention to the fairness of the procedures the federal government must undertake before an alien is excluded or deported. I concluded that the Circuit Courts of Appeals were more likely to appeal to due process for their legal reasoning while the Supreme Court was preoccupied with national sovereignty. In this paper I will investigate why each of these modes of legal reasoning appear more frequently in one court and not the other.

As previously noted, one of the most dominant themes in immigration cases at the Supreme Court level in both time periods of this study is the idea that Congress has plenary power over immigration and that the proper role of the Court is to defer to Congress. The position of the Supreme Court as a policy court and political court helps explain why plenary

power is a recurring theme in the high court and not in Circuit Courts of Appeals. In addition to a recurring mode of legal reasoning, plenary power can also be conceived of as an institutional and political arrangement among the three branches of government to divide up their labor and jurisdiction over policy areas. But what necessitates this plenary power arrangement and why is it only an arrangement involving the Supreme Court and not so much the Circuit Courts of Appeals?

Many legal scholars have described the Supreme Court as a "policy court" or a "political court" while the Circuit Courts of Appeals are viewed as "courts of appeal," meaning that the high court is actively making public policy while the Circuit Courts of Appeals are adjudicating legal questions specific to each case. In this section, I will identify three norms operating in the different courts. These norms are neither explicitly codified in circuit court manuals, nor outlined in the Constitution. Having evolved from the design of the judicial branch, tradition, and necessity, they function nonetheless as institutional norms that help to explain the legal reasoning used by the circuit court and Supreme Court judges in immigration cases. The practices and operational procedures I discuss in this chapter have become stable and enduring structures and norms that shape judicial behavior in immigration cases.

First, I will suggest that the perceived goals and images of each court directly affect the kinds of legal reasoning they employ and adopt when dealing with immigration issues. Second, I show how the ability or inability of each court to control its own docket influences the kinds of legal reasoning that they appeal to when deciding immigration cases. Finally, I argue that the different workload pressures of the two courts contribute directly to the standards of review they adopt. This in turn dictates the modes of legal reasoning they employ in adjudicating immigration cases.

The Role of Selective Overseer vs Error Corrector

Many observers have noted that the Supreme Court holds a unique position in the judicial hierarchy because of the broad influence of its rulings that extend far beyond the individual parties in the case. Indeed the high court is aware of its sway and actively selects cases to weigh in on important policy questions. One circuit court judge interviewed by J. Woodford Howard Jr. stated that because of the Supreme Court's ability to pick and choose cases involving "an important federal question[31]" the Supreme Court was "not a law court, but a political court."[32] The Supreme Court's Rules, specifically Rule 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for *compelling* reasons… A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.[33]

From the high court's rule 10 one understands that the Supreme Court will not accepted routine cases or cases where there is factual error or misapplication of the law. Instead the Supreme Court concerns itself only with the most serious and "compelling" questions of jurisprudence and policy. For this reason Howard says, "The Supreme Court is a policy court; Court of Appeals are Circuit Courts of Appeals."[34] The main difference in Howard (and his interviewee's) mind is that the Supreme Court is not an "error correction" court like the lower courts. Instead it picks

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[31] Supreme Court Rules, Rule 10, "Considerations Governing Review on Certiorari" (formerly Rule 19)
[32] J. Woodford Howard Jr. *Circuit Courts of Appeals in the Federal Judicial System—A Study of the Second, Fifth, and District of Columbia Circuits.* (New Jersey: Princeton University Press, 1981), 138. Many would argue that there is no such clear cut distinction between law and politics and that any legal decision carries political ramifications, but it is useful here to draw a line between purposive and active intent to weigh in on a political question and decisions that may have political ramifications.
[33] Supreme Court Rules, Rule 10, "Considerations Governing Review on Certiorari" (emphasis added)
[34] Howard, *Circuit Courts of Appeals in the Federal Judicial System—A Study of the Second, Fifth, and District of Columbia Circuits,* 138.

its cases to actively and selectively "oversee" the political and judicial system.[35] Donald Songer, Reginald Sheehan, and Susan Haire make a similar point in describing the impact of the judicial rulings this way:

> While appeals courts may decide cases having important policy consequences, the majority of their decisions affect only the litigants involved in the case. This is quite different from litigants appearing in the Supreme Court, who wish to win, but whose primary interest lies in establishing a national policy through precedent.[36]

One of the basic differences between the Supreme Court and Circuit Courts of Appeals is that the former is *expected* to make decisions with more public and far reaching ramifications beyond the litigants involved in the cases while the latter is not. The status of the Supreme Court as a political court also helps to explain the often grand and sweeping tone of many Supreme Court opinions on immigration. These decisions refer to the "national interest", "national security", and "national sovereignty".

