Aliens and the Burger Court

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NOTE

ALIENS AND THE BURGER COURT*

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If we shadows have offended,
Think but this, and all is mended,
That you have but slumb'red here
While these visions did appear.
And this weak and idle theme,
No more yielding but a dream,
Gentles, do not reprehend.

Puck, Act V, Scene I, ll. 423–29,
A Midsummer Night's Dream

I. PREFACE

The United States derives its basic authority to regulate the field of immigration from sources found within the Constitution, statutes passed by Congress, in some instances from the

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1. The general power to regulate immigration has been granted Congress by article I, § 8, cl. 4 of the Constitution, which empowers the legislature "[t]o establish an uniform Rule of Naturalization." There are other clauses which authorize powers permitting the regulation of immigration in either direct or peripheral fashion. For example, article II, § 2, cl. 1 provides that "[t]he President shall be Commander in Chief of the Army and the Navy." To the extent this authorization allows the President to play a decisive role in the conduct of foreign affairs, significant repercussions on the ability to regulate immigration naturally follow. Article II, § 2, cl. 2 provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Additionally, in the same clause, the President is empowered to appoint ambassadors with the consent of the Senate.

The Constitution confers powers upon the Congress that allow that body to regulate immigration directly or indirectly. Several clauses in the enumeration of congressional powers in article I, § 8 authorize Congress to raise and support the armed forces. This authorization affects the conduct of foreign affairs, and indirectly, the development of immigration law. See, e.g., art. I, § 8, clss. 1, 11, 12, 13, 14, & 15. Congress is also authorized "[t]o regulate Commerce with foreign Nations" in article I, § 8, cl. 10.

The prohibition against suspension of the writ of habeas corpus, except in times of rebellion or invasion, in article I, § 9, cl. 2, allows individuals to contest government abuses of the immigration powers. Debate has never died over which guarantees of the Bill of Rights, as well as the other amendments, apply to aliens, nor at what point the guarantees take hold during the development of the relationship between the alien and the United States.

Other provisions in the Constitution make citizenship a requirement for election to high public office. See art. I, § 2, cl. 2 (seven years of citizenship to be a member of the House of Representatives); art. I, § 3, cl. 3 (nine years of citizenship to be a Senator); art. II, § 1, cl. 5 (natural born citizen in order to be President). Section 1 of the fourteenth amendment defines as citizens "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof." Various clauses elsewhere in the Constitution refer either to citizens or to persons. The Constitution's treatment of slavery also defined who was eligible and who was ineligible to partake in the blessings of liberty in the United States. See, e.g., Scott v. Sanford (The Dred Scott Decision), 60 U.S. (19 How.)
common law, from executive orders and proclamations, from treaties with foreign nations, and from international law. Occasionally, laws created by the individual states indirectly affect immigration issues.

The United States Supreme Court has frequently decided controversies arising between the interplay of these various sources of authority. Many of the Court's opinions rest strictly on a determination of constitutional issues. In a field so heavily regulated by Congress, however, an overwhelming number of Supreme Court opinions rest primarily upon statutory interpretation.

The statutory formats regulating immigration have changed tremendously over time. The older Supreme Court opinions interpreting these statutes possess a continued vitality in the life of modern immigration law because they loosely define expansive parameters within which the executive and congressional branches must operate. The boundaries the Court has drawn are admittedly broad, allowing Congress and the executive to function with relative freedom. By defining these boundaries, however, the Court has also suggested that lines exist, even within the context of immigration law, beyond which the powers of the other two branches cannot tread.

The Supreme Court opinions analyzing vintage congressional enactments also provide a means of understanding

393 (1856). This brief listing of constitutional clauses affecting the broad field of immigration is by no means exhaustive.

2. The two most widely known statutes in the field are the recently passed Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, and the general framework for the entire subject, the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, which has been amended a number of times. Additional primary sources of authority include, but are not limited to, the rules and regulations issued by the applicable federal agencies, such as the Immigration and Naturalization Service (INS), as well as other lesser rules of everyday operation, such as the Operations Instruction of the INS. These instructions are reproduced in 4 C. Gordon & H. Rosenfield, Immigration Law and Procedure (1987).

3. See, e.g., notes 965, 1157-1175 infra and accompanying text.

4. See infra notes 239-72 and accompanying text.

5. See, e.g., infra notes 21-40, passim (treaties with China), note 838 (Jay Treaty of 1794 with Great Britain), 843 (agreement with Mexico of 1942), note 962 (Treaty with Japan of 1911), note 966 (various treaty arrangements), and note 1069 (NATO).

6. See, e.g., infra notes 345-71 (Helsinki Final Act), and note 393 (Geneva Convention, and the Protocol Relating to the Status of Refugees), and accompanying text.

7. See infra notes 852-878, 961-1104 and accompanying text.
majoritarian reaction to immigration problems of the past. The Court's decisions help illuminate the history of government social policy as it has responded to influxes of foreigners into the United States. By studying these opinions, one may evaluate firsthand the efficacy, as well as the humanity, of responses to problems that still exist today. Additionally, one may directly examine statutory remedies which may have been worse than the problems they sought to cure. The history of the relationship between the Supreme Court and Congress on this subject is one of variations on a theme, where, one hopes, less than perfect statutory solutions have been discarded to make room for more promising ideas.

In studying any modern legal problem it is helpful to consider solutions that have been tried in the past. By studying the line of Supreme Court opinions one is struck by the many statutory schemes that have been implemented. The ingenuity of Congress has not always been generous, and it is well to keep in mind the extremes of the past to avoid unnecessary hardship in the future.

During the tenure of Chief Justice Burger, the Supreme Court delivered a number of opinions concerning immigration issues which covered a large amount of legal terrain. These opinions considered a panoply of topics broad enough to affect every individual in the United States. The Burger Court rendered decisions involving the rights of foreigners to asylum and refuge within the United States. The Court considered procedural protections for individuals in a host of legal categories created by the general immigration statutes. The Court entertained entreaties by individuals seeking to avoid forced removal from the United States and scrutinized government power to effect such removal. The Court defined the nexus between the fourth amendment and general immigration law with repercussions affecting every person in the United States. The permissible ex-

9. See infra notes 399-421 and accompanying text.
10. See infra notes 422-581 and accompanying text.
11. See infra notes 582-658 and accompanying text.
12. See infra notes 659-826 and accompanying text.
tent of federal and state regulation of the right to earn a living was treated by the Court in a line of decisions. The Court further defined the effect immigration law has on the individual right to enjoy all of the benefits which life in the United States customarily affords. The Court allowed for limitations on the applicability of doctrine that would otherwise make immigration litigation in court more cumbersome for the government. Finally, the Court further developed its jurisprudence on the right to be a citizen and the power of the government to diminish that right. A summation of these opinions follows, accompanied with a treatment of as much of the historical precedents as time and space have permitted.

II. HISTORICAL INTRODUCTION ON THE POWER TO EXCLUDE ALIENS

During the nineteenth century, special legislation was enacted, known as the Chinese Exclusion Laws, which discriminated specifically against one racial group—the Chinese. The following sections show that to a large extent, the basis for such discrimination rested upon reciprocal provisions in treaties between China and the United States. The westward expansion of the United States in the nineteenth century and the influx of immigrants from Europe illustrate that absent comparable agreements with foreign nations, the United States did not claim authority to apply similar entry restrictions against individuals from other countries. The Supreme Court did not always accept efforts by Congress and the executive to exceed the scope of these treaties unless there were compelling reasons such as legi-

13. See infra notes 827-1063 and accompanying text.
14. See infra notes 1064–1128 and accompanying text.
15. See infra notes 1129–56 and accompanying text.
16. See infra notes 1157–1353 and accompanying text.

The Chinese Exclusion Laws were finally repealed by the Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600.
imate invocation of government war powers.

A. Treatment of the Chinese in the Nineteenth Century

The Chinese Exclusion Laws afforded some procedural protections to certain Chinese which were not granted other aliens. These instances are few, but examples do exist, particularly in the cases that are described below. There were at least some Chinese who were statutorily entitled to a district court trial before deportation to which other aliens were not entitled. Different types of Chinese aliens were granted some minimal substantive rights, although there apparently were, for the least protected Chinese, few guaranteed rights indeed.

A revision of the Chinese Exclusion Laws shows that there were limits and restrictions on the powers which Congress and the executive exercised over the Chinese. The tendency of modern courts to cite the Chinese Exclusion Laws as an example of Congress and the President exercising a completely plenary sovereign power is not completely supported by the line of cases and the statutes from that time. This is an important point because starting with cases such as United States ex rel. Knauff v. Shaughnessy, and following through to the present day, the most sweeping and indiscriminate exercise of power against aliens has been frequently justified by the presumed precedent of the Chinese Exclusion Laws. A closer look at these laws will reveal that they are not completely the precedent for which they are cited.

1. Development of the Chinese Exclusion Laws

The Treaty of Peace, Amity, and Commerce, between the United States and China of 1858 placed United States citizens in China in a comparable legal position as Chinese subjects

18. See notes 109-10 and accompanying text, text at notes 73-76, and notes 172-202 with accompanying text.
19. See, e.g., notes 119-222 infra and accompanying text.
21. Concluded at Tientsin, June 18, 1858; ratified by the United States, Dec. 21, 1858, and proclaimed by President James Buchanan, Jan. 26, 1860, 12 Stat. 1023. Treaty relations between the United States and China were first concluded on July 3, 1844, 8 Stat. 592. See Chae Chan Ping v. United States (The Chinese Exclusion Case) 130 U.S. 581, 590, discussed at text accompanying note 58 infra.
themselves enjoyed. United States citizens in China were not, however, on an equal footing with subjects of China since the Treaty also provided that United States citizens remained subject to the laws of the United States. Additionally, the Treaty did not allow for unrestricted movement inside China; it allowed United States citizens to visit only a handful of Chinese ports and cities.

Additional articles to the Treaty of 1858 were signed in Washington, in the summer of 1868 and became known as the Burlingame Treaty. These articles described the presence of United States citizens in China as a privilege that would be tolerated only at certain locations. To the extent that the rights of United States citizens were not specifically provided for by treaty, the articles subjected them to the authority of the Chi-

22. Art. XI, 12 Stat. 1024. The provision stated:
All citizens of the United States of America in China, peaceably attending to their affairs, being placed on a common footing of amity and good will with subjects of China, shall receive and enjoy for themselves and everything appertaining to them the protection of the local authorities of government, who shall defend them from all insult or injury of any sort.

Id. at 1025.

23. Art. XI, 12 Stat. 1024, provided:
citizens of the United States, either on shore or in any merchant vessel, who may insult, trouble, or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the consul or other public functionary thereto authorized, according to the laws of the United States.

Id. at 1025.

24. Art. XII, 12 Stat. 1024, 26 provided:
At the places where the ships of the United States anchor, or their citizens reside, the merchants, seaman, or others can freely pass and repass in the immediate neighborhood; but, in order to the preservation of the public peace, they shall not go into the country to the villages and marts to sell their goods unlawfully, in fraud of the revenue.

Similarly, the Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476 permitted entry of certain categories of Chinese into the United States only at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as the Secretary of the Treasury designated. 25 Stat. at 478, § 7. This Act was to take effect pending ratification of a treaty with China in 1888 which never occurred. See Li Sing v. United States, 180 U.S. 486 (1901), and discussion of this case in text accompanying note 106 infra.


nese government. This placed United States citizens within the boundaries of domestic Chinese law. The rights United States citizens enjoyed in China at the time of these agreements, however, were subject to discretionary action by the Chinese authorities. China was under no obligation to treat United States citizens in the same manner as it treated its own subjects.

Under the Burlingame Treaty, United States citizens in China and Chinese subjects in the United States were granted reciprocal rights of freedom from religious persecution, "liberty of conscience," and other basic rights. The 1868 agreement recognized an "inherent and inalienable right" of subjects of both nations to move freely between the two countries. Chinese subjects were extended a reciprocal right to travel and to maintain a residence in the United States as was similarly enjoyed by United States citizens in China. China and the United States agreed to accord each other's subjects the same status as they accorded subjects of the "most favored nation." A reciprocal restriction was placed on the right of Chinese subjects to be naturalized into the United States. Visitors from each country were also granted a reciprocal right of access to public education.

By November 17, 1880, the United States concluded an agreement with China, later ratified in 1881, that allowed the United States to prohibit new Chinese laborers from entering the country. This signalled a fundamental change in the way Chinese were treated under United States law. The Treaty did not affect Chinese subjects in the United States who were either

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29. Id.
31. Art. V, 16 Stat. 740, provided:

   The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, or trade, or as permanent residents.
32. Id. at art. VI.
33. See art. IV, 16 Stat. 740. Under the terms of the Treaty, the "most favored" nations were Great Britain and Russia. Art. III, 16 Stat. at 740.
34. Id. at art. VI.
35. Id. at art. VII.
36. 22 Stat. 826 (proclaimed by President Chester A. Arthur).
"teachers, students, merchants," or merely "curious[]"; nor did it affect Chinese laborers who were in the United States on the date of the conclusion of the Treaty.\footnote{37} Chinese laborers in the United States before 1880 were to be protected as citizens of the most favored nation.\footnote{38} The terms of this Treaty awaited statutory enactment.\footnote{39}

In the case of \textit{Chew Heong v. United States},\footnote{40} a Chinese subject and laborer had been residing in the United States on November 17, 1880 when the Treaty restrictions on Chinese immigration were concluded.\footnote{41} In 1881, he left the United States and remained in the Hawaiian Kingdom until 1884 when his attempted reentry into the United States was denied.\footnote{42} During his absence, two statutes were passed implementing the restrictions of the 1881 Treaty.\footnote{43} The Chinese Restriction Act of 1882 barred the entry of Chinese laborers into the United States for 10 years and provided that any Chinese laborer who entered the United States would be present unlawfully.\footnote{44} The Act made a special allowance for Chinese laborers who were in the United States before November 17, 1880 by creating an identification certificate that was to be issued to Chinese laborers when leaving the country in order to permit their return.\footnote{45} It was impossible for Chew Heong, departing from the United States before the passage of the Chinese Restriction Act, to leave in possession of one
of these certificates.

In *Chew Heong*, the Supreme Court limited Congress' ability to abrogate the 1881 Treaty with China. The Court rejected the argument that the Chinese Restriction Act had repealed the Treaty by implication. In allowing Chew Heong to return to the United States without a certificate, the Court restricted the power of Congress to decide who may enter the United States.

The effect of this ruling was complemented, at the level of state power over aliens, by the result in *Yick Wo v. Hopkins* in which the Court restricted the power of local governments to regulate the conduct of foreigners within their borders. The Court ruled that under the fourteenth amendment all persons within the jurisdiction of any state are guaranteed equal protection and equal application of the laws. Selective enforcement of state laws in a manner designed to promote hostility toward aliens on the basis of their race or nationality was expressly disallowed.

In *Edye v. Robinson (The Head Money Cases)*, the Supreme Court recognized that Congress has an additional power to regulate immigration through its power to regulate "commerce with foreign nations." In this decision, the Court upheld the power of Congress to place a tax on aliens entering the United States. The Court observed that the power to tax under such conditions rests solely in the federal government to the exclusion of the states.

In *United States v. Jung Ah Lung*, the Supreme Court extended the limitation on the power of Congress to control immigration. The Court decided that the writ of habeas corpus would issue to a detained Chinese laborer who claimed the certificate he needed to reenter the United States, as required by the Chinese Restriction Act, had been stolen by pirates while...
he was sailing to a Chinese port.\textsuperscript{54} Despite phrases in the Act allowing immigration inspectors to make a determination as to who could enter the United States, the Supreme Court decided that actions taken by administrative officers under the statute were subject to judicial review through habeas corpus. The use of this writ remains the most stalwart counter to the claim of broad sovereign power to regulate immigration.\textsuperscript{55}

Without formally modifying the treaty arrangements with China, Congress passed a bill in 1888 that barred all resident Chinese laborers who left the country from returning.\textsuperscript{56} This ban was contrary to the terms of the treaties with China that granted certain Chinese laborers a right of reentry who were in the United States on or before November 17, 1880.\textsuperscript{57} In \textit{Chae Chan Ping v. United States (The Chinese Exclusion Case)}\textsuperscript{58} the Supreme Court conceded the Act of 1888 contravened express provisions in the Treaties of 1868 and 1881.\textsuperscript{59} Nonetheless, the Court ruled that since statutes and treaties are both the supreme law of the land and neither has paramount authority over the other, the sovereign's most recent expression controls.\textsuperscript{60} The Court held that Congress had the power to prohibit all Chinese laborers who were not citizens of the United States from reentering the country following their departure.

The Court found that this power to exclude returning Chi-

\textsuperscript{54} 124 U.S. at 624–25.

