Why Refugee Status Should Be Beyond Judicial Review

By Rex D. Khan*

The history of refugees is as old as civilization itself.1 Throughout the ages, tragedies have forced people to flee their homelands in search of safety.2 We normally think of these refugees as unfortunate victims of human conflicts, natural disasters, and other calamities.3 This lay conception of refugees, however, is much broader than the legal definition of refugees. International law narrowly defines refugees as victims of political persecution.4 Under this persecution-based definition, people who are escaping from natural catastrophes, economic debacles, or even civil wars are not considered refugees.5

The persecution-based definition of refugees creates an unfair dichotomy of victims. On the one hand, victims whose sufferings sweep within the ambit of persecution may resettle in other countries.6 On the other hand, dispossessed people whose misfortunes fall outside this narrow definition have nowhere to go. This disparate treatment of victims demonstrates that refugee status is not truly based on humanitarian concerns. Instead, this Article contends that refugee status is inherently political in nature. As such, the determination of refugee

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1. See generally I. Atle Grahl-Madsen, The Status of Refugees in International Law 9-10 (1966) ("The history of refugees goes as far back as the known history of mankind itself. According to the Bible, Adam and Eve were driven out of Eden and became thereby the first 'refugees'.").
2. See id.
5. See Aleinikoff et al., supra note 3, at 986–87.
6. See id.
status should belong exclusively to the political branches of our government. Courts have no business reviewing such matters.

Part I of this Article shows that the current definition of refugee is fundamentally political, thereby forcing judges to venture beyond the province of the Judiciary and into the realm of politics. Part II points out that the political nature of refugee status invites unwarranted judicial activism, encourages judges to act like politicians, and, thus, threatens the integrity of the courts. Part III argues that refugee status is intrinsically discriminatory and, therefore, violates the rule-of-law principles of impartiality and consistency. Part IV contends that refugee status is a nonjusticiable political question and is beyond the judicial ken. Finally, Part V maintains that refugee status implicates sovereignty issues that are immune from judicial scrutiny. This Article concludes that determination of refugee status should be beyond judicial review.

I. Current System

A. Admission

1. Refugees

At the beginning of each fiscal year, the President, after appropriate consultation with Congress, determines the number of refugees that the United States should admit. The President bases this determination on humanitarian concerns and the national interest. For the past two decades, an average of 101,100 aliens have entered the United States as refugees every year.

Any alien who fits the definition of refugee and who is not firmly settled in any country, may apply to enter the United States at an overseas Immigration and Naturalization Services ("INS") office or at a United States consular office. If the alien is fourteen years old or older, he must appear before an immigration officer to determine whether he is eligible to be admitted as a refugee. If the overseas officer approves the application, the director of the port of entry will

8. See id.
11. See id. § 1157(c)(1).
12. See Aliens and Nationality, 8 C.F.R. § 207.1(a) (1999).
13. See id. § 207.2(b).
admit the alien into the United States as a refugee.\textsuperscript{14} If the officer denies the application, the alien cannot appeal the denial.\textsuperscript{15}

2. Asylees

An asylee is simply a refugee who is physically present, or has arrived, in the United States and is seeking political asylum.\textsuperscript{16} To apply for asylum, the alien first interviews with an asylum officer to see if he is eligible for asylum.\textsuperscript{17} To be eligible, the alien must prove that he qualifies as a refugee.\textsuperscript{18} If the officer finds the alien credible, then, barring any mandatory grounds for removal,\textsuperscript{19} the officer may grant asylum.\textsuperscript{20} Between 1973 and 1996, an average of 4,200 asylees entered the United States each year.\textsuperscript{21}

If the asylum officer decides that the alien does not qualify as a refugee, the officer will order the alien removed.\textsuperscript{22} The officer, however, must give the alien written notice of the removal order and ask the alien if he wishes to have an immigration judge review the order.\textsuperscript{23} If the alien requests such a review and the judge disagrees with the officer, the judge will vacate the removal order, and the alien may file for asylum again.\textsuperscript{24} If the judge agrees with the officer, then the alien will be removed.\textsuperscript{25} If ordered to be removed, the alien may appeal the immigration judge’s decision to the Board of Immigration Appeals (“BIA”).\textsuperscript{26} And if the BIA upholds the removal order, the alien may further appeal the BIA decision to a federal district court or a circuit court of appeals.\textsuperscript{27}

\textsuperscript{14} See id. § 207.4.
\textsuperscript{15} See id.
\textsuperscript{17} See Aliens and Nationality, 8 C.F.R. § 208.9(b) (1999).
\textsuperscript{18} See id. § 208.13 (explaining criteria for refugee status).
\textsuperscript{19} Mandatory grounds of removal apply to aliens: (1) who participated in persecution of another person; (2) who have been convicted of a crime that is serious enough to constitute a danger to United States communities if admitted; (3) who are a danger to United States security; or (4) who are firmly settled in another country. See 8 U.S.C. § 1158(b)(2) (1994).
\textsuperscript{20} See Aliens and Nationality, 8 C.F.R. § 208.14(b)(1) (1999).
\textsuperscript{22} See Aliens and Nationality, 8 C.F.R. § 208.30(e) (1999).
\textsuperscript{23} See id.
\textsuperscript{24} See id. § 208.30(f)(2).
\textsuperscript{25} See id. § 208.30(f)(1).
\textsuperscript{26} See id. § 3.1(b).
\textsuperscript{27} See 8 U.S.C. § 1105(a) (1994).
B. Definition

To qualify as a refugee or an asylee within the purview of the Immigration and Nationality Act\(^2\) ("INA"), the alien must either prove that he was actually persecuted or demonstrate that he has a well-founded fear of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion.\(^2\)

1. Persecution

The INA does not explicitly define the term persecution. To construe the meaning of an undefined statutory term, courts often turn to the statute's legislative history.\(^3\) With respect to the definition of persecution, the relevant legislative history begins with the Refugee Act of 1980.\(^3\) This Act amended the INA and codified the current persecution-based definition of refugee.\(^3\)

Although the Refugee Act does not define persecution, its legislative history suggests that Congress intended to bring the current definition of refugee into conformity with the United Nations definition of refugee.\(^3\) The United Nations, in its Protocol Relating to the Status of Refugees\(^3\) and its Convention Relating to the Status of Refugees,\(^3\) have defined a refugee as an individual who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion.