Although it is true that Supreme Court decisions are higher profile than Circuit Courts of Appeals ones, the characterization of the high court's impact misses the mark. What became clear from the data in this study is not that the Supreme Court is more political than the Circuit Courts of Appeals, but that that both courts make policy—but *different* kinds of policies. The Supreme Court concerns itself with only important jurisprudential questions of immigration policy, leaving routine cases or cases arguing the misapplication of laws or misinterpretation of facts to the lower courts. Meanwhile, the Circuit Courts of Appeals are hashing out, case-by-case, what qualifies as procedural due process in immigration and what is the definition of prosecution for asylum seekers. For most of the aliens in immigration proceedings, the Circuit

[35] Howard, *Circuit Courts of Appeals in the Federal Judicial System—A Study of the Second, Fifth, and District of Columbia Circuits*, 76.

Courts of Appeals are the court of last resort, therefore, the Circuit Courts of Appeals are instrumental in setting immigration policy as well, albeit on less high profile matters than the Supreme Court. In effect there are two types of immigration policy being made. The first kind involves decisions on grand jurisprudential questions such as whether aliens have first amendment rights to free speech and whether the treatment and detention of suspected alien terrorists. The second kind of policy involves more technical legal questions such as what constitutes due process for immigration purposes. The Supreme Court has *de facto* left the more technical issues for the Circuit Courts of Appeals to resolve.

Additional evidence that supports the idea that the two courts are making different kinds of policy for different "constituents" is that the judges are writing for different audiences. Richard Posner, a sitting circuit court judge himself, reports that the appellate courts (as opposed to trial courts) are "deciding cases and writing opinions for the guidance of the bar and the district bench and for the illumination of other appellate judges, law professors and law students, and to do the job right he or she must be aware of this broader audience."[37] I believe Posner's assessment here mainly applies to the Circuit Courts of Appeals. I would argue that the Supreme Court writes for an even broader national audience of legal practioners, law professors, advocacy groups, and the general public. While the Supreme Court's decisions often make news headlines, the Circuit Courts of Appeals "receive no media coverage because their decisions are often less dramatic than the pronouncements of the Supreme Court."[38] Ironically, the Circuit

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[36] Donald R. Songer, Reginald S. Sheehan, and Susan B. Haire. *Continuity and Change on the United States Circuit Courts of Appeals.* (Ann Arbor: University of Michigan Press, 2000), 89.
[37] Richard A. Posner. *The Federal Courts—Challenge and Reform.* (Cambridge, MA: Harvard University Press, 1996), 350.
[38] Songer, Sheehand and Haire. *Continuity and Change on the United States Courts of Appeal*, 3.

Courts of Appeals, which are most likely the court of last resort for the majority of litigants, often do not register on the public's radar screen.

Furthermore, the circuit court judges themselves are keenly aware of whom they are writing for. Howard's study found that "though some judges acknowledged shifts in writing style when addressing major public issues, they were more sensitive to professional criticism and consumers of federal appeals *than to public opinion or even the Supreme Court*."[39] In his survey of federal judges, Howard found that circuit court judges were most concerned with what their fellow judges and the litigants and parties before them thought of their performance. Also, on the whole, they found the opinion and influence of the public and interest groups as falling outside their frame of reference and deemed public opinion "not important."[40] If the Supreme Court judges are accustomed to being in the national and media limelight, the circuit court judges are equally accustomed to operating in the stage wings. But both are making policy in their own realms.