\textsuperscript{55} Limitations on the use of habeas corpus were recognized in Nishimura Ekiu v. United States, 142 U.S. 651 (1892), where the Court stated that if sufficient grounds for the detention of the alien seeking entry into the United States are shown, the alien will not be discharged. \textit{Id.} at 662. Under this decision, an administrative or executive official acting within the scope of his statutory authority can detain and exclude an alien and, as long as he has acted within the bounds of his authority and the alien has not pursued the right of appeal to the official's superiors, the Great Writ can be denied and judicial intervention will be barred. \textit{Nishimura Ekiu} is briefly discussed in the text accompanying note 66, \textit{infra}.

\textsuperscript{56} Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; see also Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476. See the discussion of these statutes at text accompanying note 106 \textit{infra}.

\textsuperscript{57} The Treaty of 1881, 22 Stat. 826, set the November 17, 1880 date. See the discussion \textit{supra} accompanying note 36. The Burlingame Treaty of 1868, 16 Stat. 739, discussed \textit{supra} at text accompanying note 26, and the Treaty of 1858, 12 Stat. 1023, discussed \textit{supra} at text accompanying note 21, provided for generally unrestricted movement between the two nations.

\textsuperscript{58} 130 U.S. 581 (1889).

\textsuperscript{59} \textit{Id.} at 600.

\textsuperscript{60} \textit{Id.}
nese residents derived from the government's obligation to protect the country under the general rubric of national defense. The broad power to exclude foreigners from the United States was an exercise of sovereign powers delegated by the Constitution. The Court did not specify to whom nor to which branch this broad sovereign power had been assigned. Within the context of a government of enumerated powers, this conclusion by the Court is surprising. By contrast, the Court, in Chew Heong, granted greater recognition to the enumeration of each of the fundamental sources of authority over the regulation of immigration. Once the Act of 1888 was upheld, the doorway into the United States through which returning Chinese laborers had passed was resoundingly shut. Although the prohibition was directed against Chinese laborers, it did not apply, at that time, to Chinese merchants who were returning to the United States.

By the Act of March 3, 1891, the class of aliens who could be excluded from admission into the United States included a wide range of socially undesirable people. The restriction applied against more than just the Chinese. In Nishimura Ekiu v. United States, the Supreme Court upheld the constitutionality of the 1891 Act. In that case, a Japanese woman was denied entry into the United States on the basis that she would likely become a public charge.

By 1892, statutory discrimination against Chinese persons attained new heights. The Act of May 5, 1892 extended the

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61. Id. at 606.
62. Id. at 609.
63. Chew Heong is discussed infra at text accompanying notes 41-46. A modern example of judicial restrictions of the power of Congress to regulate very fundamental attributes of immigration appears in INS v. Chadha, 462 U.S. 919 (1983), which found the one-House veto to be unconstitutional (discussed infra at text accompanying note 603). Despite the Court's acknowledgment that Congress has "plenary authority," id. at 940, to regulate aliens, the Court decided in no uncertain terms that the means Congress had chosen to implement that power were constitutionally infirm.
65. See, Lau Ow Bew, 141 U.S. 583 (1891); but cf. Lem Moon Sing v. United States, 158 U.S. 538 (1894), discussed infra at text accompanying note 98.
67. The list included "idiots, insane persons, paupers or persons likely to become a public charge," the diseased, felons, and polygamists, and contained other grounds for exclusion. 26 Stat. 1084.
68. 142 U.S. 651 (1892). See discussion at note 55 supra.
69. Ch. 60, 27 Stat. 25.
restrictions against the entry of Chinese persons to persons of
Chinese descent. Any such person who was found unlawfully in
the United States could be punished by up to one year of hard
labor.\textsuperscript{70} Eventually, this penalty was declared unconstitutional.\textsuperscript{71}
Under operation of the statute, however, a Chinese laborer with-
out a certificate of residence was unlawfully in the United States
and subject to the hard labor provision.\textsuperscript{72}

In \textit{Fong Yue Ting v. United States},\textsuperscript{73} the Supreme Court
ruled that an unjustifiable refusal to issue an identification cer-
tificate would entitle a Chinese person to a judicial hearing to
afford an opportunity to “prove by competent and sufficient evi-
dence the facts” needed to obtain a certificate.\textsuperscript{74} The Court,
however, was unpersuaded that the aliens in question should not be
deported since “the testimony of a credible white witness” had not been produced.\textsuperscript{75} Nowadays, such a requirement would
presumably collapse before the Court’s more enlightened con-
cept of due process and equal protection of the laws. It is there-
fore appropriate not to give undue weight to the precedential value of decisions like \textit{Fong Yue Ting}. The contemporary impor-
tance of this opinion rests in its recognition that under proper circum-
stances a resident alien is entitled to a judicial hearing before his forced removal from the country.\textsuperscript{76} \textit{Fong Yue Ting}
also provided a definition of deportation which drew a distinc-
tion between the process of exclusion of aliens who are entering
the United States and the expulsion of people with firmly estab-
lished roots to the nation.\textsuperscript{77} This distinction remains operative
to this day.

\textsuperscript{70} Id. at § 4, 27 Stat. 25.
\textsuperscript{71} Wong Wing v. United States, 163 U.S. 228 (1896), discussed in text accompanying
note 101 infra.
\textsuperscript{72} Ch. 60, § § 4, 6, 27 Stat. 25.
\textsuperscript{73} 149 U.S. 698 (1893).
\textsuperscript{74} Id. at 732.
\textsuperscript{75} Id.
\textsuperscript{76} See the discussion on this point in the text at notes 109–10 infra.
\textsuperscript{77} In interpreting this statute, the Court defined deportation as
the removal of an alien out of the country, simply because his presence is
deemed inconsistent with the public welfare, and without any punishment being
imposed or contemplated, either under the laws of the country out of which he is
sent, or under those of the country to which he is taken.
\textit{Fong Yue Ting v. United States}, 149 U.S. 698, 709 (1893).
Justice Brewer's dissenting opinion in *Fong Yue Ting* attacked the assertion that Congress possessed broad and inherent sovereign powers to expel resident Chinese from the United States. He argued that "[t]his doctrine of powers inherent in sovereignty is one both indefinite and dangerous." He warned of the difficulties in finding limits on such powers, especially when the same governmental body exercising those powers, such as the legislature or the executive, claims to be the judge of the extent of those powers. Under this system "the mere assertion of an inherent power creates it, and despotism exists." The statute threatened the expulsion of over 100,000 resident Chinese who had lawfully come into the United States under the treaties with China. According to Justice Brewer, government by "inherent powers" is no more than despotism.

In light of future statements by the Court, it is interesting to note the seriousness with which Justice Brewer regarded forced removal from the United States. He stated that deportation is a punishment "most severe and cruel." President

78. 149 U.S. 732.
79. *Id.* at 737.
80. *Id.*
81. *Id.*
82. *Id.* at 734.
83. *Id.* at 737.
84. *Id.* at 740. Expanding upon the issue, Justice Brewer stated:

But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that often times most severe and cruel. Apt and just are the words of one of the framers of this Constitution, President Madison, when he says (4 Elliot's Debates, 555): “If the banishment of an alien from a country into which he has been invited as the asylum most suspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind, where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . — if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”

*Id.* at 740–41. But see *Bagajewitz v. Adams* (also cited as *Bagajewitz v. Adams*), 228 U.S. 585 (1913)(Holmes, J.), in which the Court stated that deportation is not punishment. *Id.* at 591. However, Justice Holmes' statement should not be taken out of context. In *Bagajewitz*, the alien was deportable because she was a prostitute. Her deportation was not punishment in the sense that she was not convicted of the crime of prostitution, and her order of deportation did not follow any criminal proceeding. There can be little
Madison had taken a similar view. Common sense commends this perspective. As a punishment, according to Justice Brewer, deportation must follow a judicial trial with a right to secure witnesses as well as other constitutional protections. Justice Brewer’s ultimate concern was to prevent the exercise of these powers against other classes of people such as citizens themselves.

Justice Field’s dissenting opinion in Fong Yue Ting considered the effect of one of the statutes passed as part of the Alien and Sedition Acts of 1798. Under the Act of June 25, 1798, the President was authorized to order the deportation of any alien whom he deemed dangerous to the peace and security of the United States or whom he suspected to be involved in treasonable conduct. Justice Field’s dissent would have permitted the use of these broad powers against aliens from hostile countries but not against aliens from friendly nations during peacetime. In response to the frequent claim by the government to sovereign or inherent powers, Justice Field’s dissent emphasized that “[s]overeignty or supreme power is in this country vested in the people, and only in the people.” He cited the tenth amendment in support of this contention. Under this doubt, however, that the hardship which deportation can inflict upon an individual with strong familial ties in the United States can be a very painful experience. The denial of individual liberty and property interests should not follow except with due regard for all of the constitutional safeguards that accompany any proceeding designed to mete out punishment.

See supra note 84, as quoted by Justice Brewer.
86. 149 U.S. at 741.
87. Id. at 742.
88. Id. at 742-44.
89. Id. at 743-44.
90. 149 U.S. at 744.
91. Ch. 58, 1 Stat. 570. See also, Act of July 6, 1798, ch. 66, 1 Stat. 577; and The Sedition Act of July 14, 1798, ch. 73, 1 Stat. 596.
92. 1 Stat. 570.
93. 149 U.S. at 750. Similar expulsions of racial groups have occurred throughout history. Justice Field’s dissent pointed out that “Spain expelled the Moors; England, in the reign of Edward I, banished fifteen thousand Jews; and Louis XIV, in 1685, by revoking the Edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots.” (footnote omitted). In the latter half of the nineteenth century, Russia attempted to expel all its Jews. Id. at 757.
94. Id. at 758.
95. Id. See also, Justice Brewer’s concurring statement in Turner v. Williams, 194 U.S. 279, 295-96 (1904).
doctrinal view, the only powers the government possesses are those specifically enumerated and delegated to it by the people. Therefore, since Congress received no specific delegation in the Constitution authorizing it to evict a class of people from the nation, Congress' efforts to expel the Chinese were unconstitutional.

Justice Field did not rest with this argument, but pointed out that even if such a delegation of power had been attempted, other constitutional provisions would render the effort null and ineffective. Deportation under the terms of the 1892 Act amounted to cruel and unusual punishment and violated the eighth amendment. According to Justice Field, every step in the procedure to deport resident Chinese violated some constitutional provision designed to protect the rights of individuals.

By 1895, however, the Supreme Court's decision in *Lem Moon Sing v. United States* permitted the ban against the entry of Chinese to extend so far as to prevent domiciled Chinese merchants from returning to the United States following a temporary trip abroad to their homeland. In continued deference to the other branches of government, the Court accepted a statutory removal of judicial authority to review decisions by executive officers barring reentry of Chinese merchants. Congress had passed a statute in 1894 enforcing the exclusion of Chinese by vesting immigration or customs officers with decision-making capacity over individual Chinese entrants and by providing for appeal of adverse decisions to the Secretary of the Treasury. The statute did not grant a right of judicial review.

In contrast, where the rights of the individual are at stake and the issue is less concerned with apportionment of power between the branches of government, the Court has taken active steps to circumscribe the power of Congress. In *Wong Wing v. United States*, the Court refused to uphold a section of the Act of 1892 that punished those Chinese who were found to be unlawfully in the United States with up to one year of hard la-

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96. 149 U.S. at 759.
97. Id. at 760.
98. 158 U.S. 538 (1895).
99. Id. at 549.
101. 163 U.S. 228 (1896).
The Court was willing to tolerate detention or temporary confinement while the alien awaited removal from the United States and to allow an alien unlawfully in the United States to be subject to imprisonment for the offense following a judicial trial. The Court, however, rejected operation of the statute where punishment at hard labor was the result of summary proceedings conducted by a nonjudicial officer such as an agent of the legislature.

In *Li Sing v. United States*, the Supreme Court enforced provisions of the Act of October 1888 that barred the return of Chinese laborers to the United States regardless of the length of time they had resided in the United States. The provisions of the October Act "annulled every certificate of the kind which had been previously issued." The Court tolerated the operation of a statutory scheme designed to bar the return of aliens into the United States who had resided there for long periods of time; who had developed strong ties to their adopted country; and who left the United States with the understanding that their certificates of identity would enable them to return. A saving grace of this opinion was its explicit recognition that Chinese laborers had a statutorily granted right to a trial "before a United States judge" where they could defend themselves against deportation. The *Li Sing* opinion is one example, at least, where the Chinese Exclusion Laws accorded the Chinese an important right which is not directly available to aliens even under today's immigration framework.

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102. Ch. 60, § 4, 27 Stat. 25 stated:

*Sec. 4* That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided.

103. 163 U.S. at 235. In this regard, emphasis is placed on the requirement that detention is temporary. *See* Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) and related case discussion *infra* at note 404.

104. 163 U.S. at 235. This conflicts with Justice O'Connor's opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, discussed *infra* at text accompanying note 791.

105. 163 U.S. at 237.

106. 180 U.S. 486 (1901).


valuable right within the Chinese Exclusion Laws belies depictions of these laws as an instance where Congress successfully exercised an entirely free rein and absolute "plenary" power over aliens. Such a characterization is imprecise. 

_Li Sing_ is of interest for other reasons. One is the Court's recognition that a decision allowing an alien to enter the United States is not final and could be reviewed by administrative officers other than by those who were solely entitled by statute to review final decisions. In _Li Sing_, a United States commissioner reviewed a decision by the collector of customs although applicable statutes granted the reviewing power to the Secretary of the Treasury. The Court reasoned that only decisions excluding an alien are final. Thus, since a determination permitting an alien to enter the country was non-final, the alien could be required to demonstrate the legality of his presence in the United States to other authorities. This distinction between final and non-final determinations continues in present-day immigration law.

Second, the Supreme Court attacked the vitality of various provisions of the Act of September 13, 1888. Section 15 repealed earlier statutes which had authorized the commissioner to regulate immigration. In _Li Sing_, the Court held that the commissioner continued to have the authority necessary to review questions on which the collector of customs had already passed. Since the September 1888 statute relied for its effectiveness upon a treaty ratification that never occurred, the Court generally must first proceed in an administrative exclusion or deportation hearing before obtaining the right to appear before a judge on appeal. See, e.g. §§ 242, 236, & 106 of the INA (codified at 8 U.S.C. §§ 1252, 1226, & 1105a (1982)). The instances where there is an immediate right to a trial in the district court are limited, but do exist. See § 106 and discussion in text at note 494 infra.

111. _Li Sing_, 180 U.S. at 490.

112. Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390. Section 12 of the Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476, 478–79, provided for review by the Secretary of the Treasury as well. This latter provision suffered from the additional infirmity of being a part of a statute enacted to take effect upon a treaty ratification that never occurred.

113. See the discussion in text accompanying note 428 infra.

114. 25 Stat. 476, 479.

115. The statutes authorizing the commissioner were § 12 of the Act of May 6, 1882, 22 Stat. 58, 61, as amended by Act of July 5, 1884, ch. 220, 23 Stat. 115, 117–18. These two statutes were conditionally repealed by § 15 of the Act of Sept. 13, 1888, 25 Stat. 476, 479.

116. 180 U.S. at 490.
dissected its provisions and determined that section 15, at least, was of no force and effect. Another section that mandated review by the Secretary of the Treasury was similarly suspect since the treaty with China was not ratified. Although the Court refused to rule flatly that no provision in the September 13, 1888 Act was binding upon the courts, the authority of the entire statute was undermined. The rule that can be derived from the decision is that courts will respect language in a statute expressly conditioning its effectiveness upon a future treaty ratification.

The statutory void that was left by the failure to ratify the treaty with China was filled by the Act of October 1, 1888, which dealt more harshly with Chinese laborers by banning their return to the United States altogether.

In a Treaty of 1894, China officially accepted the United States rule that "absolutely prohibited" the migration of Chinese laborers to the United States. This was a significant departure from the 1881 Treaty which expressly acknowledged that the United States could not "absolutely prohibit" such migration. In United States v. Lee Yen Tai, the Supreme Court held that the 1894 Treaty was consistent with prior statutory provisions that detailed the procedures for expelling Chinese persons unlawfully present in the United States.

The 1894 Treaty additionally granted Chinese laborers the privilege of transit across the United States "in the course of their journey to or from other countries" subject to such regulations as the United States prescribed. In Fok Yung Yo v.