\(^{30}\) The author personally thinks that relying on legislative history is a form of unwarranted judicial activism; it invites judges to haphazardly speculate about obscure congressional intents. Cf. National Endowment for the Arts v. Finley, 524 U.S. 569, 594 (1998) (Scalia, J., concurring). In Finley, Justice Scalia criticized the majority's legislative-history-based statutory construction, stating:

[L]egislative history has no valid claim upon our attention at all. It is a virtual certainty that very few Members of Congress who voted for this language both (1) knew of, and (2) agreed with, the various statements that the Court has culled from the Report of the Independent Commission and the floor debate (probably conducted on an almost empty floor).

Id. (Scalia, J., dissenting). See also Lukhard v. Reed, 481 U.S. 368, 376 n.3 (1987) (criticizing the dissent's legislative-history-based statutory construction, stating: "The dissent apparently thinks it appropriate to speculate upon what Congress would have said if it had spoken."); Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 59–61 (1998) (criticizing the use of legislative history in statutory construction). That said, this Article will, nevertheless, include a legislative history analysis because it shows the inherent vagueness of the "persecution" concept.


\(^{32}\) See id. § 201, 94 Stat. at 102–03.


\(^{34}\) U.N. Protocol, supra note 4.
uses a persecution-based definition of refugee. Because the language of the Act's definition closely tracks the United Nations definition, the latter offers little help to clarify the former. To understand the United Nations definition, the United States Supreme Court looked to the Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook") for guidance. According to the Handbook, however, "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such definition have met with little success."

With little help from the Refugee Act's legislative history, courts have struggled to define the term persecution on their own. Of the thirteen federal circuits, nine have addressed the meaning of the term persecution. Of these nine circuits, some have explicitly defined the term, while others have merely provided some general parameters of the term. The following discussion briefly summarizes the various formulations.

The First Circuit defines persecution as a "disproportionate punishment" on account of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion. According to this definition, persecution could involve something "more than threats to life or freedom . . . but less than mere

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35. U.N. Convention, supra note 4.
36. See U.N. Convention, supra note 4, art. 1(A)(2). The U.N. Convention defines a refugee as a person who:
   - owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

Id. See also U.N. Protocol, supra note 4, art. 1(2).
39. HANDBOOK, supra note 37, ¶ 51.
40. See Foroglou v. I.N.S., 1999 WL 105873, at *3 (1st Cir. 1999); Mikhailevitch v. I.N.S., 146 F.3d 384 (6th Cir. 1998); Singh v. I.N.S., 134 F.3d 962 (9th Cir. 1998); Abdel-Masieh v. I.N.S., 73 F.3d 579 (5th Cir. 1996); Nyonzele v. I.N.S., 83 F.3d 975 (8th Cir. 1996); Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993); Baka v. I.N.S., 963 F.2d 1376 (10th Cir. 1992); Osaghae v. I.N.S., 942 F.2d 1160 (7th Cir. 1991); M.A. A26851062 v. I.N.S., 858 F.2d 210 (4th Cir. 1988).
41. See Foroglou, 1999 WL 105873, at *3; Mikhailevitch, 146 F.3d 384; Singh, 134 F.3d 962; Abdel-Masieh, 73 F.3d 579; Nyonzele, 83 F.3d 975; Osaghae, 942 F.2d 1160; M.A. A26851062, 858 F.2d 210.
42. See Fatin, 12 F.3d 1233; Baka, 963 F.2d 1376.
43. Foroglou, 1999 WL 105873, at *3.
harassment or annoyance.” 44 The First Circuit acknowledges that, “[b]etween these broad margins, courts have tended to consider the subject on an ad hoc basis.” 45

The Third Circuit holds that the term persecution denotes “extreme conduct.” 46 In other words, “the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.” 47 Rather, it refers to “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.” 48

The Fourth Circuit defines persecution as a “disproportionately severe punishment . . . on account of [the alien’s] race, religion, nationality, membership of a particular social group or political opinion.” 49

The Fifth Circuit defines persecution as the “infliction of suffering or harm . . . upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments.” 50 In addition to physical injury, this suffering or harm also includes “the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” 51

The Sixth Circuit defines persecution as requiring “more than a few isolated incidents of verbal harassment or intimidation.” 52 For an act to constitute persecution, it must threaten “physical punishment, infliction of harm, or a significant deprivation of liberty.” 53

In the Seventh Circuit, Judge Posner defines persecution as a “punishment for political, religious, or other reasons that [the United States] does not recognize as legitimate.” 54 In this circuit, for punishment to rise to the level of persecution, the punishment must threaten death, imprisonment, serious harm, or substantial suffering. 55

44. Aguilar-Solis v. I.N.S., 168 F.3d 565, 570 (1st Cir. 1999) (citations omitted).
45. Id.
46. Id., 12 F.3d at 1240 n.10.
47. Id. at 1240.
48. Id. (citations omitted).
50. Abdel-Masieh v. I.N.S., 73 F.3d 579, 583 (5th Cir. 1996) (citation omitted).
51. Id. (citation omitted).
52. Mikhailevitch v. I.N.S., 146 F.3d 384, 390 (6th Cir. 1998).
53. Id.
54. Osaghae v. I.N.S., 942 F.2d 1160, 1163 (7th Cir. 1991).
55. See Sharif v. I.N.S., 87 F.3d 932, 935 (7th Cir. 1996).
The Eighth Circuit defines persecution as a "disproportionately severe" punishment "based upon the alien's religious or political beliefs."\textsuperscript{56} In this circuit, economic hardship, lack of educational opportunities, and isolated attacks against the alien's family members do not constitute persecution.\textsuperscript{57}