The Judicial Hierarchy in Theory and in Practice

It is evident that the Supreme Court has established a consistent and an observable pattern of behavior in which deference to the other branches of government is the norm. One would expect the lower courts to have a similar pattern of behavior and use of legal reasoning given the hierarchical set up of the judiciary. We have all seen flow charts of the organization of the American judiciary; one would see the Supreme Court sitting at the top of the chart with the Circuit Courts of Appeals and district courts below it. One might reasonably infer that the

[39] Howard, *Circuit Courts of Appeals in the Federal Judicial System*, 151. (emphasis added)
[40] Howard. *Circuit Courts of Appeals in the Federal Judicial System*, 151-152.

Circuit Courts of Appeals are subordinate to the high court and the latter would have the last word based on the precedential impact of its rulings.

The reality is quite different. Howard described the Federal Circuit Courts of Appeals as "widely diffused among lower court judges who are insulated by deep traditions of independence, not only from other branches of the government but also from each other."[41] Howard's statement points to two unique structural features of the judiciary. First, due primarily to the fact that the Supreme Court reviews such a small number of cases, the Circuit Courts of Appeals enjoy a degree of independence from the high court. Second, the Circuit Courts of Appeals lack the accountability to the other branches of government because their cases are not as closely scrutinized as the Supreme Court ones. This insulation provides the Circuit Courts of Appeals some degree of independence based on the sheer logistics of caseload management that belie the linear, hierarchical organizational flow charts.

The Supreme Court, with its limited resources and the luxury of controlling its own docket, can choose to hear a very small number of cases. Meanwhile, the Circuit Courts of Appeals have no control over their dockets and must adjudicate all of the appeals before them. In reference to this situation, Songer and his co-authors wrote, "The rising caseloads of the U.S. Circuit Courts of Appeals, recently estimated at over 37,000 cases per year, coupled with the lack of review by the Supreme Court, has contributed to greater autonomy for the appeals courts."[42] Songer et al added that the Supreme Court is "severely limited" in its policymaking because of the small number of cases it hears and that "much of the development of precedent

[41] J. Howard. *Circuit Courts of Appeals in the Federal Judicial System*, 3.
[42] Songer, Sheehan, and Haire. *Continuity and Change on the United States Circuit Courts of Appeals.*131.

and the shaping of legal policy is left to the court of appeals."[43] The practical effect of these numbers is that the Supreme Court, the "highest court in the land", is *less* influential than the Circuit Courts of Appeals, part of the "inferior courts" which particularly in immigration, are *more* influential.

Related to the number of cases is the fact that the Supreme Court has no formal way of sanctioning the lower courts if they do not follow the high court's lead. Supreme Court opinions are not self-executing. Civil Rights era cases are a testament to the Supreme Court's impotence in regard to enforcing their decisions. The well-known story in civil rights history was that the other branches, particularly the Executive, had to step in before the Court's civil rights decrees were enforced. But the Supreme Court does not only face a problem of compelling other parties to comply with its rulings. It also is unable to enforce its will on the lower courts through rulings because of the small number of cases the high court hears. Based on his study of the Second, Fifth, and DC Circuit Courts of Appeals, Howard wrote, "The threat of reversal was so slim—roughly 1 percent of the circuit decisions and 4 percent of district court decisions [were actually reversed by the Supreme Court]."[44]

Similarly Songer et al said that, "the objective odds that any given decision will be reviewed are so low that it seems safe to assume that the consequences of review are not likely to weigh heavily on the minds of the appeals court decision makers."[45] The circuit court judges are well aware of the small odds of reversal. This fact may also explain not only why the Circuit Courts of Appeals have consistently been able to raise due process issues while also minimizing the Supreme Court's focus on national sovereignty and plenary power in immigration cases.

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[43] Songer, Sheehan, and Haire. *Continuity and Change on the United States Circuit Courts of Appeals,* 13-15.
[44] J. Howard. *Circuit Courts of Appeals in the Federal Judicial System,* 83.