117. Id.
118. But see, Chin Bak Kan v. United States, 186 U.S. 193, 201 (1902) (Section 13 of the Act of Sept. 13, 1888 was "in and of itself independent legislation and in force as such.").
119. 25 Stat. 504. The September 13, 1888 statute allowed for a few exceptions to lessen hardship to some Chinese laborers. For example, a Chinese laborer was permitted to return to the United States if he had a lawful wife, child or parent in the United States, or property worth over $1,000. Section 6, 25 Stat. 476. The October statute lacked these allowances.
120. 28 Stat. 1210 (quoted phrase appears in article I of the Treaty).
122. 185 U.S. 213 (1902).
124. Art. III, ¶ 2, 28 Stat. 1210, 1211. This was reportedly the first time Chinese were granted the privilege in a treaty. See Fok Yung Yo v. United States, 185 U.S. 296, 299. A
United States, a decision by the collector of customs disallowing such transit was deemed sufficient without further investigation to deny the privilege to a Chinese subject en route from Hong Kong to Mexico via San Francisco. The Supreme Court recognized that the privilege of transit across the United States should not be denied "without good cause" but that a necessary part of this standard included consideration of the threat posed to the well-being of the general population if transit were allowed. The Court showed great deference to the decisions by "quasi judicial" officers against claims of lawful presence made by the Chinese.

Judicial disinclination to review decisions by immigration officers also extended to claims brought by aliens of other nationalities. In Yamataya v. Fisher (The Japanese Immigrant Case), a Japanese subject who was determined by an immigration inspector to be in the United States in violation of law since she was a pauper and likely to become a public charge, was denied her request for issuance of a writ of habeas corpus. The Supreme Court found no basis for judicial intervention despite the alien's claim that her right to due process had been

modern counterpart of this privilege may be found in § 101(a)(15)(C) of the INA, 66 Stat. 163 (codified at 8 U.S.C. § 1101(a)(15)(C) (1982)) ("alien in immediate and continuous transit through the United States").


126. Fok Yung Yo, 185 U.S. at 302.


129. 189 U.S. 86 (1903). In light of Jean v. Nelson, 472 U.S. 846 (1985), discussed infra in text accompanying note 567, it is interesting to note the Court's language in Yamataya:

That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

189 U.S. at 97 (emphasis added).

130. 189 U.S. at 87. The Act of Mar. 3, 1891, ch. 551 (first section), 26 Stat. 1084, excluded from lawful admission aliens who were "likely to become a public charge."

131. 189 U.S. at 102.
violated in earlier administrative proceedings.

In Yamataya, the Court also indicated that there are minimum fundamental rights to which an alien is entitled when seeking to enter or remain within the United States. The Supreme Court agreed that in a proceeding to expel aliens there is a right to due process of law as understood at the time of the adoption of the Constitution. The right includes an opportunity to be heard before those officers upon whom the alien’s liberty in the United States depends, although full judicial involvement is not mandatory. The contours of these fundamental rights were outlined in a constricted fashion. The limited guarantee of due process in Yamataya did not protect against the fact that the alien received only informal notice of an investigation to determine whether she was illegally in the United States; that she was unfamiliar with the English language and did not understand the questions put to her; and that she claimed the investigation conducted concerning her right to be in the United States was “pretended” with no review of the decision to expel her.

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132. The Court stated:

But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in “due process of law” as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

133. Id. at 101.

134. Id.

135. Id. at 102.
2. Treatment of Claims by Chinese to United States Citizenship

The entry restrictions in the Chinese Exclusion Laws created problems for returning United States citizens who appeared to be Chinese. In *United States v. Sing Tuck*, the Court ruled that Chinese persons claiming to be United States citizens had to advance their claims according to procedures established by Congress. At the time, these provisions included initial review by an immigration inspector at the border, followed by an appeal to the appropriate executive officer, before review of the claim of United States citizenship could be had, if at all, by habeas corpus. A dissenting opinion in *Sing Tuck* questioned "a system and provisions which place within the arbitrary power of an individual the denial of the right of the right of an American citizen to free entrance into the country, and put such denial outside the scope of judicial inquiry."


137. In this case, review was originally contemplated as laying with the Secretary of the Treasury, under the Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390. This jurisdiction was transferred to the Department of Commerce and Labor by the Act of Feb. 14, 1903, ch. 552, 32 Stat. 825.

138. But see *Gonzales v. Williams*, 192 U.S. 1 (1904), where the Court exempted a citizen of Puerto Rico (Gonzales) from the obligation of appealing a decision rendered by the superintendent of immigration and the Secretary of the Treasury (pursuant to Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084) to exclude her from admission into the United States. Gonzales was born in Puerto Rico and resided there on April 11, 1899, the date of the Proclamation of the Treaty of Paris, 30 Stat. 1754 (proclaimed by President William McKinley) that ceded the island to the United States (art. II). Although the Court did not decide whether Gonzales had become a United States citizen by virtue of the cession of Puerto Rico to the United States, 192 U.S. at 12, the Court decided the term "alien," as used in the Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, did not embrace citizens of Puerto Rico. 192 U.S. at 12. Therefore, Gonzales did not fall within the exclusion requirements of the 1891 Act and the Commissioner of Immigration at the Port of New York, whose duty it was to examine incoming aliens, lacked jurisdiction to detain and deport her. 192 U.S. at 15.

139. 194 U.S. 161 (Brewer, J., dissenting).

140. Id. at 179. Justice Brewer’s dissent, in characterizing the history of Chinese immigration in the United States, aptly described the history of United States immigration law:

Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies, when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, “they
The constitutionality of these statutory provisions\textsuperscript{141} was considered in \textit{United States v. Ju Toy}.\textsuperscript{142} The Court upheld the congressional delegation to the executive of final decision-making authority concerning entry under a claim of United States citizenship. Judicial review of such a decision was effectively barred.\textsuperscript{143} The Court deferred to the executive by utilizing a presumption that no abuse of the statutory authorization occurred.\textsuperscript{144} Restrictions barring the entry of all nationalities, despite a close relationship to a United States citizen, were upheld in \textit{Zartarian v. Billings}.\textsuperscript{145} In this case, a child of a naturalized citizen was denied entry because she did not dwell in the United States at the time of her father's naturalization.\textsuperscript{146} She was ex-

have sown the wind, and they shall reap the whirlwind," and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation. \textit{Id.} at 182.

\textsuperscript{141} Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. 372, 390.
\textsuperscript{142} 198 U.S. 253 (1905)(Holmes, J.).
\textsuperscript{143} The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law [has been established]. \textit{Ju Toy}, 198 U.S. at 263. \textit{See also} Tang Tun v. Edsell, 223 U.S. 673 (1912); \textit{but cf.} Chin Yow v. United States, 208 U.S. 8 (1908) (Holmes, J.)
\textsuperscript{144} \textit{Ju Toy}, 198 U.S. at 260–61. Commenting on this opinion, the dissent stated: It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime—for it is no crime for a citizen to come back to his native land—must by the action of a ministerial officer be punished by deportation and banishment, without trial by jury and without judicial examination. \textit{Id.} at 269. Contrary to modern thinking, Justice Brewer stated "banishment is a punishment and of the severest sort." \textit{Id.} at 273. He also stated, "I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe it has the power to do so." \textit{Id.} at 279–80.
\textsuperscript{145} 204 U.S. 170 (1907). \textit{Rev. Stat.} § 2172 (2d ed. 1878) provided: "The children of persons who have been duly naturalized under any law of the United States... being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof." \textit{See also} Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 155.
\textsuperscript{146} \textit{See also}, Boyd v. Nebraska \textit{ex rel.} Thayer, 143 U.S. 135 (1892); Campbell v.
cluded since she had a dangerous, contagious disease,\textsuperscript{147} even though her native country had allowed her family to leave only by promising never to return.\textsuperscript{148}

In *Chin Yow v. United States*,\textsuperscript{149} the Court lessened this trend toward harshness. It held that a Chinese person who claimed to be a United States citizen by birth had a right to judicial review when a judge was satisfied that a proper hearing before the executive officers had been denied.\textsuperscript{150} The Court indicated that although denial of a proper exclusion hearing could not be established in a habeas corpus proceeding merely by establishing that the decision of the executive officers was wrong,\textsuperscript{151} the petitioner's allegations could attack the validity of the procedures used. In *Chin Yow*, the petitioner claimed he was prevented from obtaining testimony of named witnesses and other evidence to establish citizenship.\textsuperscript{152} The Court required the hearing by the immigration officers to be conducted in good faith, although it could remain summary in form.\textsuperscript{153} The proper forum, however, in which to reconsider the claim of citizenship was a trial on the merits before a judge.\textsuperscript{154} This expedited route to determine claims of United States citizenship has been implemented under the current immigration laws.\textsuperscript{155}

**B. Twilight of the Chinese Exclusion Laws**

By the turn of the nineteenth century, a general legislative movement was afoot to bring the Chinese within the framework of the general immigration laws. This movement developed slowly while new discriminatory legislation directed against the

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Gordon, 10 U.S. (6 Cranch) 99 (1810).

\textsuperscript{147} 204 U.S. 175. Under the Act of Mar. 3, 1903, ch. 1012, § 37, 32 Stat. 1221 (1903), she was therefore excludable.

\textsuperscript{148} 204 U.S. at 172. This result placed the girl in a category of excluded aliens whom no country would accept. Unfortunately, many other aliens, especially in recent times, have found themselves similarly situated. See notes 404 and 568, and text accompanying note 295 infra.

\textsuperscript{149} 208 U.S. 8 (1908)(Holmes, J.).

\textsuperscript{150} Id. at 13.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 11.

\textsuperscript{153} Id. at 12.

\textsuperscript{154} Id. at 13.

Chinese was contemporaneously enacted. It was not until the midpoint of the twentieth century that the Chinese Exclusion Laws finally were repealed.\textsuperscript{156} During the first decades of the nineteenth century, a welter of conflicting statutes delivered the Chinese from the restrictions of the Exclusion Laws and brought them within the mainstream of the general immigration laws. Confusion developed over which body of laws applied to particular Chinese individuals and did not completely disappear until the Exclusion Laws were repealed.

Occasionally, the Supreme Court bridged some of the gaps in the existing laws and, along the way, effected humane results. For example, early statutes required Chinese to present certificates to establish their right to enter the United States. An exception to this rule existed for Chinese merchants. In \textit{United States v. Gue Lim},\textsuperscript{157} the Treaty of 1880 with China and an Act of 1884 were construed to exempt the wife and minor children of a Chinese merchant from this requirement.\textsuperscript{158} A later Treaty of 1894\textsuperscript{159} did not alter this result.\textsuperscript{160} The Court later limited the exception to prohibit the entry of a wife and child of a polygamist Chinese merchant.\textsuperscript{161}

An Act of April 29, 1902 continued all Chinese restriction laws which were not inconsistent with treaty obligations.\textsuperscript{162} The Treaty of 1894 granted to “Chinese laborers or Chinese of any other class . . . all rights that are given by the laws of the United States to the citizens of the most favored nation.”\textsuperscript{163} In \textit{Ah How v. United States}\textsuperscript{164} the Court held that despite the language of this Treaty, residential certificate requirements were still in effect since the Treaty specifically saved the earlier statu-

\begin{itemize}
\item \textsuperscript{156} Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.
\item \textsuperscript{157} 176 U.S. 459 (1900). \textit{See also} Tom Hong v. United States, 193 U.S. 517 (1904) (Chinese merchants without required certificates allowed to remain in the United States where uncontradicted testimony by disinterested witnesses other than Chinese established they were merchants rather than laborers).
\item \textsuperscript{158} 22 Stat. 826 (art. II, affecting the rights of Chinese merchants); and Act of 1884, ch. 220, § 6, 23 Stat. 115, 116.
\item \textsuperscript{159} 28 Stat. 1210 (art. III).
\item \textsuperscript{160} \textit{Gue Lim}, 176 U.S. at 463.
\item \textsuperscript{161} Lee Lung v. Patterson, 186 U.S. 168 (1902).
\item \textsuperscript{162} Ch. 641, § 1, 32 Stat. 176.
\item \textsuperscript{163} Art. IV, 28 Stat. 1210, 1211.
\item \textsuperscript{164} 193 U.S. 65 (1904).
\end{itemize}
In **Liu Hop Fong v. United States**, the Court indicated that a Chinese resident found by the commissioner to be unlawfully in the United States as a Chinese laborer had a right to a judicial hearing before deportation. In so deciding, the Court admitted the gravity of such proceedings and recognized that competent evidence must overcome the presumption that the Chinese alien's entry certificate was legally effective rather than fraudulent.

Chinese aliens were brought within the mainstream of general immigration law when the Court decided that section 36 of the Immigration Act of February 20, 1907 with its less “cumbersome” procedures leading to deportation, applied to Chinese laborers in **United States v. Wong You**. A number of provisions in the 1907 Act continued the effectiveness of earlier statutes directed against Chinese persons or persons of Chinese descent in spite of this decision.

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168. A commissioner was provided for in various statutes. See, e.g., Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476. This latter statute was enacted pending a treaty ratification which never occurred. See discussion at text accompanying note 106 supra. This particular provision remained in force as independent legislation despite the failure to ratify the Treaty of March 12, 1888. The United States, Petitioner, 194 U.S. 194 (1904); Chin Bak Kan v. United States, 186 U.S. 193, 201 (1902). A United States commissioner was a “quasi-judicial” officer. The United States, Petitioner, 194 U.S. 194, 199.
170. *Id.* at 461.
171. *Id.* at 463. *Cf.* Reid v. INS, 420 U.S. 619 (1975), discussed below at text accompanying note 646 infra.
The Chinese Exclusion Laws were reenacted in 1904. Under these provisions, Chinese persons were accorded a formal procedure of deportation containing various safeguards of their rights. These rights were not accorded all aliens under the general immigration laws. For example, the general immigration laws provided for summary and direct proceedings leading to deportation. Unlike the result obtained in Wong You, the Court in United States v. Woo Jan ruled that the added protections in the Chinese Exclusion Acts applied to a Chinese person alleging to be permissibly in the United States as a merchant. The Court distinguished Wong You, which had applied the General Immigration Act to deport Chinese laborers who entered the United States in a surreptitious fashion. In light of Woo Jan, the Court’s earlier rule in Wong You appeared to require that the General Immigration Act be applied to Chinese people only where there was a direct violation of one of its express provisions. The distinction was unclear because a violation of one statute could be a violation of the other.

The Court clarified the distinction between these two cases in White v. Chin Fong. Later decisions did not fully consider all of the statements made in Chin Fong. The Court in Chin Fong characterized Woo Jan as a case in which a Chinese person facing imminent deportation is entitled to a judicial hearing


177. The safeguards of impartiality included “the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions.” United States v. Woo Jan, 245 U.S. 552, 556 (1918). See also Act of Sept. 13, 1888, ch. 1015, § 13, 25 Stat. 476, 479, providing for judicial review of a decision to deport a Chinese person.


181. 233 U.S. 67 (1912).


183. In explaining the difference, the Court in Woo Jan, 245 U.S. 552, stated the rule from Wong You, 223 U.S. 67, was that a Chinese persons “might offend against the Immigration Act and be subject to deportation by the Department of Labor if they should so offend.” Woo Jan, 245 U.S. at 557.

184. 253 U.S. 90 (1920).

when he is in\textsuperscript{186} the United States.\textsuperscript{187} \textit{Wong You}, on the other hand, involved a Chinese person seeking to enter the United States who was thereby subject to executive action and decision-making.\textsuperscript{188} By this reasoning, the Court focused upon the distinction currently in effect today between exclusion hearings\textsuperscript{189} and deportation hearings.\textsuperscript{190} This difference determines which type of hearing an alien will be accorded: An exclusion hearing is for an alien seeking entry into the United States; a deportation proceeding is for one already present.

\textit{White v. Chin Fong}\textsuperscript{191} presented the more novel issue concerning which proceeding was appropriate for a resident Chinese merchant who was returning after a temporary trip to China. The Court decided a judicial hearing was appropriate and indicated the right was statutorily granted.\textsuperscript{192} The statutory provision relied upon, however, did not expressly state a judicial inquiry was required.\textsuperscript{193} Nonetheless, the Court decided that under

\begin{footnotesize}
\begin{enumerate}
\item[186.] The relevant facts in \textit{Woo Jan} appear at 245 U.S. 554. For a modern definition of what it takes to be “in” the United States, see \textit{In re Phelisna}, 551 F. Supp. 960 (E.D.N.Y. 1982).
\item[187.] 253 U.S. at 92.
\item[188.] \textit{Id.} For exposition of the facts in \textit{Wong You}, see \textit{Ex parte Wong You}, 176 F. 933, 934 (N.D.N.Y. 1910) (entry was made a few days prior to apprehension and “these Chinese aliens had not settled down and become a part of the resident population of the United States.”), rev’d, \textit{Wong You v. United States}, 181 F. 313 (2d Cir. 1910), rev’d, 223 U.S. 67 (1912). The argument that the extent of the alien’s ties to the United States should play a role in expulsion decisions, where such ties are defined in terms of family, property, and community participation, is developed in Martin, \textit{Due Process and Membership in the National Community: Political Asylum and Beyond}, 44 U. Pitt. L. REV. 165 (1983).
\item[189.] Exclusion hearings are provided for in § 236 of the INA, 66 Stat. 200 (current version at 8 U.S.C. § 1226 (1982)).
\item[191.] 253 U.S. 90 (1920).
\item[192.] 253 U.S. at 92.
\item[193.] Act of Nov. 3, 1893, ch. 14, § 2. 28 Stat. 7, 8. \textit{But see Chin Fong v. Backus}, 241 U.S. 1 (1916), an earlier decision which also considered § 2 of the Act of Nov. 3, 1893, 28 Stat. 7, 8. In dismissing the Chinese person’s claim of being a returning Chinese merchant to the United States, \textit{Backus} indirectly upheld the lower court’s determination that the surreptitious and illegal nature of the alien’s original entry into the United States would bar a Chinese merchant from returning to the United States. Later, in \textit{White v. Chin Fong}, 253 U.S. 90, however, the Court repeated and upheld the statement submitted to it by the lower court that “The question was not whether the applicant was legally admitted . . . The question was whether he had been a merchant in the United States at least one year before his departure from the United States in 1912.” \textit{White v.}
\end{enumerate}
\end{footnotesize}
these facts a Chinese merchant was entitled to a judicial hearing for a determination of his claim. A contrary result was reached in the relatively recent case of *Landon v. Plasencia* in which a returning legal permanent resident was relegated to a summary, executive, exclusion hearing.