The Ninth Circuit defines persecution as an "infliction of suffering or harm upon those who differ."\textsuperscript{58} The suffering must be imposed in such a way that a reasonable person would find it offensive.\textsuperscript{59} In this circuit, persecution is an "extreme concept" that exceeds the mundane variety of offensive treatment.\textsuperscript{60} For example, although our society considers racial discrimination to be morally reprehensible, it does not amount to persecution in the Ninth Circuit.\textsuperscript{61}

In the Tenth Circuit, for a punishment to rise to the level of persecution, it must be "so severe that repatriation would be inhumane."\textsuperscript{62} The fact that an alien's political party membership causes his coworkers to harass him, denies him chances for promotion, and results in general economic disadvantage does not amount to persecution.\textsuperscript{63}

Although these definitions vary according to jurisdiction, there is a common denominator. All the definitions require the courts to make moral judgments about the acts of foreign governments. Essentially, under the current definitions of persecution, if a court thinks that it is offensive, illegitimate, disproportionately severe, extreme, or inhumane for a foreign government to punish its citizens for belonging to a racial, religious, social, or political category, then the punishment is persecution.

2. Well-Founded Fear

If an alien cannot show actual persecution, he can still qualify as a refugee or asylee if he can prove that he possesses a well-founded fear of persecution.\textsuperscript{64} In \textit{I.N.S. v. Cardoza-Fonseca},\textsuperscript{65} the United States Supreme Court explicitly declined to define the phrase "well-founded
fear" or explain how the lower courts should apply the phrase. Instead, the Court directed the lower courts to construe the phrase on a case-by-case basis. In an earlier case's dicta, however, the Court provided that, "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, . . . it is enough that persecution is a reasonable possibility." As with the definition of persecution, the circuit courts are divided as to what constitutes a well-founded fear.

In accordance with the Supreme Court's objective standard, the First Circuit holds that a fear of persecution is well-founded when the alien's fear is "both genuine and objectively reasonable." The First Circuit explains that the "degree of probability required to establish the objective component of a well-founded fear of persecution is somewhat less than the classic 'more likely than not' formulation." Instead, the relevant inquiry is "whether a reasonable person in the asylum applicant's circumstances would fear persecution." The Second Circuit and the Fifth Circuit also follow this approach.

The Third Circuit holds that, to prove a well-founded fear of persecution, the alien must show that "he has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility." The Sixth Circuit and the Tenth Circuit concur with this analysis. The Fourth Circuit, however, holds that

66. See id. at 448.
67. See id.
69. See Aguilar-Solis v. I.N.S., 168 F.3d 565 (1st Cir. 1999); Asani v. I.N.S., 154 F.3d 719 (7th Cir. 1998); Balasubramanrim v. I.N.S., 143 F.3d 157 (3d Cir. 1998); Feleke v. I.N.S., 118 F.3d 594 (8th Cir. 1997); Nazaraghaie v. I.N.S., 102 F.3d 460 (10th Cir. 1996); M.A. A26851062 v. I.N.S., 858 F.2d 210 (2d Cir. 1986); Guevara Flores v. I.N.S., 786 F.2d 1242 (5th Cir. 1986); Yousif v. I.N.S., 794 F.2d 236 (6th Cir. 1986).
70. Aguilar-Solis, 168 F.3d at 572.
71. Id.
72. Id.
73. See Carcamo-Flores, 805 F.2d at 68 (holding that an "alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country" (citation omitted)); Guevara Flores, 786 F.2d at 1249 (holding that an "alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country").
74. Balasubramanrim, 143 F.3d at 165 (quoting Chang v. I.N.S., 119 F.3d 1055, 1066 (3d Cir. 1997)).
75. See Nazaraghaie v. I.N.S., 102 F.3d 460, 462 (10th Cir. 1996) (holding that "[f]ear of persecution is well-founded if it is subjectively genuine and objectively reasonable"); Yousif v. I.N.S., 794 F.2d 236, 243–44 (6th Cir. 1986) (holding that, while an alien "may
the alien does not need to show objective (or corroborative) evidence of potential persecution against the alien himself.\textsuperscript{76} It is sufficient for the alien to show that "members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution."\textsuperscript{77}

The Seventh Circuit holds that, "to establish a well-founded fear of future persecution, an alien must not only show that his or her fear is genuine but must establish that a reasonable person in the alien's circumstances would fear persecution."\textsuperscript{78} The Eighth Circuit elaborated upon this approach and presented the following test: "A well-founded fear is one that is both subjectively genuine and objectively reasonable. Subjectively, the alien must demonstrate with credible evidence that he genuinely fears persecution; objectively, he must demonstrate through credible, direct, and specific evidence that a reasonable person in his position would fear persecution."\textsuperscript{79} The Ninth Circuit follows this approach as well.\textsuperscript{80}

The objectively reasonable standard requires courts to look at how a reasonable person would feel if he was \textit{in the alien's situation}. This means that courts would have to look into the political situation in the alien's home country. One problem with this approach is that judges have neither the expertise nor the experience to make this type of determination. More importantly, as the following section argues, even if judges are competent to do so, they ought to abstain from making such determinations.

II. Judicial Restraint

A. Disparate Treatment of Refugees

The current definition of persecution requires judges to decide whether a foreign government's action vis-à-vis the alien is offensive or

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  \item \textsuperscript{76} See M.A. A26851062 v. I.N.S., 858 F.2d 210, 214 (4th Cir. 1988) ("Frequently \ldots corroborative (or 'objective') evidence of specific facts that an \textit{individual} seeking political asylum will be singled out for persecution is unavailable, and, we think, unnecessary.").
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Asani v. I.N.S., 154 F.3d 719, 725 (7th Cir. 1998).
  \item \textsuperscript{79} Feleke v. I.N.S., 118 F.3d 594, 598 (8th Cir. 1997) (citations omitted).
  \item \textsuperscript{80} See Diaz-Escobar v. I.N.S., 782 F.2d 1488, 1492 (9th Cir. 1986) (holding that the well-founded fear standard has "both a subjective and an objective component. The subjective component requires a showing that the alien's fear is genuine. The objective component requires a showing, by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear that the petitioner faces persecution." (citations omitted)).
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illegitimate. Because the standards of offensiveness and illegitimacy are imprecise, courts often end up treating similarly situated refugees dissimilarly. There are two causes of this disparate treatment. First, individual judges intentionally treat refugees differently for political reasons. Second, judges unintentionally treat refugees differently because the definition of persecution is so vague.