The consequence of the Supreme Court's limited review of cases, coupled with its inability to actually enforce its decisions on the Circuit Courts of Appeals, is that the modern Circuit Courts of Appeals are more influential as policy makers because in immigration cases, they have more opportunities to make policy. The actual number of published immigration decisions from the Circuit Courts of Appeals in the years 1990-2000 underscores the limited role of the Supreme Court in reviewing these types of cases.[46] In the ten-year period between 1990-2000, the Fifth circuit published 152 decisions on immigration. The Ninth circuit published approximately 3,068, and the Eleventh circuit published 81 decisions.[47] These three circuits alone heard more than 3,300 cases. In stark contrast, the Supreme Court in this same time period heard a total of 17 cases in the ten-year period. Given the growing volume of cases the circuits must hear (because they do not control their own docket), it is these courts that are primarily responsible for most of the judicial oversight over administrative agencies like the INS and the Board of Immigration Appeals (BIA). Therefore, the Circuit Courts of Appeals are arguably more influential in immigration cases, particularly in deciding what constitutes procedural due process and the standards for granting asylum, than the Supreme Court.

Intended Purpose of the Circuit Courts of Appeals

Looking at the history of the Circuit Courts of Appeals provides another piece of the puzzle toward explaining why the Supreme Court and Circuit Courts of Appeals may emphasize and favor different modes of legal reasoning. The Constitution is very vague on the structure of

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[45] Songer, Sheehan, and Haire. *Continuity and Change on the United States Circuit Courts of Appeals*, 18.
[46] As a rule of thumb, each circuit publishes roughly one third of their decisions. Many cases are adjudicated without the circuit court having issued a published opinion. So the number of actual immigration cases decided by the circuit courts is higher than the published opinions show.

the judicial branch. Article III Section I is very vague in its mandate for the creation of "such inferior courts as Congress may from time to time ordain and establish." The passage says nothing about the purpose or role of these inferior courts.

There is evidence that the Circuit Courts of Appeals were originally designed to "focus on their role of error correction."[48] The original Circuit Courts of Appeals consisted of panels of two Supreme Court justices who would "ride circuit" along with one other district court judge. As the workload grew, this arrangement became unworkable during a time where comforts of modern transportation did not yet exist.[49] There needed to be a better way to coordinate the panels of judges. Posner reports that one solution was to create "intermediate appellate courts—intermediate, that is, between the trial courts [the district courts] and the supreme Court of a jurisdiction."[50] Congress eventually created the intermediate federal appellate courts via the Evarts Act of 1891. Major reforms to reduce the number of cases under the Supreme Court's jurisdiction began in 1911. By 1925, the Supreme Court was given almost full discretion over its docket. The final round of reforms was completed in 1988.[51]

The original design of the Circuit Courts of Appeals as primarily error correction tribunals seems to explain the pattern of legal reasoning we found in the early circuit court immigration cases from 1883-1893. During this period, they tended to follow the Supreme Court's lead. Like the high court, the Circuit Courts of Appeals initially tied the power to

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[47] These numbers are from the data set used in this dissertation. For the purposes of the content analysis of this study, I took a random sample of the Ninth circuit cases by reading every other case.
[48] Songer, Sheehan and Haire. *Continuity and Change on the United States Circuit Courts of Appeals*, 134.
[49] R. Posner. *The Federal Courts*, 4.
[50] R. Posner. *The Federal Courts*, 4.
[51] R. Posner. *The Federal Courts*, 5. The history of the Circuit Courts in the United States is long and varied. See R. Posner, Chapter 1 of *The Federal Circuit Courts* for an overview. Also refer to Ashlyn K. Kuersten and Donald R. Songer. *Decision of the U.S. Circuit Courts of Appeals*. (New York, Garland Publishing, Inc., 2001), pages 17-21 for a chronology of the history development of the circuit court of appeals.

regulate immigration with Congressional power to regulate interstate commerce. In the circuit court version of *Edye and Others v Robertson*, about whether the state of New York had the right to tax steamship passengers, the circuit court said, "In view of decisions made by the supreme court there can be no doubt that this act is a regulation of commerce with foreign nations."[52] Later in the same opinion, the circuit court added that, "It is a tax laid to create a fund to be so used, which it must be assumed Congress has said is a tax laid to provide for the general welfare of the United States; and it is not the province of a court to say to the contrary."[53] The Circuit Courts of Appeals in this time period found nothing controversial about the early immigration cases and agreed with the Supreme Court that the federal government should immigration.