*White v. Chin Fong* held that the right to a judicial proceeding existed even though it was not expressly conferred by statute. The decision accorded a significant right to a class of people whose presence in the United States was considered the least desirable of practically all people. *White v. Chin Fong* illustrates that the Chinese Exclusion Laws did not constitute congressional carte blanche over the regulation of aliens, regardless of how future courts reflected upon this body of legislation. Although the statutory scheme has changed greatly since this case, a returning resident's right to a judicial proceeding would not have diminished if it were constitutionally based. *White v. Chin Fong* suggests this was in fact the basis for the Court's decision.

Certain procedural safeguards were guaranteed in an exclusion proceeding against a person of Chinese descent in *Kwock Jan Fat v. White*. This case involved various executive immi-

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194. The Court stated:

one who has been in the United States and has departed from it with the intention of returning, is entitled under existing legislation to have his right to do so judicially investigated with "its assurances and sanctions," as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in executive action.

253 U.S. at 92–93.


196. Additionally, the Act of Nov. 3, 1893, ch. 14, § 1, 28 Stat. 7, *amending Act of May 5, 1892*, ch. 60, § 6, 27 Stat. 25, contemplated a judicial inquiry for Chinese laborers, but unlike the case concerning merchants, the proceeding was for individuals already resident in the United States.

197. 253 U.S. 454 (1920).
gration officers who had failed to preserve testimony in which three white men identified the Chinese person as a native born United States citizen.\textsuperscript{198} As a result of this failure, the Court reversed the exclusion decisions. The Court indicated that despite the broad legislative and executive powers to regulate immigration, it would not abdicate its responsibility to review actions of the other two government branches.\textsuperscript{199}

On February 5, 1917, a General Immigration Act was passed to take effect on May 1, 1917.\textsuperscript{200} Section 19 of the Act provided for the deportation of aliens upon executive orders.\textsuperscript{201} Under the Chinese Exclusion Acts, however, eligible Chinese could only be deported following judicial proceedings.\textsuperscript{202} In \textit{Ng Fung Ho v. White},\textsuperscript{203} several Chinese persons entered the United States shortly before the General Immigration Act became effective. The issue arose as to which body of law was applicable. Rather

\begin{quote}
\begin{itemize}
\item \textsuperscript{198} \textit{Id.} at 464.
\item \textsuperscript{199} \textit{Id.} The Court stated:
\begin{quote}
The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, no less of the Commissioner of Immigration and of the Secretary of Labor than of the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.
\end{quote}
\item \textit{Kwock Jan Fat}, 253 U.S. at 464. Additionally, the Court required that hearsay used against the Chinese not be “unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law.” \textit{Id.} at 459. The Court, however, did express tolerance of tactics in which adverse testimony was used against the individual seeking to return to the United States when the testimony was collected from an unnamed witness from another unnamed witness, \textit{id.} at 459, even where the Commissioner of Immigration refused to disclose such testimony to the petitioner, asserting the testimony did not affect his decision, and where the Court, upon viewing such secret testimony, concluded that if believed, the “evidence [would be] of first importance . . . against the claim of the petitioner.” \textit{Id.} at 458.
\item \textit{Ch. 29, 39 Stat. 874.}
\item \textsuperscript{200} \textit{39 Stat. 889-90. See also Ng Fung Ho v. White, 259 U.S. 276, 279 (1922)(Brandeis, J.).}
\item \textsuperscript{201} \textit{Ng Fung Ho, 259 U.S. at 279.}
\item \textsuperscript{202} \textit{259 U.S. 276 (1922)(Brandeis, J.).}
\end{itemize}
\end{quote}
than rule whether the new statute could apply retroactively to the time of the entry of the aliens, the Court decided the aliens maintained a continuous unlawful presence by remaining in the country and were deportable under the more recent statute. 204

On a separate issue, the Court in *Ng Fung Ho* decided that where Chinese individuals make a nonfrivolous claim of United States citizenship, the fifth amendment guarantee of due process requires a judicial proceeding to evaluate that claim rather than a fact finding by the executive department. 205 Under the facts of *Ng Fung Ho*, one of the individuals claiming United States citizenship resided in the United States over a year and the other for more than six months after their most recent entry. 206 It may be possible to confine the rule in *Ng Fung Ho* granting the judicial proceeding to those claiming United States citizenship where the claim is made by one already within the United States in the context of a deportation proceeding. Following *Ng Fung Ho*, it is less clear that claims of United States citizenship in an exclusion hearing automatically entitle the claimant to a judicial proceeding. One could speculate that a judicial proceeding would be appropriate where the claim is not frivolous, but a definition of this latter term was not provided in *Ng Fung Ho*. 207

Other bars to entry into the United States under the general immigration laws were vigorously enforced in the early twentieth century. In *Kaplan v. Tod*, 208 a feeble-minded girl was barred from entering the United States by operation of a statute that restricted entry of aliens who were mentally impaired. 209

204. 259 U.S. at 281. The Court also stated: "Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful; and may do so by appropriate executive proceedings." 259 U.S. at 280.

205. The Court stated its famous dictum: "To deport one who so claims to be a citizen, obviously deprives him of liberty . . . It may result also in loss of both property and life; or of all that makes life worth living." 259 U.S. at 284. Cf. *Agosto v. INS*, 436 U.S. 748 (1978) (review of a claim to United States citizenship), discussed infra at text accompanying note 494.

206. *Ng Fung Ho v. White*, 266 F. 765, 769 (9th Cir. 1920), aff'd in part, & rev'd in part, 259 U.S. 276.

207. The Court stated: "If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing." 259 U.S. at 282.

208. 267 U.S. 228 (1925)(Holmes, J.).

Modern statutes provide similarly. She was excluded as if she had never entered the United States although she was detained nine years awaiting her physical removal while the First World War made her departure impossible. She was confined on Ellis Island for eleven months and for the remainder of the time, she lived with her father under the supervision of an aid society. During her stay, her father became a naturalized citizen of the United States. Although a statute provided that minor children became citizens if they were living in the United States when a parent was naturalized, Kaplan held the girl did not receive any immigration benefits because she had not been officially admitted into the United States.

In Kaplan v. Tod, the Court also held that although two statutes placed a limitation upon the time period following entry into the United States during which an immigration officer could deport an alien, the time limitations did not bar the government from deporting an excludable alien physically in the United States when she technically had never made an entry into the United States. According to the Court, "[t]heoretically she is in custody at the limit of the jurisdiction awaiting the order of the authorities."

This categorization of some individuals as physically but not legally present in the United States has received widespread approval by the courts and Congress. Kaplan v. Tod is an early instance of this approval and is the result of an expansive reading of the applicable statutes. The two statutes under interpretation in Kaplan v. Tod addressed aliens who were excludable, providing that their removal from the United States should follow "within five years after entry" or "within three years


211. 267 U.S. 228, 228.

212. REV. STAT. § 2172 (2d ed. 1878); Act of Mar. 2, 1907, ch. 2534, § 5, 34 Stat. 1228, 1229. See the discussion of the modern practice of granting parole to some aliens at text accompanying note 563 infra.


214. 267 U.S. at 231.

215. See statutes listed at note 213 supra.

after the date of . . . entry into the United States."\(^{217}\) The statutes plainly recognized that excludable aliens make entries into the United States. A legal fiction has developed to the contrary.

On December 17, 1943, the Chinese Exclusion Acts were repealed.\(^{218}\) Section 2 of that Act brought all Chinese persons entering the United States within the general numerical limitations used in the Immigration Act of 1924.\(^{219}\) This Act created a quota, beginning in 1927, limiting the number of immigrants eligible to enter the United States to a figure based upon a ratio between the number, in 1920, of inhabitants in the United States having the entrant’s national origin and the number of all inhabitants in the United States. This ratio was multiplied against 150,000, which was a ceiling amount of receivable immigrants.\(^{220}\) Additionally, some of the exceptions to the quota provisions applied to Chinese\(^{221}\) and they received an expanded eligibility for naturalization.\(^{222}\)

C. Dawn of the Modern Era

Decisions of the Supreme Court immediately following the repeal of the Chinese Exclusion Laws\(^{223}\) indicated that the Court derived from them a broad deference to Congress and the executive in matters relating to immigration. For reasons described earlier, this deference was not entirely appropriate.\(^{224}\) The decisions of the Court during the 1940s and early 1950s extended this deference to unprecedented lengths and are described in this section. Following the post–World War II era, the lower courts, in particular, chipped away at broad assertions of executive and congressional authority. Recently, the modern Supreme Court has also extended a greater array of rights to aliens in various legal statuses; these developments are discussed else-

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\(^{217}\) Section 20, 34 Stat. 905-6.
\(^{218}\) Ch. 344, § 1, 57 Stat. 600.
\(^{219}\) Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153, 159.
\(^{220}\) Id. § 11(b).
\(^{224}\) See supra notes 21–222 and accompanying text.
where in this paper.\textsuperscript{225}

1. Exclusion from the United States in the Immediate Post–World War II Context

In \textit{United States ex rel. Knauff v. Shaughnessy},\textsuperscript{226} the Court held that an alien could be prevented from entering the United States without a formal hearing and without being informed of the charges against her. The Court refused to review the basis of the exclusion decision and decided that until the alien left the country, she could be confined indefinitely.\textsuperscript{227}

The facts in \textit{Knauff} are even more compelling than the result indicates.\textsuperscript{228} Ellen Raphael Knauff was Jewish. She left Germany and moved to Czechoslovakia in the early 1930s.\textsuperscript{229} From 1943 to 1946 she worked for the Royal Air Force. Her service was described as "efficient[] and honorabl[е]."\textsuperscript{230} Then she worked for the United States War Department in Germany and received similar praise for her work. She married a United

\textsuperscript{225} See, e.g., notes 422–658 and accompanying text.
\textsuperscript{227} See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).
\textsuperscript{228} See E. Knauff, supra note 226.
\textsuperscript{229} That she was Jewish is mentioned in her autobiographical account of her battle to enter the United States. E. Knauff, supra note 226, at 12. In her account of arriving in the United States, Ellen Knauff recounted a dialogue she had with an inspector of immigration:

"Your name?" he started his interrogation.

Gradually, I told him my whole life-history, beginning with my birth in January 1, 1915, in a small German town, the daughter of prosperous Jewish parents. I told him of my marriage in 1934, after I finished high school, to my first husband, a Czech national. I had automatically acquired Czech citizenship by that marriage and had gone to live with my husband in Prague. This marriage ended in divorce in 1936. I had stayed in Prague, however, working as a clerk in an import-export business until it closed down in 1939 after the German invasion of Czechoslovakia.

"Why didn't you return to Germany after your divorce?" he wanted to know.

"How could I have returned as a Jew? Besides, I wasn't a German citizen any longer," I answered.

"But you were born in Germany and that makes you a German," he insisted.

\textit{Id. supra} note 226, at 11–12.
\textsuperscript{230} 338 U.S. at 539.
States Army veteran who was a naturalized United States citizen.\textsuperscript{231} Her claim to enter the United States was based upon rights created by the War Brides Act of December 28, 1945.\textsuperscript{232} When she arrived in the United States on August 14, 1948, she was detained on Ellis Island, with a few interludes away, until her final release on November 2, 1951.\textsuperscript{233} Ultimately she triumphed in her efforts to enter the United States, but her claims before the judiciary met with failure.\textsuperscript{234}

The War Brides Act\textsuperscript{235} provided that a foreign wife of a United States soldier could enter the United States when the soldier was a citizen of the United States and honorably discharged from the armed forces.\textsuperscript{236} The Act provided, however, that a war bride could be admitted to the United States "if otherwise admissible under the immigration laws."\textsuperscript{237} Unfortunately for Ellen Knauff, this was the phrase which kept her detained at Ellis Island for most of her three-year contest to be admitted into the United States.\textsuperscript{238}

\begin{itemize}
\item\textsuperscript{231} Id.
\item\textsuperscript{232} Act of Dec. 28, 1945, ch. 591, 59 Stat. 659.
\item\textsuperscript{233} For a chronology of the major events concerning her stay at Ellis Island, see the list presented at E. Knauff, supra note 226, at 235.
\item\textsuperscript{235} A second writ of habeas corpus was dismissed in the District Court for the Southern District of New York in an unreported opinion, in United States ex rel. Knauff v. McGrath, rev'd & remanded, 181 F. 2d 839 (2d Cir. 1950) (before L. Hand, C.J.), dismissed (S.D.N.Y. 1950) (unreported opinion) aff'd, 182 F.2d 1020 (2d Cir. 1950), dismissed as moot, 340 U.S. 940 (1951).
\item\textsuperscript{236} While contesting her exclusion, Mrs. Knauff's application for naturalization was denied in Knauff v. Shaughnessy, 88 F. Supp. 607 (1949), aff'd, 179 F.2d 628 (1950).
\item\textsuperscript{237} Ellen Knauff was eventually released into the United States when the Board of Immigration Appeals (BIA) found there was not adequate evidence to justify her order of exclusion in In re Ellen Raphael Knauff or Boxhorn or Boxhornova, BIA file A-6937471 (Aug. 29, 1951) (order approved by Attorney General McGrath on November 2, 1951). These last two decisions are reproduced in the appendix of E. Knauff, supra note 226. The unreported opinions mentioned above are described in her autobiographical account. Id. supra note 226, at 237.
\item\textsuperscript{238} Act of Dec. 28, 1945, ch. 591, 59 Stat. 659.
\item\textsuperscript{239} Id. (first section).
\item\textsuperscript{237} Id.
\item\textsuperscript{238} 338 U.S. at 546.
\end{itemize}
The authority to exclude Ellen Knauff was based on a presidential proclamation of May 27, 1941, in which President Roosevelt proclaimed an unlimited national emergency. This proclamation provided the basis for excluding and detaining Ellen Knauff without notification of charges against her and without a hearing. In response to presidential Proclamation No. 2487, Congress passed the Act of June 21, 1941, ch. 210, 55 Stat. 252, which amended the Act of May 22, 1918, ch. 81, 40 Stat. 559. Section 1(a) of the 1918 Act authorized the President during wartime to issue rules and regulations governing the entry of aliens into the United States. The 1941 Act augmented the President's authority by allowing him to issue rules and regulations during the existence of the national emergency declared on May 27, 1941. The Act also authorized the President to issue rules and regulations governing the entry of aliens when two or more states were engaged in war. All of these allowances were conditioned upon a presidential finding that the interests of the United States required additional rules and regulations pertaining to the entry of aliens beyond what was already provided for by any other laws.

On the basis of these authorizations, and the outbreak of war in the Eastern Hemisphere, on November 14, 1941, President Roosevelt issued Proclamation No. 2523, 3 C.F.R. 270 (1938-1943), reprinted in 55 Stat. 1696, in which he imposed restrictions on the entry of aliens into the United States. The November 14, 1941 Proclamation prohibited the entry of aliens into the United States who lacked the proper documentation unless the aliens were exempted by rules and regulations prescribed by the Secretary of State and Attorney General. Pursuant to the authority conferred in this Proclamation, the Attorney General and Secretary of State prescribed regulations which allowed for the exclusion and detention of aliens without charges and without a hearing. See United States ex rel. Knauff v. Watkins, 173 F.2d 599, 602 (2d Cir. 1949).

The authorizing legislation for the presidential proclamation and subsequent rules and regulations, which was contained in the Act of May 22, 1918, ch. 81, 40 Stat. 559, was repealed by the Act of June 27, 1952, ch. 477, § 403(a)(15), 66 Stat. 163, 279. These wartime restrictions are now generally covered by § 215 of the INA, 66 Stat. 190 (current version at 8 U.S.C. § 1185 (1982)), which authorizes the President to prescribe "reasonable rules, regulations, and orders" to govern the entry of aliens into the United States. Notably absent from the current provision are the requirements that the United States must either be at war or experiencing a national emergency as proclaimed by the President, or that a state of war must exist between two or more foreign states. Title 8 U.S.C. § 1185(a) (1982) provides that "[u]nless otherwise ordered by the President, it shall be unlawful—(1) for any alien to . . . enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe."