1. Intentional Disparate Treatment

The vague definition of persecution and the elastic standard of well-founded fear leave room for manipulation, both by judges who favor generous admissions as well as by those who prefer restricted entries. Empirical studies show that ad hoc rules and standards dominate the current immigration system. Immigration judges often use their own cultural and political assumptions to assess an alien's credibility. When different judges inject their own political and ideological views into the judicial decision-making process, the result is often a disarray of incongruous decisions. Moreover, this sort of politically-expedient adjudication violates the fundamental principles of due process, which require judges to conduct proceedings in a neutral manner.

Congress adopted the current legal standard of refugee status to ensure an evenhanded approach to refugee law. The Legislature's

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81. See discussion supra Part I.B.1.
82. See, e.g., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446-47 n.30 (1987) (noting the BIA's "long pattern of erratic treatment" of the well-founded fear standard); Derek Smith, Note, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. Rev. 681, 712-15 (1989) (noting the BIA's disparate treatment of "former members of guerrilla organizations fleecing government retribution").
83. See ALENIKOFF ET AL., supra note 3, at 987.
85. See id. at 452.
86. See James C. Hathaway, A Reconsideration of the Underlying Premise of Refugee Law, 31 HARV. INT'L L.J. 129, 133 (1990) (observing that "the current trend of dealing with most involuntary migrants on an extralegal basis results in the differential treatment of persons similarly at risk").
87. See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ").
88. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (holding that "the right to an impartial decision-maker is required by due process"); Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (holding that "the appearance of evenhanded justice . . . is at the core of due process").
89. See, e.g., S. REP. No. 96-256, at 1 (1979) (stating that the Refugee Act "repeals the current immigration law's discriminatory treatment of refugees by providing a new definition of a refugee that recognizes the plight of homeless people all over the world"); Refugee
intent was to excise ideological preferences and political judgments from refugee and asylum proceedings.\textsuperscript{90} Despite this goal however, immigration judges continue to use an alien's social class, cultural makeup, ideological beliefs, and political orientation to decide whether or not to grant asylum.\textsuperscript{91} In other words, immigration judges have failed to achieve the neutral adjudication process that Congress mandated.\textsuperscript{92}

2. Unintentional Disparate Treatment

To be fair, however, we should not focus our criticisms exclusively on the judges for failing to achieve the congressional mandate. Because the concept of persecution is so vague,\textsuperscript{93} judges inevitably end up treating refugees inconsistently. Even if all the judges were to conscientiously interpret and apply the law as neutrally as possible, they

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\item \textsuperscript{90}See, e.g., H.R. Rep. No. 96-608, at 1 (1979) (stating that the Refugee Act "amends the definition of refugee to eliminate current discrimination on the basis of outmoded geographical and ideological considerations"); Refugee Hearings, supra note 89, at 27 (statement of Hamilton Fish, Jr., U.S. Rep., New York) (stating that "the fundamental change under the legislation, of course, is the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol on refugees, thus eliminating ideological and geographical limitations").
\item \textsuperscript{91}See Anker, supra note 84, at 454.
\item \textsuperscript{92}See id. at 455; see also Katherine L. Vaughns, Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century, 30 San Diego L. Rev. 1, 28 (1993). In her article, Professor Vaughns states: The passage of the new refugee law was hailed as a significant milestone in human rights, a promise of fair and equitable treatment for all refugees without any geopolitical biases. But complicating matters in the asylum debate is the widely held view that the present system is politically biased, compromising the intended goal of neutrality in the adjudication process.
\item \textsuperscript{93}See Handbook, supra note 37, ¶ 51 ("There is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success."); Daniel J. Steinbock, Interpreting the Refugee Definition, 45 UCLA L. Rev. 733, 736 (1998) (pointing out that "almost fifty years after the creation of the Refugee Convention, fundamental questions of the definition's meaning remain, including the critical issue of what it means to be 'persecuted on account of race, religion, nationality, membership of a particular social group, or political opinion.' What is the definition of 'persecution'? ")
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would still render incongruous opinions. Without a clear definition to guide judges on what types of atrocities constitute persecution, it is difficult for immigration judges across the country to adjudicate refugee cases uniformly.

B. Dangers of Judicial Activism

Regardless of whether immigration judges are intentionally or unintentionally treating refugees disparately, this haphazard treatment is merely a symptom of the problem. The underlying cause of the problem lies in the political nature of the current legal standard. By requiring judges to evaluate whether a foreign government acted reasonably toward the alien, the current legal standard requires judges to venture beyond the familiar province of the Judiciary and forces them to dip their oars in the treacherous waters of politics.

1. Threat to Judicial Integrity

Whereas the law is a predictable creature that lives on rationality, politics is a mysterious animal that blindly chases whatever is fashionable at the time. It is often tempting for judges to forsake cold and impersonal logic to pursue compassionate and moral ideals. Popular causes often lure judges into treating statutes as malleable texts. Instead of following the law, activist judges interpret statutes to fit favored political causes. But when a judge starts ruling like a politician, he abandons his objectivity and intellectual honesty. If judges continue to fall prey to this political seduction, the legal field will lose its integrity as a discipline, and law will cease to be a calling for thinkers and become a profession of emoters and sensitives.