Another example of this consensus between the Supreme Court and the lower courts is found in the circuit court ruling of the *Head Money Cases*, where the circuit court noted on several occasions that the judiciary was not the proper branch to change policy. In the case *In re Chae Chan Ping*, the circuit version of the Supreme Court case, the circuit court of the Northern District of California stated:

> The responsibility of this hardship is not upon the courts. They do not and cannot make the law. That was a consideration to be addressed to Congress and the president. It is the duty of the courts to administer, and enforce the law as they find it. Hardship affords no justification, or authority, for the courts to take out of the provisions of the statute by force construction, matters that Congress clearly, and unmistakably, intended should not be expected.[54]

Similarly, in "The Case of Former Residence by a Chinese Laborer" also known as *In re Cheen Heong*, the same circuit court noted:

> If this construction [of the statute] works any hardship, it is for Congress to change the act. The court has no dispensing power over its provisions. Its duty is to construe and

[52] 18 F. 135, 137.
[53] 18 F. 135, 137-138 (1883)
[54] 36 F. 431, 433 (1888)

> declare the law, not to evade or make it…If as already stated, the law works any hardship, it is for Congress to change its. With that body it rests, under the constitution, to determine what foreigners shall be permitted to come to the United States and on what conditions remain.[55]

It was not just the Northern California Circuit that held this view and it was not just in reference to the exclusion of immigrants. The Louisiana Circuit also echoed the sentiment that the courts were not the branch to implement changes in naturalization policy and that any changes should be undertaken by the legislative branch. The Louisiana circuit's statement in *Comitis v Parkerson et al* says:

> My conclusion, for the reasons which I have thus stated, is that on the questions of naturalization and expatriation the judgment of the courts must not outrun the action of Congress, and the courts must carefully observe the lines of demarcation which the Congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by Congress, and not by the courts; and that the laws of Congress do not authorize, nor do her own acts impute, any cessation of her citizenship of the United States.[56]

The Circuit Courts of Appeals between 1883-1893 upheld Congressional plenary power over immigration, which is consistent with the behavior of the Supreme Court in the same time period.

In the 1990s, the Circuit Courts of Appeals continued to be cognizant of plenary power as a mode of legal reasoning, although they did not treat it as an important or dominating aspect in adjudication. There were *fewer than fifteen* citations of plenary power between the Fifth, Ninth, and Eleventh Circuit Courts of Appeals among the roughly 1,800 cases that were sampled for this study. One such example is in *Rodiguez v INS*, a case from the Fifth circuit about the granting of a waiver of deportation. The majority in this case wrote: "Our review of immigration decisions is extremely limited." The opinion then cited *Fiallo v. Bell*, "…the power

[55] 21 F. 791, 793 (1884)

over aliens is of a political character and therefore subject only to narrow judicial review'." [57] The plenary power doctrine, which was first born in the 1880s, and strengthened by several Communist cases in the 1950s, continued to be viable to the Circuit Courts of Appeals in the modern period. Judging from the few times the theme is cited in modern circuit court cases, however, the Circuit Courts of Appeals find the mode of legal reasoning less defensible and persuasive than the Supreme Court does. Instead, by selectively citing from precedent, often found in Supreme Court dissenting opinions, they prefer to emphasize procedural due process issues. Why do the modern Circuit Courts of Appeals usually emphasize procedural due process instead?

Work Load, Standards of Review and Modes of Legal Reasoning

Another less obvious structural factor that affects the tone and content of legal opinions in immigration is the workload of the judges. This factor is especially relevant to the Circuit Courts of Appeals where they must adjudicate all cases that are appealed from the district courts or administrative agencies. While the Circuit Courts of Appeals historically were designed to be error correction tribunals, modern phenomena such as concerns about managing workloads have reinforced the error correction focus of the Circuit Courts of Appeals. With the explosion of cases in the Circuit Courts of Appeals, these courts have adopted a variety of measures to manage their caseloads including publishing only roughly one-third of all their decisions, cutting

[56] 56 F 556, 563 (1893)
[57] 9 F.3d 408 **(**1993) (citing *Fiallo v Bell*, 430 U.S. 787, 792, (1977) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976)).

back on the amount of time allowed by each party in oral arguments, and having law clerks take primary responsibility for "routine" or "easy" cases.[58]