It is to be noted, pursuant to the Act of Oct. 7, 1978, Pub. L. No. 95-426, § 707(e), 92 Stat. 963, 993, that current § 1185 is entitled, "Travel documentation of aliens and citizens," rather than, as previously titled, "Travel control of aliens and citizens in time of war or national emergency." When the 1978 amendment was passed, the basis for presidential regulations allowing the detention of excluded aliens without notice or hearing no longer rested upon war powers, but arguably upon presidential powers to conduct foreign affairs as well as Congress' ability to authorize the President to act on behalf of Congress' naturalization powers. Since the war powers provide a broader base of authority than do other sources of government power, the source of powers to authorize § 1185 is correspondingly diminished, and absent invocation of war powers during wartime or na-
proclamation was not repealed until April 28, 1952, when President Truman proclaimed the termination of the wartime emergency. The presidential power both to proclaim as well as to terminate the existence of such emergencies is established under the aegis of the executive's sweeping war powers. The Knauff decision is vulnerable to attack on two fronts. First, it failed to give full consideration to the purpose behind the War Brides Act. Second, its continued relevance is extremely limited in a modern era that is not operating under the ordeal of total war and in which the sweeping war powers have not been legally invoked. Arguably, Knauff was wrongly decided in that it
defeated the purpose of the War Brides Act.\textsuperscript{244} The purpose of that Act was to allow servicemen in Europe to bring home their alien wives.\textsuperscript{245} \textit{Knauff} was decided by only four members of the Court.\textsuperscript{246} Thus a case that may be criticized for its harshness and utilized for the proposition of nearly unchallengeable government authority to detain excludable aliens was not decided by a majority or plurality of the Court. Justice Minton's opinion denied the Knauffs the benefit of the War Brides Act by constructing the clause "if otherwise admissible under the immigration laws"\textsuperscript{247} to allow for her exclusion on the basis of the Attorney General's undisclosed information.

The legal invocation of sweeping war powers during the Second World War has not been replicated in modern times. Under a proclamation of August 17, 1949,\textsuperscript{248} President Truman amended President Roosevelt's proclamation of November 14, 1941\textsuperscript{249} to allow for a continuation of the rule-making power by lower officers of the executive branch. President Truman's proclamation referred to the same two statutory authorities as did President Roosevelt's proclamations, but it is debatable whether those statutes empowered the President to issue the 1949 proclamation because by that time the Second World War had ended and the United States was not faced with an unlimited national emergency.\textsuperscript{250}

\begin{itemize}
\item \textsuperscript{244} Act of Dec. 28, 1945, ch. 591, 59 Stat. 659.
\item \textsuperscript{245} 338 U.S. at 550 (Frankfurter, J., dissenting).
\item \textsuperscript{247} Act of Dec. 28, 1945, ch. 591, 59 Stat. 659.
\item \textsuperscript{248} 3 C.F.R. 27 (1949-1953), 14 Fed. Reg. 5173 (1949).
\item \textsuperscript{249} Presidential Proclamation No. 2523, 3 C.F.R. 270 (1938-1943), \textit{reprinted in} 55 Stat. 1696.
\item \textsuperscript{250} \textit{See} discussion at note 239 \textit{supra}. The Korean conflict was not proclaimed to be a national emergency until December 6, 1950, about 16 months after President Truman recontinued President Roosevelt's wartime proclamation. \textit{See} Proclamation No. 2914, 3 C.F.R 99 (1949-1953), \textit{reprinted in} 50 U.S.C. app., note prec. § 1 (1982), \textit{and in} 64 Stat. A454. The Korean conflict did not authorize the President to exercise wartime powers as fully as that office desired. Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).
\end{itemize}

Ellen Knauff expressed her personal response to her treatment: "I believe that the ways of the Immigration Service are in complete antithesis to the deeply traditional and overwhelming prevailing American respect for the individual." E. Knauff, \textit{supra} note 226, at 170.
President Roosevelt issued the proclamation of November 1941 as an exercise of presidential war powers. It provided that no alien could enter the United States if the Secretary of State was satisfied that such entry would be prejudicial to the interests of the United States as provided by rules and regulations issued by the Secretary of State and the Attorney General. Under this authorization the Attorney General and Secretary of State issued regulations that allowed the Attorney General to deny entry where the Attorney General determined the alien was excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." There is no question that at times such absolute discretion properly lies within the powers of the Attorney General for reasons of national defense, security, conduct of foreign affairs, and sovereignty. The difficulty arises less in the theoretical underpinnings for the power than in the problems arising in practical operation. The Attorney General does not act individually but has a multitude of immigration officers beneath him who vicariously exercise his absolute discretion. The large number of officers alone constitutes a complex bureaucracy peopled with individuals fundamentally as subject to all of the frailties to which the rest of mankind is heir. No one can question that a terrorist attempting to enter the United States should be denied entry. The overwhelming majority of aliens seeking to enter the United States, however, clearly do not pose a categorical threat to the existence of the United States nor come close to fitting such a characterization. The danger of such unlimited discretion in the Office of the Attorney


General\textsuperscript{256} lies in the abuses which arise where a member of a large bureaucracy has authority to affect the well-being of others in a system that allows individual files to be lost or misplaced, and where, until recently, there was little recourse for contesting categorization as a threat to the national security of a nation of over 200,000,000 people.\textsuperscript{257} For example, when some witnesses eventually surfaced to testify against Ellen Knauff, the sum total of all testimony was hearsay uncorroborated by direct evidence.\textsuperscript{258} The only reason Ellen Knauff could provide for the existence of such rumours against her was the jealousy of another woman that was provoked by Ellen’s courtship to a soldier who was a United States citizen.\textsuperscript{259} Obviously, this is not a basis for conducting foreign policy and a national defense. Also, the immigration officers were free to levy unfounded charges against Ellen Knauff including that she functioned as a spy for Czechoslovakia in Great Britain during her service with the Royal Air Force in 1943 to 1946, and during her employment with the War Department of the United States in Germany up until 1948. In the Board of Immigration Appeals (BIA) opinion\textsuperscript{260} that eventually held for her release into the United States, the Board noted that prior to 1948 “the Czechoslovakian Government was not an enemy but supposedly a friendly power. Czechoslovakia was one of the liberated countries, and the Communist Coup did not take place there until February 25, 1948.”\textsuperscript{261} Under a system of absolute discretion there is no basis upon which to defend against erroneous and unfounded allegations.

In the present-day context, section 235(c) of the INA\textsuperscript{262} provides similarly for the detention of excludable aliens on the basis of undisclosed, confidential information without a hearing. This section did not become law until 1952, well after the legal


\textsuperscript{257} E. Knauff, supra note 226, at 46 (lost file).

\textsuperscript{258} In re Ellen Raphael Knauff or Bozhorn or Boxhornova (BIA, File A-6937471), reprinted in E. Knauff, supra note 226, appendix at 16.

\textsuperscript{259} Ellen Knauff refers to this situation in various points in her book. E. Knauff, supra note 226, at 54-55, 57, 135, & 187.

\textsuperscript{260} Reprinted in E. Knauff, supra note 226 (appendix).

\textsuperscript{261} Id. supra note 226, appendix at 17.

\textsuperscript{262} Ch. 477, 66 Stat. 163, 199 (current version at 8 U.S.C. § 1225(c) (1982)).
wartime footing of the United States had been repealed. Section 235(c), and the rules and regulations flowing from it, are creatures of Congress. 265 Part of Congress’ authority to pass section 235(c) rests upon its power to regulate naturalization under article I, section 8, clause 4 of the Constitution. This is a different source of power than the President’s emergency wartime powers. The constitutional power authorizing section 235(c) was not the same power which President Roosevelt exercised to protect the United States from Nazi Germany. When a modern court seeks to examine the full scope of the section 235(c) power, it is appropriate to turn to President Roosevelt’s proclamations to consider an analogous authority; but, the authorization for section 235(c) and the authorization that detained Ellen Knauff are not identical. Increasingly, the courts have found inroads into the expansive powers suggested by section 235(c) and restrictions have accordingly developed. 264 Since the basis for a claim of wide, unreviewable authority by the government to exclude and detain Ellen Knauff in United States ex rel. Knauff v. Shaughnessy was based upon President Roosevelt’s wartime proclamations, absent similar presidential proclamations of wartime emergencies, it is inappropriate to cite Knauff for the proposition that the government may treat excludable aliens however it pleases. 265

The Knauff opinion is well-known for the statement that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” 266 This phrase should not be read without consideration of Chief Justice Marshall’s observation in Cohens v. Virginia that general ex-
pressions in opinions should not control the Court's judgment in a subsequent suit.\textsuperscript{268} \textit{Knauff} can be confined as a decision interpreting the executive's wartime powers to exclude aliens during an unlimited national emergency. In fact, the Court strongly cautioned against an overly broad reading of its holding. The Court conceded that the enabling statutes\textsuperscript{269} authorized the "special restrictions on the entry of aliens only when the United States is at war or during the existence of the national emergency proclaimed May 27, 1941. For ordinary times Congress has provided aliens with a hearing."\textsuperscript{270} The peacetime hearing to which the Court referred had been enacted in two sections by the Act of February 5, 1917.\textsuperscript{271} These sections did not authorize the executive to issue rules and regulations permitting the exclusion and detention of an alien without a hearing before a board of inquiry, nor exclusion and detention based upon undisclosed information. The Court in \textit{Knauff} upheld a statutory and regulatory scheme that did provide for such measures because that scheme was based upon the sweeping executive and legislative powers which exist during an unlimited wartime emergency. The Court did not pass upon the propriety of such a statutory and regulatory scheme during ordinary peacetime.\textsuperscript{272}

\begin{flushleft}
\textsuperscript{268} \textit{Id.} at 97–98.

It is a maxim, not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.


\textsuperscript{270} 338 U.S. at 544–45 (footnote omitted).


\textsuperscript{272} In criticizing the Court's decision in \textit{Knauff}, Justice Jackson summarized the facts of the case from the viewpoint of the naturalized husband:

Now this American citizen is told he cannot bring his wife to the United States, but he will not be told why. He must abandon his bride to live in his own country or forsake his country to live with his bride.

So he went to court and sought a \textit{writ of habeas corpus}, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the Government tells the Court that not even
2. Deportations in the Post-War Setting

In 1950, in *Wong Yang Sung v. McGrath*, the Court held that the Administrative Procedure Act (APA) applied to deportation proceedings. The statutory largesse of Congress provided resident aliens with some additional procedural safeguards in the deportation process. The facts in *Wong Yang Sung* involved a Chinese crewman who overstayed his shore leave. The Supreme Court noted that one of the fundamental purposes of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." The Court also found that the Constitution's requirement of due process of law guarantees an alien undergoing a deportation some type of procedural safeguards. These include a hearing for those aliens whose entry into the United States was not clandestine even if they remained in the country illegally for some time.

Section 5 of the APA of 1946 provided that the Act's safeguards would apply to those "adjudication[s] required by statute." The Court accepted the petitioning alien crewman's argument that earlier Court decisions required a hearing before effecting a deportation, even though such a requirement did not appear expressly in the statutes. The Court reasoned, therefore, that deportation hearings fell within the ambit of the APA. The Court appeared at cross-purposes with itself: At

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a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.

338 U.S. at 550-51.

275. Deportation was provided for under the Immigration Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889.
276. 339 U.S. at 35.
277. *Id.* at 41. E.g., § 5(c) of the 1946 Act, 60 Stat. at 240, provided for a separation between those officers involved in a decision-making function and those officers acting in an investigative capacity.
279. Ch. 324, § 5, 60 Stat. at 239.
281. 339 U.S. at 50.
one time it found that the safeguards of the APA applied to a
deporation hearing because such hearings were required by
statute. Simultaneously, the Court appeared to be trying to
make a more forceful statement of the law, finding a constitu-
tional guarantee to a fair hearing in a deportation proceeding.

The strength of the Court's decision in Wong Yang Sung is
uncertain. The language of the APA of 1946 indicated that it
applied to all adjudications required by statute. The Court de-
determined a deportation hearing is such an adjudication and
therefore subject to the procedural safeguards provided in the
APA. But the Court did not indicate that Congress could not
alter the APA, and, in doing so, curtail even minimum rights
afforded an alien in a deportation proceeding. The language the
Court adopted suggested it would uphold certain minimum safe-
guards in a deportation proceeding as constitutionally based,
without going into details.

For a short time following the Supreme Court decision de-
nying Ellen Knauff entry into the United States, the Court
placed some restrictions upon the leeway with which it permit-
ted the Attorney General to function. This affected agency regu-
lations that denied hearings and allowed for determinations of
excludability "on the basis of information of a confidential na-
ture, the disclosure of which would be prejudicial to the public
interest." In Kwong Hai Chew v. Colding, the Court prohib-

282. Id.
283. We do not think the limiting words render the Administrative Procedure
Act inapplicable to hearings, the requirement for which has been read into a
statute by the Court in order to save the statute from invalidity. . . . We would
hardly attribute to Congress a purpose to be less scrupulous about the fairness
of a hearing necessitated by the Constitution than one granted by it as a matter
of expediency.

Indeed, to so construe the Immigration Act might again bring it into constitu-
tional jeopardy. When the Constitution requires a hearing, it requires a fair one,
once before a tribunal which meets at least currently prevailing standards of im-
partiality. A deportation hearing involves issues basic to human liberty and hap-
piness and, in the present upheavals in lands to which aliens may be returned,
perhaps to life itself. It might be difficult to justify as measuring up to constitu-
tional standards of impartiality a hearing tribunal for deportation proceedings
the like of which has been condemned by Congress as unfair even where less
vital matters of property rights are at stake.

Id. at 50-51.
284. See quote at note 283 supra.
285. 8 C.F.R. § 175.57(b) (Supp. 1945), reproduced in United States ex rel. Knauff v.
limited application of this secret decision-making procedure where the individual involved was a returning lawful permanent resident seaman, and for a brief while, signalled that an individual with significant ties to the United States would enjoy some legal protection when entering the country. In *Kwong Hai Chew*, the returning Chinese seaman was married to a native born American for five years before his exclusion, owned a home in New York, served with honor in World War II in the United States Merchant Marine, and passed Coast Guard security clearances for employment on a merchant vessel.

Earlier Supreme Court cases indicated, however, that the government had the power to remove resident aliens who had even greater ties to the United States when the rationale for exercising such power was founded upon a claim of national security or defense. These decisions helped form the basis for the Supreme Court’s application of the *Knauff* doctrine to bar the reentry of a resident alien who had previously enjoyed a very long period of residence in the United States with concomitant extended family ties, in *Shaughnessy v. United States ex rel. Mezei*.

In *Kwong Hai Chew*, because the individual seeking to reenter the United States was a resident alien, the Court reasoned he was a person under the fifth amendment and entitled to due process of law prior to deprivation of the liberty to remain at large in the United States. The procedural protection entitled the alien to notice of the nature of the charges against him and

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Shaughnessy, 338 U.S. 537, 542 n.3 (1950). The modern counterpart of this regulation may be found at § 235(c) of the INA, 66 Stat. 163, 199 (codified at 8 U.S.C. § 1225(c) (1982)).

286. 344 U.S. 590 (1953).

287. *Kwong Hai Chew* was married in June 1946, *United States ex rel. Kwong Hai Chew* v. *Colding*, 97 F. Supp. 592, 593 (E.D.N.Y. 1951), and was detained upon his attempted reentry into the United States in March of 1951. 344 U.S. at 594.


290. 345 U.S. 206 (1953), discussed *infra* at text accompanying note 295.

291. 344 U.S. at 596.
at least some type of hearing before an executive or administrative tribunal.\textsuperscript{292} Prior Supreme Court decisions provided a check upon any claim on behalf of Congress to the power to expel a resident alien without a fair opportunity to be heard.\textsuperscript{283} In \textit{Kwong Hai Chew}, the Court reasoned that the regulations denying notice and a hearing did not apply to a returning resident alien. The Court did not squarely base its decision upon any claimed unassailable right of such resident alien to fifth amendment protection.\textsuperscript{284}

In \textit{Shaughnessy v. United States ex rel. Mezei},\textsuperscript{295} the Court again considered the application of those agency regulations that denied excludable aliens notice and a hearing and which permitted their indefinite detention.\textsuperscript{296} The Court upheld application of these rules against a returning resident alien who had much stronger ties to the United States than the returning alien in \textit{Kwong Hai Chew}.