94. See generally Sophie H. Pirie, Note, The Need for a Codified Definition of "Persecution" in United States Refugee Law, 39 Stan. L. Rev. 187, 201 (1986) (explaining that "even decisionmakers who make good faith, competent efforts to apply United States refugee law as a humanitarian law may not render consistent persecution decisions").
95. See Note, Political Legitimacy in the Law of Political Asylum, 99 Harv. L. Rev. 450, 464 (1985) ("Even if there are articulable standards available to guide judicial inquiry, one might say, judges have no business evaluating foreign political systems. Such matters belong to the "political" branches; courts lack the competence and even the jurisdiction to address them.").
97. See id.
98. See id.
99. See id. at 1.
100. See id. at 262.
2. Threat to Democracy

Judge Bork\textsuperscript{101} points out that if judges continue to politicize the law, our democratic legitimacy will be at risk.\textsuperscript{102} In our democratic society, for the law to maintain its integrity, judicial processes must be legitimate.\textsuperscript{103} That means judges must be able to demonstrate that they are using recognized legal principles and are applying these principles in intellectually coherent ways to reach politically neutral results.\textsuperscript{104} To protect our democratic legitimacy, judges must follow this restrained approach to adjudication.\textsuperscript{105}

Judge Wallace\textsuperscript{106} explains that this judicial restraint doctrine simply urges judges to defer to democratically elected officials and refrain from substituting their own moral or political values for those of our elected representatives.\textsuperscript{107} If federal judges wish to act like legislators, then they should be elected like legislators.\textsuperscript{108} Because they are not elected,\textsuperscript{109} federal judges are not beholden to the voters and have no business pursuing popular causes. Instead, judges are appointed to be neutral expounders of justice.\textsuperscript{110} As such, they should abstain from passing political judgments.

C. Conflict Between Judicial Restraint and Refugee Status

While judges should avoid political decisions, the current legal standard on refugee status does not allow judges to abstain from making political judgments. Under the current definition of refugee, judges have to determine what constitutes persecution. To make this determination, they must look at how foreign governments treat their

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\item \textsuperscript{101} The Honorable Robert H. Bork, Judge, United States Court of Appeals for the District of Columbia Circuit, 1982–1988. See WHO'S WHO IN AMERICAN LAW 74 (10th ed. 1998).
\item \textsuperscript{102} See Bork, supra note 96, at 2.
\item \textsuperscript{103} See id.
\item \textsuperscript{104} See id.
\item \textsuperscript{105} See The Federalist No. 78 (Alexander Hamilton) ("The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure for that of the legislative body.").
\item \textsuperscript{106} The Honorable J. Clifford Wallace, Judge, United States Court of Appeals for the Ninth Circuit, 1972–present. See WHO'S WHO IN AMERICAN LAW 812 (10th ed. 1998).
\item \textsuperscript{108} See id. at 8.
\item \textsuperscript{109} Immigration judges are appointed by the Attorney General. See 8 U.S.C. § 1101(b)(4) (1994). Members of the Board of Immigration Appeals are also appointed by the Attorney General. See Aliens and Nationality, 8 C.F.R. § 3.1(a)(1) (1999).
\item \textsuperscript{110} See Wallace, supra note 107, at 14.
\end{itemize}
citizens and decide whether the treatment is so offensive as to constitute persecution. To make this decision, a judge has to compare the treatment in question with what he considers to be legitimate behavior. This consideration is inherently political.

For example, to manage its population growth, the Chinese government requires its citizens to undergo sterilization. What happens if a Chinese national asks the United States for political asylum because he does not wish to be sterilized? Is China’s population control measure offensive enough to constitute persecution? If American states cannot regulate the use of contraceptives, then forced sterilization certainly will not pass constitutional muster in this country. But because a judge cannot apply the United States Constitution to the Chinese government’s actions, the judge lacks a legal standard to decide whether the Chinese national is being persecuted. The judge can only turn to his own political or ideological views to evaluate the legitimacy of China’s “one couple, one child” policy.

III. Rule-of-Law

Related to the judicial restraint doctrine is the rule-of-law concept. This concept traces back to Chief Justice Marshall’s dictum in Marbury v. Madison that the United States government is “a govern-

111. See discussion supra Part I.B.1.
113. See id.
114. The Board of Immigration Appeals held that China’s population control policy did not constitute persecution. See id. at 43. In 1996, however, Congress amended the definition of refugee to include people who had been forced to undergo sterilization. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 1.03[b] (1997).
115. See generally Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that married couples have a fundamental right to use contraceptives).
117. For example, the judge in the Chang decision made the following socio-economic evaluation of China’s population control policy:

Chinese policymakers are faced with the difficulty of providing for China’s vast population in good years and in bad. The Government is concerned not only with the ability of its citizens to survive, but also with their housing, education, medical services, and the other benefits of life that persons in many other societies take for granted. For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence.

Chang, 20 I. & N. Dec. at 43–44.
118. 5 U.S. (1 Cranch) 137 (1803).
ment of laws, and not of men." The concept denotes the idea that laws—not judges—rule this nation. For laws to rule this nation, the laws must conform to certain principles of legality. These principles regulate how legislators are supposed to make laws and how judges are to apply them. This Article focuses on the rule-of-law principle that requires judges to apply the law impartially and consistently.

A. Impartiality and Consistency

"I assure thee on my faith, that if the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right." This declaration by Lord Chancellor More demonstrates a judge's duty to be impartial and consistent, no matter how unpalatable the outcome may be. This twin duty lies at the heart of our notions of fairness and justice. To illustrate this point, Justice Scalia offers this example: Children may be willing to accept all sorts of arbitrary rules imposed by their parents, such as no television in the evening, but "try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed."