One of the mechanisms Posner writes about that directly affects the kinds of modes of legal reasoning that appear in circuit court decisions is standards of review. Because of the large number of cases that the Circuit Courts of Appeals must review, they have adopted specific standards of review. Although there are some variations among the different circuits, they generally do not review most cases *de novo,* or by looking at the facts of the case and the application of statutes "from the beginning." Rather, these circuits have adopted abridged standards of review that call for deference toward the court or administrative agency being reviewed. As Posner writes, this deference works in part to:

> [R]educe the amount of work that the appellate court has to do in cases that are appealed, since it is easier to decide whether a finding is reasonable or defensible than to decide whether it is right, just as it is easier to grade an exam paper pass or fail than to grade it A, B, C, D or F.[59]

He adds that this effort to streamlining the judicial process to cope with the workload has led to a profusion of opinions with standards of deference summed up as "abuse of discretion" and "substantial evidence."[60] Certainly the immigration cases in this study confirmed this procedural standard of review adopted by the Circuit Courts of Appeals. To put these circuit court standards of review into context, such standards would be equivalent to a minimum level of scrutiny or "rational" test found in constitutional law. Although it is true that the Supreme Court also rarely reviews cases *de novo,* the high court does so out of a desire to pick and choose the issues they

[58] See especially R. Posner. *The Federal Courts*. Chapter 5 "Consequences: The System Expands…" for an in depth discussion of many of these measures adopted by the circuit courts.
[59] R. Posner. *The Federal Courts*, 177.
[60] R. Posner. *The Federal Courts*, 175-176.

wish to address; the Circuit Courts of Appeals use a streamlined review primarily out of necessity.

An example of the standards of review used by the Circuit Courts of Appeals is found in the Fifth circuit case *Silwany-Rodriguez v INS* (1992), which was an asylum and deportation case involving an alien with a drug conviction, the Fifth circuit laid out the standards of review it was employing in the case in the following manner:

> Considering the way in which this case developed, we address it both as a question of fact and as a question of law. To the extent it involves a question of law, this is subject to *de novo* review. Such review, however, "is limited," and the court "accords deference to the Board's interpretation of immigration statutes unless there are compelling indications that the Board's interpretation is wrong." On review, an agency's construction of its own regulations is controlling unless it is plainly erroneous or inconsistent with the regulation.[61]

Even when the Fifth circuit was reviewing a case *de novo*, it is not really the case that they began their review of the law and facts of the case "from the beginning." In *Silwany-Rodriguez*, the Fifth circuit clearly states their deference to the administrative agency, the BIA. They write that they will not overturn the decision of the BIA "unless it is plainly erroneous or inconsistent" with the Board's own regulations.

In terms of reviewing questions of fact, the Fifth circuit shows deference to the BIA's determinations and only examines the BIA decision for "substantial evidence" presented for its conclusions. The Fifth Circuit also wrote in the *Silwany-Rodriquez* case that:

> When questions of fact are presented, the court reviews the basis of the board's decision to determine whether its findings are supported by substantial evidence. "The substantial evidence standard requires only that the Board's conclusion be based upon the evidence presented and be substantially reasonable." Substantial evidence is a deferential standard, meaning that we cannot reverse the BIA simply because we disagree with the BIA's apprehension of the facts…To obtain a reversal of the board's decision under this standard, the alien must show that the evidence he presented was so compelling that no

[61] 975 F.2d 1157 (1992), 1160. Internal citations and footnotes omitted.

> reasonable fact-finder could fail to arrive at his conclusion. The evidence must not merely support the alien's conclusion but must compel it.[62]

As the Fifth circuit lays out its "substantial evidence" standard above, one can see that it is a standard that gives deference to the administrative agency and puts the burden of proof on the alien. This is a different standard from the one employed by the district court, which is a trial court where the judge would presumably look at all questions of fact and law *de novo*. The issue of this standard of review is not just the deference given to the administrative agencies. It is also the Circuit Courts of Appeals declining to review *de novo* the facts of the case because of its status as an appellate court and because its workload precludes a more extensive and detailed review.