\textit{Mezei} involved a cabinetmaker who was determined to be a deportable security risk.\textsuperscript{297} He was born in Gibraltar and lived in the United States as a resident alien for twenty-five years from 1923 to 1948. He was married to a native born American citizen, owned a house in Buffalo, New York, and his children were born in the United States.\textsuperscript{298} He tried to visit his dying mother in Rumania in 1948, but was denied entry into that country. He remained in Hungary for 19 months because of difficulty in obtaining an exit permit. When he finally returned to the United States in 1950, he was excluded and confined on Ellis Island.\textsuperscript{299} Since none of the approximately fifteen countries to which he
applied would accept him, Mezei remained on Ellis Island. 300 He was finally released "after four years' imprisonment only through executive action as a matter of grace" 301 in 1954. 302 Mezei was simply, a man without a country, 303 but in this regard, he was by no means unique. 304 The Attorney General excluded Mezei without a hearing "on the 'basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.' That determination rested on a finding that [Mezei's] entry would be prejudicial to the public interest for security reasons." 308 The executive branch declined to divulge whatever evidence it may have had to the district court even in camera, 306 thereby adopting the position that the executive and legislative branches could avoid judicial review and circumvent the tripartite system of checks and balances in the implementation and execution of general immigration powers. District Judge Kaufman stated "[w]ithout much doubt his conduct as a resident alien between 1923 and 1948 was unexceptionable." 307 The district court, in hearing Mezei's petition for a writ of habeas corpus, based its decision to release him on parole 308 on the rationale that the court "has the power to release an alien from custody who has been detained an unreasonably long time where his deportation cannot be effectuated." 309 The decision of the Supreme Court in Mezei relied upon the same statutory authorization for the exercise of broad executive powers during a period

300. Id. at 209.
302. Alien, Long Held, Freed, supra note 297.
303. Id.
304. E.g., consider the experience of the Cubans and Haitians, in the cases cited at notes 404 and 568 infra.
305. 345 U.S. at 208.
306. Id. at 209.
307. United States ex rel. Mezei v. Shaughnessy, 101 F. Supp. 66, 67 (S.D.N.Y. 1951). In the Supreme Court opinion, combined dissents of Justices Jackson and Frankfurter commented that "[t]his man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him." 345 U.S. at 219.
308. For the practice of paroling excluded aliens into the country generally, see Leng May Ma v. Barber, 357 U.S 185 (1955), discussed infra at note 566.
of war or national emergency as was proclaimed by President Roosevelt. By the date of the decision in Mezei, however, the United States was clearly not embroiled in the national emergency of the Second World War and cries that the nation exists on a perpetual full wartime footing are chillingly Orwellian in vision.

The practice of using confidential undisclosed information was extended in Jay v. Boyd to be used against resident aliens in the United States to deny their application for suspension of an order of deportation. By regulations promulgated by the Attorney General, the immigration authorities could act upon secret information in order to effectuate the resident alien’s removal from the country. An immigration officer could unilaterally decide the disclosure of such information would be prejudicial to the public interest, safety, or security, and not be required to give the alien notice. The practice was upheld even where the alien in Jay had resided in the United States more than forty years and was sixty-five years of age. President Eisenhower described the statutory provisions under which Jay became deportable as an “injustice.” According to one of the dissenting voices in Jay, and as was the case concerning Ellen Knauff, “[n]o nation can remain true to the ideal of liberty

310. See notes 239-40 supra and accompanying text. Mezei was excluded from the United States on February 9, 1950, before President Truman terminated the national emergency. Mezei was excluded as a national security risk. 345 U.S. at 216. In adopting the position that Mezei was entitled to a fair hearing with notice of the charges against him, Justice Jackson’s dissent in Mezei stated: “[i]t is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country.” 345 U.S. at 228.


312. The statute provided discretionary suspension of deportation at § § 244(a)(5),(c) of the Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 215, 216 (current version at 8 U.S.C. § 1254(a), (c) (1982)).

The resident alien in Jay was ordered deported following passage of the Internal Security Act of 1950, ch. 1024, 64 Stat. 987, as a former member of the Communist Party from 1935 to 1940, over the alien’s claim that non-membership was not a condition of his original entry into the United States in 1921. Jay v. Boyd, 222 F. 2d 820 (9th Cir. 1955), reh’g denied, 224 F. 2d 957 (9th Cir. 1955), cert. granted, 350 U.S. 931 (1956), aff’d, 351 U.S. 345 (1956).


314. Id. at 362 (dissenting opinion of Warren, C.J.).

315. Id. at 364 (dissenting opinion of Black, J.).

316. 351 U.S. at 363 n.1 (describing the message from President Eisenhower to Senator Arthur V. Watkins, of April 6, 1953).
under law and at the same time permit people to have their homes destroyed and their lives blasted by the slurs of unseen and unsworn informers.”

Deep-rooted attachment to the United States will also not prevent the forcible eviction of aliens who have run afoul of the immigration laws. For example, aliens who enter the United States merely to bear a child who will thus obtain United States citizenship at birth will not necessarily be saved from deportation. Furthermore, excluded aliens who are temporarily paroled into the United States while awaiting deportation will not necessarily be considered as having established ties strong enough to allow them to remain within the United States. They are not within the United States for purposes of the immigration statutes. In *Leng May Ma v. Barber* the Court stated that “[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond.” But even this turning point in the treatment of aliens has suffered recent erosion. Developments occurring when perceived large influxes of Haitians and Cubans arrived in the United States, in the early 1980s, and changes brought by the Reagan Administration, challenged the general rule stated in *Leng May Ma.*

### III. CONGRESS’ PLENARY POWER TO DECIDE WHO SHALL ENTER: VISAS, ASYLUM, AND REFUGEES

An unchecked federal authority to regulate immigration continuously risks intervening with issues historically left to the states and upsetting the nation’s distinctive brand of federalism and dual sovereignty. The extent to which the federal government may interfere with domestic affairs of states and the lives of private citizens under a claim of regulating immigration was

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317. 351 U.S. at 365 (Black, J., dissenting).
319. Provision for the paroling of excluded aliens was provided for in § 212(d)(5) of the INA, 66 Stat. 163, 188 (currently codified at 8 U.S.C. § 1182(d)(5) (1982)).
322. *Id.* at 190.
323. *See* discussion in notes 404 and 568 *infra.*
restricted by the Supreme Court in *Keller v. United States.*\(^3\)\(^2\)\(^4\) In that opinion, the Court announced that Congress does not have the power to control all dealings between citizens and resident aliens.\(^3\)\(^2\)\(^5\) The decision found unconstitutional an immigration statute that made it a felony for anyone to support or harbor an alien woman for the purpose of prostitution.\(^3\)\(^2\)\(^6\)

Ideology, however, has been held to be a permissible basis on which to remove a long-time resident alien from the country, or to deny entry into the United States.\(^3\)\(^2\)\(^7\) In *Turner v. Wil-

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325. Id. at 148.

The act charged is only one included in the great mass of personal dealings with aliens. It is her [the alien's] own character and conduct which determines the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the Government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation. . . . If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration of the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress had not largely entered into this field of legislation it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced.

213 U.S. at 148-49.

liams, the Court rejected a first amendment claim made by an alien anarchist to have a right to remain in the United States in order to espouse his political philosophy. The facts in the case involved an alien facing deportation who had impermissibly engaged in various activities as a labor organizer.

A. Visa Allocations

Another example illustrating the tension between the liberty of United States citizens and the need for the government to regulate its borders arose in Kleindienst v. Mandel, where the Court held that the first amendment right of citizens to hear an alien is qualified by Congress' plenary power to exclude aliens. In Mandel, a Belgian citizen who was an "internationally respected scholar," was denied entry into the United States and barred from speaking upon invitation at various universities because he advocated "the economic, governmental,
and international doctrines of world communism.\(^{332}\) His visa was denied despite claims by university professors that their first and fifth amendment rights were denied by being prevented from hearing and speaking with Mandel. In dicta, the Court stated that the "congressional power to make policies and rules for the exclusion of aliens"\(^{333}\) is plenary.\(^{334}\) The actual holding of the case, however, is that when the executive exercises a congressional delegation of power to exclude aliens, and such power is exercised "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the" alien.\(^{335}\)

The Court specifically stated that it was not addressing the question of what the result would be if the executive offered "no justification whatsoever"\(^{336}\) for the exercise of its discretion. The "facially legitimate and bona fide reason" to deny the scholar's entry was that in a previous trip to the United States, Mandel "went far beyond the stated purposes of his trip, on the basis of which his admission had been authorized."\(^{337}\) According to Justice Marshall's dissent, however, "[m]erely ‘legitimate governmental interests’ cannot override constitutional rights,"\(^{338}\) such as the first amendment right of United States citizens to hear a speaker of their choice, absent a "compelling governmental interest."\(^{339}\) Justice Marshall stated that "government has no legitimate interest in stopping the flow of ideas."\(^{340}\)

Justice Marshall did not believe prior cases upholding congressional power to exclude aliens need be overruled to support his position, since the issues involved in Mandel hinged upon the rights of United States citizens to hear a speaker. According to Justice Marshall, "[a]t least when the rights of Americans are

\(^{332}\) Id. at 756 (footnote omitted).
\(^{333}\) Id. at 769.
\(^{335}\) 408 U.S. at 770.
\(^{336}\) Id.
\(^{337}\) Id. at 759 (quoting INS letter to counsel).
\(^{338}\) Id. at 777.
\(^{339}\) Id. at 779.
\(^{340}\) Id. at 780.
involved, there is no basis for concluding that the power to exclude aliens is absolute.\footnote{Id. at 782.} Where the Bill of Rights protects citizens' free speech and association rights, it also functions as a restriction on the congressional power to exclude aliens. Following this line of reasoning, the older alien exclusion cases were distinguishable because those decisions did not involve rights of United States citizens.\footnote{Id. at 783.}

There was no compelling government interest to exclude Mandel. According to Justice Douglas' dissent "national security [was] not involved."\footnote{Id. at 772.} Additionally, Justice Douglas argued that "[t]hought control is not within the competence of any branch of government . . . [T]he Congress did not undertake to make the Attorney General a censor."\footnote{Id.} Discretion was invested in the Attorney General for purposes not relevant in Mandel, according to Justice Douglas, such as for reasons of national security, importation of drugs, and similar matters.

There have been at least three significant developments since Kleindienst v. Mandel which have severely undermined the force of its holding: (1) The Helsinki Final Act,\footnote{Id. at 772.} (2) The

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341. Id. at 782.
342. Id. at 783. Justice Marshall further expounded upon this theme in Fiallo v. Bell, 430 U.S. 787 (1977), when he considered the rights of United States citizens as they are affected by operation of the federal immigration laws. See discussion at text accompanying note 1122.

The federal powers to regulate immigration are so extensive that the rights of United States citizens practically disappear by the wayside. For example, in Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the court of appeals affirmed the district court’s holding that it lacked subject matter jurisdiction over the complaint which claimed that the constitutional rights of a citizen wife had been violated by denial of her husband's visa application without reason by the United States Consul in Palermo, Italy, and that failure of the Department of State in accordance with its regulations to specify the reason for denial of the husband's visa application denied him procedural due process.

523 F.2d at 554–55. Similarly, in Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), the court decided that no constitutional right of a citizen is violated by the deportation of his or her alien spouse. See also Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); Swartz v. Rogers, 254 F.2d 338(D.C. Cir. 1958), cert. denied, 357 U.S. 928 (1958).

343. Id. at 772.
344. Id.
McGovern Amendment;\(^{346}\) and (3) Abourezk \textit{v.} Reagan.\(^{347}\) On August 1, 1975, the Helsinki Declaration was signed by thirty-four nations participating in the Conference on Security and Cooperation in Europe.\(^{348}\) The McGovern Amendment uses the


346. 22 U.S.C. § 2691 (1982). The most recent provisions of the McGovern Amendment are:

(a) Application by excludible aliens

For purposes of achieving greater United States compliance with the provisions of the Final Act of the Conference on Security and Cooperation in Europe (signed at Helsinki on August 1, 1975) and for purposes of encouraging other signatory countries to comply with those provisions, the Secretary of State should, within 30 days of receiving an application for a nonimmigrant visa by any alien who is excludible from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such an alien, unless the Secretary determines that the admission of such alien would be contrary to the security interests of the United States and so certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate. Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership in or affiliation with a proscribed organization.

(b) Nonadmission of labor organization representatives of a totalitarian state

This section does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state.

(c) Nonadmission of aliens connected with Palestine Liberation Organization

This section does not apply with respect to any alien who is a member, officer, official, representative, or spokesman of the Palestine Liberation Organization.

(d) Waiver recommendations

The Secretary of State may refuse to recommend a waiver for aliens from signatory countries which are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions.


348. The High Representatives who signed the agreement were Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland,
term "Final Act" to refer to part four of the Helsinki Declaration which pertains to compliance with the purposes of the Declaration.\textsuperscript{349} United States domestic law created a Commission on Security and Cooperation in Europe (Commission)\textsuperscript{350} to monitor programs and activities of the United States Government with a view of promoting "a greater interchange of people and ideas between East and West" in compliance with the Helsinki Final Act.\textsuperscript{351}

Numerous provisions of the Final Act encourage an enhanced exchange of people and ideas between East and West.\textsuperscript{352} For example, the Act supports the easing of barriers to allow for the movement of migrant workers.\textsuperscript{353} The Final Act encourages

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\item Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America, and Yugoslavia. The Holy See was also a signatory. 14 INT'L LEGAL MAT. 1292. This list includes the nine members of the European Economic Community, and all the European States, both Communist and non-Communist, with the exception of Albania. Historical note to 22 U.S.C.A. § 3002 (West 1979).
\item 349. See the historical note to 22 U.S.C.A. § 3002 (West 1979).
\item 352. The participating states, under the language of the Final Act, declared it to be their aim to facilitate freer movement and contacts, individually and collectively, whether privately, or officially, among persons, institutions and organizations of the participating States, and to contribute to the solution of the humanitarian problems that arise in that connexion. 14 INT'L LEGAL MAT. at 1313. The participating States declared themselves ready to take measures to implement these provisions. Id. at 1313.
\item 353. 14 INT'L LEGAL MAT. at 1311. The Final Act aims to ensure, through collaboration between the host country and the country of origin, the conditions under which the orderly movement of workers might take place, while at the same time protecting their personal and social welfare and, if appropriate, to organize the recruitment of migrant workers and the provision of elementary language and vocational training; to ensure equality of rights between migrant workers and nationals of the host countries with regard to conditions of employment and work and to social security, and to endeavour to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions; to endeavour to ensure, as far as possible, that migrant workers may enjoy the same opportunities as nationals of the host countries of finding other suitable employment in the event of unemployment . . . . 14 INT'L LEGAL MAT. at 1311. Notably, the recently passed Immigration Reform and Control Act of 1986 (IRCA) takes a diametrically opposite view toward migrant workers by severely restricting eligibility for inclusion within the class of legal migrant workers, denying employment eligibility for most individuals who cross the United States border, and by making illegal the employment of illegal aliens who migrate across the border. Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359.
\end{itemize}
cross-border visitation between family members without distinction on the basis of country of origin or destination.\textsuperscript{354} As applicable to Mandel, the Final Act requires simplification and flexibility concerning procedures for entry into the United States when admission is for professional purposes. The Act also requires the easing of regulations to permit movement of citizens of participating states while within the foreign countries.\textsuperscript{355} The Act promotes free exchanges and contacts between organizations representing student interests.\textsuperscript{356} These provisions address the facts as they existed in Mandel where various universities had invited Mandel to speak at their campuses. The Act also supports facilitating conventions of nongovernmental organizations, associations, and individuals.\textsuperscript{357}

The Final Act provides generally for an enhanced flow of information between the participating states\textsuperscript{358} including improving conditions under which journalists from one participating state may function in another participating state.\textsuperscript{359} Under these provisions, lecture tours by specialists from other participating states are encouraged.\textsuperscript{360} Conceivably, these provisions describe Mandel's situation rather closely as he was a journalist for a Belgian paper.\textsuperscript{361} Additionally, under the Final Act, journalists are to have visa requests examined in a "favorable spirit."\textsuperscript{362} The Act also contemplates cultural cooperation and exchanges,\textsuperscript{363} including the development of contacts between teachers and specialists.\textsuperscript{364} The Helsinki Final Act envisions expansion of contacts among individuals in the field of education\textsuperscript{365} which arguably applies to individuals such as Mandel.\textsuperscript{366}

\begin{itemize}
\item \textsuperscript{354} \textit{Int'l Legal Mat.} at 1313-14.
\item \textsuperscript{355} \textit{Id.} at 1314 ((d) Travel for Personal or Professional Reasons).
\item \textsuperscript{356} \textit{Id.} at 1315 ((f) Meetings among Young People).
\item \textsuperscript{357} \textit{Id.} at 1315 ((h) Expansion of Contacts).
\item \textsuperscript{358} \textit{Id.} at 1315-17.
\item \textsuperscript{359} \textit{Id.} at 1315.
\item \textsuperscript{360} \textit{Id.} at 1316 ((a) Improvement of the Circulation of, Access to, and Exchange of Information (i) Oral Information).
\item \textsuperscript{361} \textit{Mandel}, 408 U.S. at 756.
\item \textsuperscript{362} 14 \textit{Int'l Legal Mat.} at 1317 ((c) Improvement of Working Conditions for Journalists).
\item \textsuperscript{363} \textit{Id.} at 1317-21.
\item \textsuperscript{364} \textit{Id.} at 1320.
\item \textsuperscript{365} \textit{Id.} at 1321-24.
\item \textsuperscript{366} \textit{Mandel}, 408 U.S. at 774.
\end{itemize}
The Final Act encourages improved access for scholars to educational institutions within the other participating states for symposiums and seminars. Mandel was a respected scholar in his field and conceivably would have fallen within the ambit of these allowances. The Act supports coordination of programs to foster exchanges of information concerning the disciplines of philosophy, political science, and economics—a broad designation under which Mandel certainly would have fallen had the Act been in existence at the time of his attempted entry into the United States.