This example nicely captures the undeniable notion that partial or inconsistent treatment is inherently unfair and unjust. Any legal system that fails to treat like cases alike is an unfair and unjust sys-

119. Id. at 163. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 2 n.7 (1997).
120. Professor Altman explains that the rule of law entails five principles of legality:
   (1) The government is not above the law.
   (2) The government must maintain peace and order through a system of general and authoritative rules.
   (3) The rules must be (a) public, (b) clear in meaning, (c) operative for a reasonable period of time, (d) applied prospectively, (e) applied impartially and consistently, (f) capable of being complied with, and (g) enacted lawfully.
   (4) The government must give the accused a fair chance to defend against the charges.
   (5) The sovereign people must act within these principles of legality.
121. See Robert S. Summers, How Law Is Formal and Why It Matters, 82 Cornell L. Rev. 1165, 1198 (1997) (explaining that the rule of law consists of a set of principles that "regulate how law itself is to be made and applied").
Furthermore, in democratic societies, the people will not let such an inconsistent system rule them. And yet, inconsistent decisions abound in refugee law. Immigration judges continue to treat aliens with similar risks of persecution dissimilarly.

B. Partial and Inconsistent Treatment of Refugees

When the President determines the number of refugees that the United States will admit each year, he has to justify that number on the basis of either humanitarian concerns or national interest. If it were truly based on humanitarian concerns, then refugee law would be politically neutral. The law would not care about why the alien is being persecuted; rather, it would only focus on the severity of the persecution. But this is not the case under the current status of asylum law. The policy towards Russian Jews provides an example of disparate treatment among refugees who are similarly at risk.

125. See generally Dale A. Nance, Law and Justice 135 (1994) ("One of the core instincts that most people share is the idea that justice . . . entails a requirement of equality. It is often articulated by the maxim, 'Treat like cases alike.'").

126. See generally Anker, supra note 84, at 448–54 (finding that immigration judges often contradict the Court’s ruling in I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987), and impose an "exaggerated burden of proof" upon the alien; that immigration judges often apply evidentiary rules "on an ad hoc and unpredictable basis"; that immigration judges often appear to be partial and play the role of a "second prosecutor"; and that immigration judges often impose "their own cultural and political assumptions in assessing applicants' credibility, and making implicit political and ideological judgments").

127. For example, one of the statutory grounds of refugee status is persecution on account of "membership in a particular social group." 8 U.S.C. § 1101(a)(42) (1994). The Ninth Circuit holds that family ties do not constitute a social group. See Estrada-Posadas v. I.N.S., 924 F.2d 916, 919 (9th Cir. 1991) (holding that "persecution of a social group" does not extend to "persecution of a family"); De Valle v. I.N.S., 901 F.2d 787, 793 (9th Cir. 1990) (holding that "families of deserters" are not social groups). The First Circuit, however, holds that: "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." Gebremichael v. I.N.S., 10 F.3d 28, 36 (1st Cir. 1993).

Another example of disparate treatment involves the question of what types of punishment constitutes persecution. The Ninth Circuit holds that the "deliberate imposition of substantial economic disadvantage upon an alien" constitutes persecution. Kovac v. I.N.S., 407 F.2d 102, 107 (9th Cir. 1969). The Eighth Circuit, however, views the fact that the alien "will be deprived of his livelihood" as insufficient to constitute persecution. Minwalla v. I.N.S., 706 F.2d 831, 835 (8th Cir. 1983).


129. See Hathaway, supra note 86, at 130–31 ("If conceived of in humanitarian terms, refugee law would be a politically neutral response to the needs of suffering persons who have in some way been forced to leave their homes.").

130. See id.

131. While some governments might be more oppressive than others, the average levels of persecution in the different geographical regions of the world should be relatively comparable. For example, if, say, 25% of all the people in Africa suffer from persecution,
During the latter half of the Cold War, the United States admitted Soviet Jews as refugees in response to the Soviet Union's human rights abuses. But even after the Soviet Union ceased to exist, Jews from Russia continue to receive a lion's share of the refugee allocation. Supporters of this policy point to "the rise of nationalist extremists in Russia and the risk of a resurgence of anti-Semitism."

If it is the case that we admit refugees solely because they are being persecuted on account of ethnic or religious intolerance, then why not admit all the Tibetans who fled to India to avoid persecution by the Chinese? In humanitarian terms, one can argue that the Tibetans, having been driven out of their country, have suffered more than the Russian Jews. So why is it that Russian Jews have a higher priority? It is because current refugee policy is not based on humanitarian concerns; instead, it is driven by the national interest.

Unlike the altruistic humanitarian concerns, national self-interest is inherently discriminatory. There are over fourteen million refugees in the world today. With limited capacity, the United States can then the average percentage of persecuted people in Asia, Latin America, etc. should be around, say, 15% to 35%. The point is this: because each geographical region encompasses many different types of governments, the percentage of persecuted people should average out within each region. If refugee admission is truly based on humanitarian concerns, then the average percentage of refugees admitted into the United States from the different regions should be comparable. As indicated by the following data from fiscal year 1994, this is not the case. See U.S. Department of Justice, 1994 Statistical Yearbook of the Immigration and Naturalization Service 79 (1996). The first column refers to geographic regions. The second column denotes the number of refugee applications received in 1994. The third column denotes the number of applications approved in 1994. The fourth column denotes the approval rate.

<table>
<thead>
<tr>
<th>Region</th>
<th>Received</th>
<th>Approved</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>7,891</td>
<td>5,748</td>
<td>72.8%</td>
</tr>
<tr>
<td>East Asia</td>
<td>61,202</td>
<td>40,639</td>
<td>66.4%</td>
</tr>
<tr>
<td>Eastern Europe</td>
<td>52,567</td>
<td>48,963</td>
<td>93.5%</td>
</tr>
<tr>
<td>Latin America</td>
<td>11,901</td>
<td>2,513</td>
<td>21.1%</td>
</tr>
<tr>
<td>Near East</td>
<td>8,645</td>
<td>7,229</td>
<td>83.6%</td>
</tr>
</tbody>
</table>

133. See Aleinikoff et al., supra note 3, at 1011.
134. Id.
135. See supra note 131 and accompanying text.
136. See Hathaway, supra note 86, at 148 ("The rejection of comprehensive humanitarian or human rights coverage is explained by the conviction of most Western states that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values." (citations omitted)).
137. See Aleinikoff et al., supra note 3, at 990.
only accommodate a small percentage of them. Because the admission of refugees is a sovereign prerogative, the United States is free to allocate spaces only to those refugees who will best serve the national interest.