It should be noted that the standards of review applied to administrative bodies like the Board of Immigration Appeals or Immigration Judges vary from circuit to circuit. As the Eleventh circuit in *Acosta-Montero v INS* (1995) says:

> The circuits have disagreed about the standard under which the Circuit Courts of Appeals should review the Board's decision in these cases. *See, e.g., Butros,* 990 F.2d at 1144 (labeling the question as "purely legal" and calling for de novo review); *Katsis,* 997 F.2d at 1070-71 (deferring to the Board's interpretation if it is "permissible" or "not arbitrary or capricious"). In *Jaramillo v. INS,* 1152-53 (11th Cir.1993) (en banc), which also involved an alien's eligibility for section 212(c) relief, we relied on the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), for the proposition that the Board's interpretation is entitled to deference and will be upheld as long as it is reasonable. Because Congress has not spoken directly to this question, the Board's interpretation is entitled to deference, assuming it is reasonable.[63]

In this summary of cases, the Eleventh circuit notes that other circuits have used standards that range from *de novo* review, to looking at whether the BIA's decision was "permissible" or "not arbitrary or capricious", to deferring to the BIA if it is "reasonable." Additionally, the standard

[62] 975 F. 2d 1157, 1160. Internal citations and footnotes omitted.

in the Ninth circuit is to review the BIA or Immigration Judge's decision for whether the decision and reasoning are supported by "substantial evidence." For example, in *Singh v INS* (1998) an asylum case, the Ninth circuit denied the applicant's petition for review and says: "We review the BIA's decision not to withhold deportation for substantial evidence. The factual findings underlying the BIA's decision are also reviewed for substantial evidence."[64] Despite the variations in the standards of review, the prevailing standard across all the Circuit Courts of Appeals is one of deference to the administrative agency and at levels of scrutiny far below what a *de novo* review would call for.

The workload problem that causes the Circuit Courts of Appeals to adopt streamlined and limited standards of review also dovetails with one of the original intents of the Circuit Courts of Appeals as appellate courts, which is to correct errors. As Songer, Sheehan, and Haire report:

> Whereas a trial court focuses on fact-finding and norm enforcement, the appellate court turns to examining questions surrounding legal error in the proceeding below. As a result procedural issues are more likely to be raised in the Circuit Courts of Appeals. In a courts and years where judges are pressured with high caseloads, procedural questions may provide the framework for the decision-making process as they are *less costly in terms of time and resources.*[65]

The reality that the Circuit Courts of Appeals must mange a growing workload helps to explain why procedural due process as a mode of legal reasoning in immigration cases appears far more often in the Circuit Courts of Appeals than in the Supreme Court. If the Circuit Courts of Appeals are focusing on whether an abuse of discretion has occurred or whether the reasoning by the administrative agency or district court was "reasonable," it makes sense that they would concentrate on procedural due process questions rather than substantive due process ones. In

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[63] 62 F.3d 1347, 1349 (1995) Some internal citations omitted.
[64] No. 97-70819 Lexis 9498 (1998) Some internal citations omitted.
[65] Songer, Sheehan and Haire. *Continuity and Change on the United States Appeals Courts*, 52. (emphasis added)

turn the focus makes the Circuit Courts of Appeals the arbiters of operative doctrine on what constitutes procedural due process in immigration and what qualifies as persecution in asylum cases.

Conclusion

Structural and operational features of the judiciary go a long way toward explaining the pattern in the modes of legal reasoning in immigration cases. I have demonstrated in this chapter that the court's position in the judicial hierarchy affects the judges' conception of their perceived roles, obligations, and motivations. Their views on these are not the same from the Supreme Court to the Courts of Appeal. The two courts have different policy foci, different audiences, and different institutional considerations based on the courts' positions in the judicial hierarchy. The status of the Supreme Court as the "political court," and the role of the Circuit Courts of Appeals as "error correctors" dissuaded the early Circuit Courts of Appeals from weighing in on grand, jurisprudential issues like national sovereignty. In 1990-2000, the Circuit Courts of Appeals' workload, which required a streamlined standard of review, led these courts to focus on procedural due process violations as a time saving mechanism. This concern about managing their workload and these courts' role as error correction tribunals also precluded them from delving into grand jurisprudential questions about national sovereignty and plenary power. The upshot of all of this is that structural features and operational norms derived from the design of the judicial hierarchy, tradition, and necessity have a lot to do with the kinds of modes of legal reasoning that appear in immigration law.

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