Although the Helsinki Final Act was not ratified as a treaty, its provisions were selectively implemented by United States domestic law through the passage of the McGovern Amendment and other provisions related to foreign relations law which established the Commission on Security and Cooperation in Europe. The McGovern Amendment specifically allows for the issuance of temporary visas to aliens who are members of, or affiliated with “proscribed organization[s]” as long as they are otherwise qualified for admission into the United States and as long as the Secretary of State does not determine that the admission would be contrary to the security interests of the United States. Thus, an alien such as Mandel, would now likely obtain a visa despite his advocacy on behalf of the doctrines of world communism. Under the McGovern Amendment, the

367. 14 INT'L LEGAL MAT. at 1322 ((b) Access and Exchanges).
368. Mandel, 408 U.S. at 774.
369. 14 INT'L LEGAL MAT. at 1323.
Secretary of State is authorized to make the decision that the admission would be contrary to the "security" interests of the United States. Under the Immigration and Nationality Act (INA), the Attorney General retains authority to do likewise. The McGovern Amendment specifically restricts its application to aliens who are excludable for the sole reason that they are members of, or affiliated with, a proscribed organization. For example, an alien who is affiliated with the Communist Party could still be excluded as a threat to the security of the United States under section 212(a)(27) of the INA or under the McGovern Amendment's similar provision.

A circuit court, in Abourezk v. Reagan, grappled with the problem of whether application of section 212(a)(27) completely eviscerates the potency of the McGovern Amendment and decided squarely that it does not. The circuit court in Abourezk remanded the case to develop a more substantive record to aid in determining the contours of section 212(a)(27) but the Supreme Court, in granting certiorari, may have decided to perform this task itself.

The Court in Abourezk decided that the Secretary of State cannot bar the admission of an alien into the United States for the sole reason of membership in a proscribed organization. The Court reasoned that the "prejudice to foreign policy" that arises is not significant enough to warrant denial of admission for national security purposes. The circuit court emphasized

the United States are not jeopardized and that "instances in which the Attorney General rejects action in the foreign policy realm that the Secretary recommends will be extraordinary." Abourezk, 785 F.2d 1043, 1059 n.22.

376. Section 212(a)(27) of the INA of 1952, 66 Stat. 184 (currently codified at 8 U.S.C. § 1182(a)(27) (1982)) (barring entry of aliens who would "engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States").
380. The United States Court of Appeals for the District of Columbia stated that "[t]he Executive may not use subsection (27) to evade the limitations Congress appended to subsection (28)." 785 F.2d at 1057.
381. 785 F.2d at 1056.
383. 785 F.2d at 1057.
384. Id.
that the executive branch, acting under the security provision of section 212(a)(27), must not evade the will of Congress as expressed in the McGovern Amendment. The court held that the reason for denying admission under section 212(a)(27) must be "independent of" the fact of the alien's membership in, or affiliation with, the proscribed organization. The executive agencies cannot succeed on a claim that membership alone is sufficiently prejudicial to the security of the United States to bar admission.

The circuit court in Abourezk also expressed a growing displeasure in the lower federal courts for arguments by the executive which would deny the safeguard of judicial review when the issue concerns immigration matters. This judicial self-assertion came in the majority's response to the dissent in which the majority rejected the argument that the State Department could exclude members of proscribed organizations believed to be affiliated with specific unfriendly governments. Since relations with foreign governments lie least of all within the ambit of judicial cognizance, the court recognized that acceptance of such an argument would eliminate judicial review of State Department activities. This result would bar effective implementation of the McGovern Amendment. The judicial self-assertiveness thereby evinced contrasts with the earlier deference the courts gave the executive when treating immigration matters. For example, in Knauff and Mezei, the Attorney General refused to divulge information forming the basis for the exclusions for in camera review by a judge even in the absence of opposing counsel. Nonetheless, the Attorney General in each

386. 785 F.2d at 1057, 1058 (emphasis added by the court).
387. 785 F.2d at 1058 n.20.
388. 785 F.2d 1043 (Bork, Circuit Judge, dissenting).
389. 785 F.2d at 1058 n.20. The court decided that an individual can be denied a visa on the basis of his or her affiliation with a government that is hostile to the United States under § 212(a)(27). But the court clarified this point by explaining that such affiliation cannot be presumed merely "because of the applicant's membership or participation in a subsection (28) organization" 785 F.2d at 1059.
392. Mezei, 345 U.S. at 209; Knauff, 338 U.S. 537 (nondisclosed information). Concerning the government's refusal to disclose information about the alien, even in ex parte
case prevailed because of the great deference the Court extended to claims concerning national security.

In the relatively short span of time since Knauff and Mezei, the lower federal courts, aided by new statutes, judicial decisions, and agency regulations, have greatly reduced the applicability of the former, self-imposed doctrine of judicial passivity in matters relating to immigration law. This development arrives in camera proceedings, see note 272 and text accompanying note 305 supra.

393. For example, in Allende v. Schultz, 605 F. Supp. 1220 (D. Mass. 1985) (denying motion for summary judgment), motion to dismiss denied, 624 F. Supp. 1063 (D. Mass. 1985) where the widow of former Chilean President Salvador Allende was refused a non-immigrant visa by the Department of State on the basis of § 212(a)(28)(C) and (27) of the Immigration and Nationality Act, the court refused to consider the State Department's classified documents in its motion for summary judgment, not out of judicial deference to the executive on immigration matters, but because the United States citizen plaintiffs (scholars, politicians, and religious leaders) were denied access to the classified materials and thus could not counter them. The court not only refused to give deference to a "national security" argument, but also, the court decided the motion by expressly refusing to consider, ex parte, the classified documents the government possessed, and denied the government's motion for summary judgment. Also, the court recognized that first amendment rights of United States citizens are implicated when the government refuses to grant a visa to an alien with whom United States citizens wish to speak. Allende, 624 F. Supp. at 1065.

In El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982) (Sofaer, J.) the court examined classified materials in deciding that a Libyan aeronautics student's entry into the United States would aid Libyan policies and objectives which would threaten the public interest and welfare of the United States. El-Werfalli involved § 235(c) of the INA of 1952, 66 Stat. 199, 8 U.S.C. § 1225(c) (1982), which allows for the exclusion of aliens on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion . . . concludes would be prejudicial to the public interest, safety, or security [whereby such alien may] be excluded and deported without any inquiry or further inquiry by a special inquiry officer . . . .

The court decided the statute does not "eliminate the very limited judicial review traditionally applied in this area." 547 F. Supp. at 153. Examination by the court of the classified material satisfied the court that the government's explanations were sufficient under Mandel, 408 U.S. 753, to justify the exclusion. Under the Mandel standard, according to El-Werfalli, the government may exclude for "a facially legitimate and bona fide reason" but the court is limited from probing into the wisdom or the basis of the reasons. 547 F. Supp. at 153.

The importance of El-Werfalli is that the court will look at classified or confidential material (which it did not do in Knauff nor Mezei, see note 392 supra) in evaluating the government's claim that an alien is inadmissible under § § 212(a)(27), & 235(c) of the INA, 8 U.S.C. § § 1182(a)(27), & 1225(c) (1982).

The situation of an alien who is excluded as a danger to the national security of the United States, who simultaneously advances a claim for asylum, was considered in Ellis v. Ferro, 549 F.Supp 428 (W.D.N.Y. 1982), where the court held that the alien was entitled to a district court hearing, on habeas corpus, concerning his asylum claim and a
as a balanced correction for the excessive docility the judiciary

review of the Regional Commissioner's determination based on § § 235(c) and 212(a)(27) of the INA, 8 U.S.C. § § 1227(c), and 1182(a)(27) (1982), under an “abuse of discretion” standard. 549 F. Supp. at 434.

The net result of these decisions is that an alien may challenge an INS determination that he is a danger to the security of the United States under certain circumstances. In Azzouka v. Sava, 777 F.2d 68 (2d Cir. 1985), the court decided that although an alien has no right to an asylum hearing under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, if the Regional Commissioner determines, under the procedures of § 235(c) of the INA, that the alien is a danger to the national security of the United States under § 212(a)(27) of the INA, the courts will nonetheless require an “explicit finding” under the § 235(c) procedures that the alien in fact poses a present danger to the security of the United States. Azzouka, 777 F.2d 68, 76. The courts will no longer merely give rubber-stamp approval to a claim of national security put forward by the government. Failure by the government to establish such a finding will result in the ability of the alien to advance an asylum petition with all the associated opportunities for judicial review of his or her claim. 777 F.2d at 76.

In Abourezk v. Reagan, 785 F.2d 1043, at 1061, the court specifically rejected the proposition that an alien can be faced with an exclusion decision against him “based on evidence he was never permitted to see and rebut.” Under 8 C.F.R. § 208.10(c) (1987) (record and non-record evidence) the immigration judge can receive classified information (under Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (containing 1982 compilation)) as non-record evidence and the alien must “be informed as to whether the character of the evidence concerns political, social or other conditions in a specified country, or [is] personally related to the applicant.” There may be limited disclosure of such evidence to the alien. 8 C.F.R. § 208.10(d) (1987). Even without a consideration of international law, United States domestic law has moved a great deal toward eroding the underpinnings of the broad dicta announced in Knauff and Mezei, discussed supra at text accompanying notes 226 and 295.

These recent developments represent a break with the past, or at least a minor separation. For example, in Jay v. Boyd, 351 U.S. 345 (1956), the Court held that confidential information, undisclosed to the alien, may be used in rulings upon applications for suspension of deportation. Even in Jay, however, the Court recognized that “where there is no compelling reason to refuse to disclose the basis of a denial of an application, the statute does not contemplate arbitrary secrecy.” 351 U.S. at 358. Justice Black, in his dissent, expounded

What is meant by “confidential information”? According to officers of the Immigration Service it may be “merely information we received off the street”; or “what might be termed hearsay evidence, which could not be gotten into the record . . . ”; or “information from persons who were in a position to give us the information that might be detrimental to the interests of the Service to disclose that person's name” . . . .

351 U.S. at 365.

The combination of these recent procedural safeguards places United States immigration law closer to the international standards announced in the Geneva Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, T.I.A.S. 6577. Although the United States is not a party to this Convention, it is a party to the Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, which incorporates Articles 2 through 34 of the Geneva Convention. The applicable articles in this context are illustrated by the following:
has formerly displayed and diminishes the danger that the political voices of the other two branches will secretly include within the rubric of national security considerations reaching the lives of innocuous individuals whose personal politics may be offensive but who by no leap of the imagination pose a threat to the national existence. There is no point in ceding judicial reviewability of the actions of an executive agency when judges can keep a secret as well as bureaucrats, and can take adequate precautions against uninvited disclosures. In a tripartite scheme of checks and balances there is much to be said against one branch refusing to play the role the Founding Fathers assigned to it regardless of the convenience and economy that may be engendered. Recognition that a government is sovereign by no means dispenses with the fact that it remains a government of enumerated powers. Once conceded that there are inherent powers accompanying a government's sovereignty, it is illogical to conclude that one or two branches of the government were given such powers to the exclusion of the judiciary.394

Article 32 (Expulsion)
1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Article 33 (Prohibition of Expulsion or Return ("Refoulement"))
1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Arguably, these provisions, in force since 1951, have risen to the level of customary international law, which is binding upon United States courts. The Paquete Habana, 175 U.S. 677 (1900). On related developments, see generally Sofaer, Terrorism and the Law, 64 Foreign App. 901 (1986).

394. See The Federalist No. 51, at 320 (J. Madison) (Mentor ed. 1961), where it is explained that it is intended that the separate branches of government will "by their mutual relations, be the means of keeping each other in their proper places." See also E.
In Abourezk, the circuit court went so far as to direct the district court to make certain that the aliens were “accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.” The circuit court noted “grave concern about the district court’s heavy reliance upon [the executive’s] in camera ex parte evidence when it granted the [executive’s] motion for summary judgment.” In a step away from the broad judicial deference to the executive in immigration matters, the Abourezk court cut an inroad by holding “that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.” On immigration issues, the judiciary shows signs of moving out of its former mold of complete deference to the other two branches.

B. Political and Refugee Asylum

Federal immigration law applies different standards in its evaluation of requests for political and refugee asylum. Two


395. 785 F.2d. at 1060.
396. Id.
397. Id. at 1061.
398. The Abourezk court pronounced limitations on the broad power to regulate immigration:

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

785 F.2d at 1061.

The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(emphasis added).
400. “Refugee asylum” is a reference to the combined operation of §§ 101(a)(42)(A) and 208 of the INA, as added by the Act of Mar. 17, 1980, Pub. L. No. 96-212, §§ 201(a),
cases decided within the space of one year illustrate the difference: in *Garcia-Mir v. Smith*,401 the burden of proving deportability ultimately fell upon the government; in *INS v. Stevic*,402 the deportable alien had to demonstrate, by a clear probability, that he would suffer persecution if returned to his native land.403


The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

(emphasis added). Section 208(a) of the INA provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such an alien is a refugee within the meaning of section 101(a)(42)(A) of this title.


403. Regardless of the standard of proof used to establish the likelihood of persecution, as well as upon whom the burden is placed, the fact of an alien's resettlement in a third country before coming to the United States is a relevant factor in evaluating a request for asylum. The Burger Court held, in *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, (1971)(Black, J.)(Stewart, J., dissenting, joined by Douglas, Brennan and Marshall, JJ.), that resettlement could defeat the alien's request for asylum within the United States. In *Yee Chien Woo*, the alien-applicant fled mainland China in 1953, lived in Hong Kong until 1959, and stayed within the United States from 1960 to 1966. The Court reasoned that because prior statutes allowing refugee asylum had considered whether the alien

Conditional entries shall next be made available by the Attorney General . . . to aliens who satisfy an Immigration and Naturalization Services officer at an examination in any non-Communist or non-Communist dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area . . . and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made . . . (emphasis added). See, e.g., Tsamenyi, The 'Boat People': Are They Refugees?, 5 Hum. RTS. Q. 348 (1983) (discusses people fleeing Vietnam after the fall of Saigon in 1975, including the condition of the Hoa, the ethnic Chinese, in Vietnam); see also, In re Portales, 18 I. & N. Dec. 239 (BIA 1982) (Int. Dec. No. 2905) where requests for asylum and withholding of deportation were held to be properly denied to natives and citizens of Cuba who were granted “nonimmigrant resident refugee status [by Peru entitling them] to work, attend school, practice their religion, and requir[ing them] to pay taxes.” Id. at 240–41. The BIA indicated that “[a]n alien is deemed firmly resettled if offered permanent resettlement by another country as a consequence of his flight from persecution, unless it is established that the conditions of his residence in that country have been substantially and consciously restricted by the authorities of that country.” Id. at 242. See also 8 C.F.R. § 207.1(b) & (c), 208.8(f)(1)(ii), and 208.14 (1987).

For an analysis of the standard of proof used in the deportation context, see Woodby v. INS, 385 U.S. 276 (1966) (government’s burden of proof in a deportation proceeding is to establish the facts supporting deportability by clear, unequivocal and convincing evidence). For a discussion of the development of the evidentiary standard utilized in denaturalization proceedings and expatriations, see infra notes 1304–53 and accompanying text.

404. 469 U.S. 1311 (1985) (Rehnquist, Circuit Justice), which represents the tip of the iceberg concerning litigation arising between the Cubans who arrived in the United States as part of the Mariel Boatlift and the efforts by the federal government to expel or incarcerate them. This episode in United States history is chronicled in the court decisions concerning the Cubans’ claims. A recital of the major cases follows. For an argument that the Haitian boat people were received differently by the United States than were the Marielitos merely on the basis of the color of their skin, see, E. HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS (1985).