Unlike the political departments, however, courts are not free to selectively choose what types of refugees to admit. Courts must apply the rules impartially and consistently. And because the political nature of refugee status will force courts to violate this principle of the rule-of-law, courts should abstain from adjudicating such matters and defer them to the political branches.

IV. Political Question

Also related to the judicial restraint doctrine is the political question doctrine. This doctrine holds that certain political matters are nonjusticiable, and that such matters are best resolved by the political branches. The term "nonjusticiability" does not mean a lack of jurisdiction. Instead, it denotes "the inappropriateness of the subject matter for judicial consideration." The political question doctrine involves a combination of constitutional construction and judicial restraint. Among other things, it requires courts to consider whether the Constitution specifically authorizes another branch of the government to decide the issue in question, whether the court is competent to decide the issue, and the consequences of adjudicating the issue.

138. Cf. David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247, 1253–54 (1990) ("Classically, the right of asylum under international law belonged to states and not individuals. Sovereigns were considered to have the right or prerogative to grant protection against return of those they chose to shelter.").
141. Id.
142. See Laurence H. Tribe, American Constitutional Law § 3-16, at 79 (1978) (explaining that "the political question doctrine . . . reflects the mixture of constitutional interpretation and judicial discretion which is an inevitable by-product of the efforts of federal courts to define their own limitations").
143. See id.
144. See id.
145. See id.
A. Application of the Doctrine to Refugee Status

In *Baker v. Carr*, the United States Supreme Court listed several categories that make an issue nonjusticiable. This Article focuses on three such categories: (1) whether it is "textually demonstrable" that the Constitution specifically commits the issue to another branch of the government; (2) whether there is a "lack of judicially discoverable and manageable standards" to resolve the issue; and (3) whether there is a potential for "embarrassment from multifarious pronouncements by various departments on one question." A dispute that falls within any one of these categories is nonjusticiable.

The following sections use China’s sterilization example to illustrate how the political question doctrine applies to refugee law. The example demonstrates why the doctrine is particularly applicable in cases involving foreign relations.

1. Commitment to Other Branches

Although the Constitution does not expressly mention refugees, it does grant Congress the power to “establish an uniform Rule of Naturalization” and to make laws that are “necessary and proper” to establish such an uniform rule. This enumerated power implies that the Constitution confers upon Congress the authority to regulate

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146. 369 U.S. 186 (1962).
147. See id. at 217 (noting that nonjusticiable political questions include the following: (1) cases involving political questions that are textually committed to another branch; (2) situations where there is a lack of judicial standards for resolving the issue presented; (3) when the case could not be resolved until after a policy decision was made by another branch of the government; (4) when the court cannot resolve the issue without "expressing lack of the respect due coordinate branches of government"; (5) when there is a need for strict adherence to a previously determined political decision; and (6) when there is "potentiality of embarrassment from multifarious pronouncements by various departments in one question").
148. Id.
149. Id.
150. Id.
151. See id.
152. See discussion supra Part II.C.
153. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 596 (1966) ("The emphasis of the political question is on the 'foreign relations law,' and within this field on questions of international and domestic law which immediately concern the political or military interactions of the United States with foreign states.").
the admission of aliens. Accordingly, it is textually demonstrable that the Legislature has the constitutional power to define refugee status. Specific to the sterilization example, Congress has the authority to define whether forced sterilization is persecution.

The Constitution also grants the President the power to "make Treaties" and "appoint Ambassadors." This power implies that the Constitution bestows upon the President the power to conduct foreign affairs. Because immigration decisions implicate foreign relations, the Executive has the constitutional power to receive or exclude aliens. Therefore, it is textually demonstrable that the President has the authority to declare whether the United States approves of China's family planning policy.

2. Lack of Judicial Standards

As indicated earlier, for a judge to determine whether a foreign government's action is offensive enough to constitute persecution, the judge must look at that nation's political, social, and economic conditions. In Coleman v. Miller, however, the Supreme Court explicitly held that political, social, and economic factors are not "within the appropriate range of evidence receivable in a court of justice." Therefore, courts lack the institutional competence to decide whether forced sterilization amounts to persecution.

3. Potential for Multifarious Pronouncements

If an immigration judge decides that forced sterilization is not offensive enough to constitute persecution, then this decision could potentially undermine, for instance, U.S. endeavors to get China to minimize its human rights violations. But if the judge decides that

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156. See Fiallo v. Bell, 430 U.S. 787, 792 (1976) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))).


158. Cf Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . .").


161. This was, in fact, what the court did in the Chang decision. See Matter of Chang, 20 I. & N. Dec. 38, 43-44 (BIA 1989).


163. Id. at 453-54.
forced sterilization is so offensive that it amounts to persecution, then it is possible that this decision could hamper U.S. efforts to improve trade relations with China. Thus, without knowing how Congress or the President wishes to deal with China, and without knowing how China is going to react, the judge should defer the forced sterilization issue to the political branches.

B. Importance of the Doctrine

Aside from the issues of institutional competence and foreign relations, on a more abstract level, the political question doctrine plays an important role in protecting our democratic liberty. Along with the judicial restraint doctrine, the political question doctrine keeps the Judiciary independent and separate from the other branches of the government. This separation of powers is the foundation of our democratic liberty.164 As Alexander Hamilton pointed out, when the three branches are separated, the Judiciary has limited power and thus poses little threat to liberty.165 If, however, the Judiciary merges with either of the two other branches, then people "would have everything to fear."166

V. Plenary Power

A. Primacy of Sovereignty

Sovereignty is a sine qua non of statehood.167 It refers to "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation."168 Every independent nation exercises an inviolable jurisdiction over its

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164. See The Federalist No. 51 (James Madison) (stating that a "separate and distinct exercise of the different powers of government . . . [is] essential to the preservation of liberty").

165. Alexander Hamilton explained:

[T]he Judiciary . . . will always be the least dangerous to the political rights of the Constitution . . . . The executive . . . holds the sword of the community. The legislature . . . commands the purse . . . . The judiciary, on the contrary, has no influence over either the sword or the purse . . . . but merely judgment . . . . [T]he general liberty of the people can never be endangered from that quarter . . . . so long as the judiciary remains truly distinct from both the legislature and executive . . . .

The Federalist No. 78 (Alexander Hamilton).

166. Id.

167. Cf. M. Salimoff & Co. v. Standard Oil Co., 262 N.Y.S. 693, 700 (1933) ("Sovereignty is the supreme power inherent in a State, by which the State is governed." (citations omitted)).

own territory. Fundamental to this jurisdiction is the power to exclude foreigners from its dominion. Within the context of refugee law, sovereignty gives the federal government an absolute prerogative to admit or exclude refugees as it sees fit.

B. Sovereignty Is Extra-Constitutional

Sovereignty is not subject to law. It is the author and the source of law. In other words, sovereignty transcends the Constitution. Because the power to exclude aliens is an incident of sovereignty, this power is extra-constitutional. Hence, Congress's plenary power to regulate the admission or exclusion of aliens is not subject to constitutional limitations.

Where Congress has delegated the exercise of this power to the Executive, as long as the Executive acts on a "facially legitimate and bona fide reason," the action is immune from judicial scrutiny. Given that the admission or exclusion of aliens is based on national self-interest, and such interest is always a legitimate and bona fide reason, courts should always defer to Congress's policies on refugees as

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169. See Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) ("Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."); Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

170. See Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("The power to admit or exclude aliens is a sovereign prerogative."); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (stating courts' recognition of "the power to expel or exclude aliens [is] a fundamental sovereign attribute.").

171. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe."); see also Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). In Nishimura Ekiu, the Supreme Court stated:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Id.

173. See id. Cf. American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909) ("The very meaning of sovereignty is that the decree of the sovereign makes law.").

174. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (holding that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

well as the Executive's implementation of such policies.\textsuperscript{176} In short, refugee admission policies belong to the political branches of our government and are "wholly outside the concern and the competence of the Judiciary."\textsuperscript{177}

**Conclusion**

Suppose that five Iranian female college students came to the United States to study as exchange students in five different universities.\textsuperscript{178} While here, all five decided to seek political asylum. They all claimed that they are feminists, that they refused to wear a veil as required by Islamic law, and that they feared the Iranian government would stone them for violating this law.\textsuperscript{179} After the INS ordered its agents to deport all five students, they each went to a different court to appeal the order.

Student number one appeared in front of Judge A. Judge A believed that it was unfair for a government to impose a dress code upon women but not men. The judge sympathized with the student and decided to grant her asylum. Having made this decision, Judge A next looked up the criteria for refugee status. Once familiar with the rules, the judge then justified his decision to grant asylum by finding that student number one will be punished on account of her political opinion, that a reasonable person in her position would be afraid to return to Iran, and that the draconian punishment is so offensive that it constitutes persecution.

\textsuperscript{176} See id. at 765 (holding that the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government" (emphasis added)); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien."); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893). In Fong Yue Ting, the Supreme Court stated:

> The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the Judiciary cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

Id.

\textsuperscript{177} Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952).

\textsuperscript{178} The author borrowed and modified the facts from Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993).

\textsuperscript{179} See id. at 1236.
Student number two appeared in front of Judge B. Judge B believed that America should respect other cultures and not impose Western values on them. The judge felt that it would be wrong to criticize Iranian culture and decided to affirm the deportation order. Having made this decision, Judge B then looked up the criteria for refugee status and announced that the veil requirement was not so profoundly abhorrent as to constitute persecution.

Student number three appeared in front of Judge C. Judge C believed that courts should apply the law as it is and not as it should be. The judge first looked up the criteria for refugee status and then applied the rules to the facts. Without letting his personal political views color his decision-making process, Judge C rationally deduced that stoning is a cruel and unusual punishment regardless of the offense. Accordingly, the judge held that this form of punishment is offensive enough to constitute persecution. Judge C then granted student number three asylum.

Student number four appeared in front of Judge D. Like Judge C, Judge D also believed that courts ought to adjudicate cases in a politically-neutral manner. The judge first looked up the criteria for refugee status and then applied the rules accordingly. Judge D reasoned that the veil requirement is religious in nature. As such, religious law—and not secular law—should govern the requirement. And because the most devout Shiite practitioners find the veil requirement entirely appropriate, it cannot be offensive. Even though Judge D personally felt sorry for student number four, the judge nevertheless upheld the deportation order.

Student number five appeared in front of Judge E. Like Judges C and D, Judge E also believed in the doctrine of judicial restraint. After the judge looked up the criteria for refugee status, he discovered that his decision could implicate United States foreign policy vis-à-vis Iran. Judge E realized that he did not know enough about international politics to decide whether criticizing Iran would serve America's national interest. Accordingly, he declined to review student number five's petition and deferred the matter to the INS.

Because the criteria for refugee status is vague, Judges A and B were able to selectively apply the rules to reach whatever outcome they preferred. This sort of judicial activism threatens the integrity of the courts. In addition to fostering judicial activism, the vague criteria inevitably force judges to violate the principle of impartial and consis-
tent treatment. Of the four judges who adjudicated the matter, two granted asylum and two affirmed the deportation order. Judges A and B intentionally contributed to this disparate treatment, while Judges C and D did so unintentionally. Furthermore, as Judge E correctly recognized, refugee status involves nonjusticiable political questions. Courts are not competent to handle such matters and should defer them to the political branches of the government. Finally, refugee status implicates sovereignty issues that transcend the Constitution. And courts, as expositors of the Constitution, overstep their bounds in scrutinizing such issues. For these reasons, refugee status should be beyond judicial review.