In Soroa-Gonzales v. Civilliti, 515 F. Supp. 1049 (N.D. Ga. 1981) (Shoob, J.), an excludable Cuban under § 212(a)(20) (current version at 8 U.S.C. § 1182(a)(20) (1982)) (lack of proper entry documents) whose parole under § 212(d)(5) (current version at 8 U.S.C. § 1182(d)(5) (1982)) had been revoked by the INS, and who had subsequently been incarcerated for one year in a maximum security federal prison, the Atlanta Federal Penitentiary, was granted habeas corpus relief and released on parole under order of the district court since the government failed to show that the Cuban detainee was “a risk to the national security . . . likely to abscond,” or an individual whose release “would be
had set aside the Board of Immigration Appeals (BIA) orders of
against the public interest." Id. at 1061. The alien was released into the custody of two
individuals willing to sponsor him.

Factors which apparently weighed in the alien’s favor were as follows. The judge
accepted that the entire boatlift had occurred at the President’s invitation. Id. at 1051.
The alien had been detained solely because he entered without the proper entry docu-
ments although some 130,000 other Cubans fitting the same description were nonetheless
free on parole. Id. Additionally, the alien was being held indefinitely in prison. The court
concluded that the alien’s treatment was “neither fair, reasonable nor humane.” Id. The
court indicated that it was acting upon the writ, additionally, out of an “absence of gov-
ernment policy” where the alternative was to permit the continued indefinite incarcera-
tion of the alien. Id. at 1051 n.1. The court recognized that Cuba would not accept the
detainee or other participants in the “freedom flotilla.” Id. at 1053 n.1.5.

The Court distinguished the Knauff, 338 U.S. 537 (1950), and Mezei, 345 U.S. 206
(1953) cases, discussed supra at text accompanying notes 226 and 295, by taking the
position that the alien was not a threat to national security, and that his presence in the
United States was in response, in part, to the invitation President Carter extended to the
Cubans originally.

Regarding international law, the court indicated it was avoiding a decision on these
issues, but that

[w]here the Court forced to decide, however, whether petitioner’s continued in-
carceration pursuant to INS’ refusal to reinstate parole amounted to “arbitrary
detention” in violation of the Universal Declaration of Human Rights (Article
9), the International Covenant on Civil and Political Rights (Article 9, para. 1),
and the American Convention on Human Rights (Article 7, para. 3), the Court
would conclude that petitioner’s further detention was arbitrary. He is being
treated as if he had been found to have committed a crime in Cuba despite the
fact that the opposite was found to be the case.

515 F. Supp. at 1061 n.18.

court conditionally certified the

class of all Cuban nationals whose parole . . . [had] been revoked by the INS,
who [were at the time of certification] incarcerated at the Atlanta Federal Peni-
tentiary or who [would] be incarcerated there, and who [had] arrived in the
United States from Cuba as part of the “Freedom Flotilla” in 1980.

Id. at 126 (italicized language deleted from the certification in 91 F.R.D. 244). The Cu-
ban detainees were known as the “Mir” class. 91 F.R.D. at 119-120. The court refused to
delay judicial proceedings in deference to the executive’s July 22, 1981 proposed plan to
reconsider release of the detained Cubans which had been entitled the “Status Review
Plan and Procedures.” Id. at 121. The court indicated a willingness to consider claims by
the government concerning those aliens whose release on parole “(a) [would] constitute a
serious threat to national security; (b) [would] likely result in the detainee’s absconding;
or (c) [would] be against the public interest for reasons not readily apparent.” Id. at 125.
Further, the court indicated the government would bear the burden of convincing the
court that any particular individual Cuban fell within one of the 3 detainable classes
listed above. The court conditionally certified 12 subclasses, within the major class
grouping, of excludable detainees. The subclassifications were determined by the basis
upon which individual subclass members were excludable. These subclasses included va-
rious groupings of Cubans who had violated § 212(a)(20) by arriving in the United States
without proper documentation; Cubans who had committed crimes in Cuba which would
have constituted misdemeanors in the District of Columbia, as well as those with felony backgrounds; and Cubans who fell within the insanity provisions of § 212(a)(2), (3), or (4) (current version at 8 U.S.C. § 1182(a)(2), (3), or (4) (1982)). The court ordered all of these Cubans released from detention within less than one month (many Cubans had been detained in a maximum security prison for 14 months), unless the alien fell within one of the three detainable exceptions listed above. The court described the government's request for more detention time of the aliens as "but another refrain of a tune that has played too long." 91 F.R.D. at 122. The degree of rights bestowed upon the aliens, as well as the judicial assessment of decision-making traditionally marked for the sovereign powers of the political branches, distinguish this opinion from the judiciary's earlier position in Knauff and Mezei.

In Fernandez-Roque v. Smith, 91 F.R.D. 239 (N.D. Ga. Aug. 20, 1981) (Shoob, J.) the court granted "classwide habeas relief" to subclasses (1) to (4) of those Cuban detainees excludable from the United States on the basis of 212(a)(20) (lack of proper entry documents) which subclasses were defined in the earlier decision conditionally certifying the class. An attempt by the State of Florida to intervene as a party defendant in the habeas case was denied in Mir v. Smith, 521 F. Supp. 446 (N.D. Ga. 1981) (Shoob, J.) The Fernandez-Roque court decided that "the indefinite detention of persons not convicted of crime is not an acceptable alternative to exclusion." 91 F.R.D. at 243. The government had not objected to the release of these subclasses on any articulated basis such as that release would be "a threat to national security or to the public interest, or that they are likely to abscond." Id. at 243. Rather, the government had objected on "general grounds" which the court found unacceptable. Id. at 241.

The court agreed with a government plan that for the Cubans to be released they would have to be "sponsor[ed] or resettled by the United States Catholic Conference" or some other acceptable agency; and those who were witnesses to crimes were "required to report by telephone monthly to the [FBI]," as well as to the INS "Service Office as directed by the INS." Id. at 241. The court indicated that it was not annulling the aliens' excludability, but was drawing a line pertaining to parole decisions by the Attorney General that "continued incarceration in a maximum security prison—after approximately 15 months . . . is an abuse of parole discretion." Id. at 242-43. Cf. Leng May Ma v. Barber, 357 U.S. 185 (1958). Finally, in seeing the government take earnest steps to implement its "Status Review Plan and Procedures," the court indicated it was willing to tolerate government efforts to regulate the entire process of evaluating the Cubans' claims for release. The court established itself as an unwilling and hesitant intervenor which would nonetheless intervene if the Attorney General and government simply did "nothing." Id. at 244. Plans were made to transfer a number of Cuban and Haitian refugees from a detention center in Florida to Fort Allen in Puerto Rico. See Colon v. Carter, 507 F. Supp. 1026 (D. Puerto Rico, 1980), vacated, 633 F.2d 964 (1st Cir. 1980); Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. Puerto Rico, 1981), vacated sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981). Approximately 122,000 Cuban nationals and 9,500 Haitians entered the United States. 507 F. Supp. at 1041. The District Court for Puerto Rico stated that "in other times and circumstances the so-called refugee facility would be referred to as a concentration camp." Id. at 1043. It also noted that "under the present posture of things it is unlikely that any but Haitians will be interned at Fort Allen, thus converting it into a de facto Haitian ghetto." Id. at 1043 n.8. Efforts were made to delay the opening of the detention centers. See, e.g., Colon, 507 F. Supp. 1026 (enjoining government from preparing Fort Allen until Environmental Impact Statement (EIS) filed), vacated, 633 F.2d 964; Puerto Rico v. Muskie, 507 F. Supp. 1035 (permanently enjoining transfer of the detainees to Fort Allen), vacated, 668 F.2d 611, 616 (1981) (despite "allegations of human suffering and deprivation at Fort Allen.").
Ultimately, the injunction against transferring the aliens to Puerto Rico was lifted. *Id.*

Litigation concerning the arrival of the Cuban “Marielitos” continued in the following cases: Fernandez-Roque v. Smith, 535 F. Supp. 741 (N.D.Ga. 1981) (Shoob, J.) (joining the Secretary of the Department of Health and Human Services and the Director of the Office of Refugee Resettlement as defendants in class action habeas corpus case); Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982) (Tuttle, J.) (concluding that the government had consented to a district court’s temporary restraining order (TRO) prohibiting it from deporting any of the 1800 detained Cubans with a suspected criminal background and, as a TRO, the district court’s order was therefore nonappealable, and remanding to the district court to decide the jurisdictional issue); Fernandez-Roque v. Smith, 539 F. Supp. 925, 935, 948 (N.D. Ga. 1982) (Shoob, J.) (indicating “[t]here is no significant difference between the provisions of Article 33 [of the Protocol] and those of 8 U.S.C. § 1253(h),” (footnote omitted) and emphasizing that “in the absence of action from the other branches, and to the extent that its jurisdiction is properly invoked, this Court has heard and decided plaintiffs’ claims and will continue to do so, it is hoped, on a rational and responsible basis.”); Mir v. Smith, 521 F. Supp. 446 (1981) (Shoob, J.) (denying motion by State of Florida to intervene as a party defendant in a habeas proceeding); Fernandez-Roque v. Smith, 557 F. Supp. 690, 691 (N.D. Ga. 1982) (Shoob, J.) (denying writs of habeas corpus for Cuban detainees who had “been approved for release . . . but remain incarcerated awaiting sponsors,” while closely and critically examining restrictions placed upon potential sponsors of Cuban detainees in consideration of the adverse effects of continued incarceration); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1128 (N.D.Ga. 1983) (Shoob, J.) (a liberty interest arises on behalf of the alien detainee requiring justification for continued incarceration on the basis of a procedurally adequate finding).

Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984) (Henderson, J.) (a consolidated appeal rev’g 557 F. Supp. 690 and 567 F. Supp. 1115, and remanding); Fernandez-Roque v. Smith, 599 F. Supp. 1103 (N.D. Ga. 1984) (BIA abused its discretion in denying Cubans their classwide motions to reopen their asylum claims); Fernandez-Roque v. Smith, 599 F. Supp. 1110 (N.D.Ga. 1984) (Shoob, J.) (denying motion by the government to stay the order from 599 F. Supp. 1103 pending appeal of that order); Fernandez-Roque v. Smith, 600 F. Supp. 1500 (N.D. Ga. 1985) (Shoob, J.) (ordering release on parole of 34 of 147 Cuban detainees; noting also that the vast majority of these “Marielitos” were released on parole rather than remaining in detention camps and prisons); Garcia-Mir v. Smith, 469 U.S. 1311 (1985) (Rehnquist, Circuit Justice) (refusing to modify the Eleventh Circuit’s stay of the district court order of 1984 (at 599 F. Supp. 1103) that had vacated and remanded the outstanding order of exclusion for reevaluation of the Cubans’ asylum claims—therefore, those aliens under 8 U.S.C. § 1253(h)(2) (1982) were deportable); Garcia-Mir v. Smith, 766 F.2d 1478, 1483–85 (11th Cir. 1985) (per curiam) (in consolidating the two separate appeals of 599 F. Supp. 1103 and 600 F. Supp. 1500, the circuit court stated that the excluded Cubans should not be treated to the same legal protections given to those who have effected a legal entry into the United States, where the Attorney General had a “facially legitimate and bona fide reason” for suspending release of the detainees because “Cuba’s agreement to take back 2,746 Mariel Cubans increased the likelihood that an alien would abscond if released on parole.”).

Fernandez-Roque v. Smith, 622 F. Supp. 887, 896, 903 (N.D. Ga. 1985) (Shoob, J.) (President’s “invitation” to the Cubans “gave rise to a protected liberty interest in continued parole that cannot be impaired without due process of law,” but the Attorney General’s involvement in their detention can be considered a “controlling executive act” removing such act from the bounds of international law (footnote omitted)); Garcia-Mir v. Meese, 781 F.2d 1450, 1455 (11th Cir. 1986) (Johnson, J.) (“indicating that “the cost of
The United States Court of Appeals for the Eleventh Circuit had partially stayed the district court's decision and reactivated the orders of exclusion against some of the Cubans. Justice Rehnquist's opinion continued the order of exclusion against those Cubans who had serious, nonpolitical, criminal backgrounds and who were thus ineligible under section 243(h)(2) of the INA for a withholding of deportation. Cubans

more days, weeks, months, or even years in the penitentiary for those already held for five years is incalculable. . . . these refugees have been indefinitely incarcerated by a process that ignores the fundamental fact that they are human beings").

Perhaps the most significant decision to arise from the Cuban episode, was Fernandez v. Wilkinson, 505 F. Supp. 787 (D.Kan. 1980) (Rogers, J.) The facts involved a Cuban who was detained for over one and a half years at the United States penitentiary at Leavenworth, Kansas, a maximum security prison. He had admitted the commission of various petty crimes while in Cuba. Cuba refused to accept his return. According to Fernandez, 505 F. Supp. at 789, "the Government has been unable to expeditiously carry out the order of deportation and cannot even speculate as to a date of departure. No other country has been contacted about possibly accepting petitioner." The court held that "an excluded alien may [not] be detained in a maximum security prison indefinitely awaiting deportation." Id. at 791. Section 237 of the Act of 1952, 66 Stat. 201, provided for the immediate deportation of an excluded alien "to the country whence he came" but has subsequently been amended by Act of Dec. 29, 1981, Pub. L. No. 97-116, § 7, 95 Stat. 1615 (currently codified at 8 U.S.C. § 1227 (1982)). Under § 242(c) of the INA (current version at 8 U.S.C. § 1252(c) (1982)), the Attorney General has six months to deport a deportable alien although not necessarily to the country whence he came. See also § 243 of the INA (current version at 8 U.S.C. § 1253 (1982)). The Court reiterated in Fernandez that "detention was intended for the sole purpose of effecting deportation. . . . Once it became evident that deportation was not realizable in the foreseeable future, the continued detention of the alien was found to be without cause." Fernandez, 505 F. Supp. at 793. The court objected to the "indeterminate detention" of the excluded alien who had not been convicted of a crime in the United States nor found to be a security risk. Id. at 794. The court also distinguished Mezei, 345 U.S. 206, on the basis that the Cuban detainee was not "deemed a national security risk, and . . . statutory authority for parole of excluded aliens now exists." Fernandez, 505 F. Supp. at 794. Compare this reception with the one the Haitians received, described in note 568 infra.

405. 469 U.S. at 1312.


(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, or membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to
without criminal backgrounds, who were not automatically de-
portable by operation of section 243(h)(2), were to have their
requests for asylum considered under sections 101(a)(42) and
208 of the INA which define a refugee and prescribe a procedure
for granting asylum.\textsuperscript{407}

According to the definition in section 101(a)(42), refugees
include those aliens who are unable to return to their home
country because of a "well-founded fear of persecution on ac-
count of . . . membership in a particular social group."\textsuperscript{408} The
Cubans claimed this provision was applicable since they believed
they would be persecuted in Cuba in retaliation against their
participation in the Mariel boatlift. The result of upholding the
Eleventh Circuit's partial stay, however, was to place the burden
of establishing each Cuban's ineligibility to remain in the United
States on the government by requiring it to demonstrate that
the Cubans fell within one of the exceptions to the withholding
of deportation allowance. According to Justice Rehnquist, ordi-
narily the burden is on the alien to show he or she qualifies for
asylum.\textsuperscript{409}

One year before this decision, the Court decided \textit{INS v. Stevic},\textsuperscript{410} which held that an alien must establish a clear probability of persecution in his home country if he is to avoid
deporation under the asylum provision in 243(h)(1). This stan-
dard had been used in section 243(h) determinations at least
since the early 1970s.\textsuperscript{411} \textit{Stevic} found that a "well-founded fear
of persecution" standard was inapplicable in a withholding of
deporation proceeding. Despite the similarity between sections
243(h) and 101(a)(42)(A), the \textit{Stevic} decision declined to enforce
a uniform standard for evaluating the likelihood of persecution.

The Refugee Act of 1980\textsuperscript{412} added section 101(a)(42)(A) to
the INA, which encompasses the "well-founded fear of persecu-
tion" standard, while simultaneously amending section 243(h) of

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\textsuperscript{407} Sections 101(a)(42) & 208 of the INA, 8 U.S.C. \S\S 1101(a)(42)(A), & 1158
(1982), respectively. See supra note 400.

\textsuperscript{408} See supra note 400.

\textsuperscript{409} 467 U.S. at 1314.


2192).

the INA to include language parallel to that appearing in section 101(a)(42)(A). Simultaneous legislation on both issues suggests Congress intended these sections to be read in light of one another.\textsuperscript{413} Section 243(h)(1) provides that the Attorney General

\textsuperscript{413} Immediately after the decision in \textit{Stevic}, the circuit courts of appeals were at odds in determining how different, if at all, the two evidentiary standards are. Before the Supreme Court decided \textit{Stevic}, the Second Circuit indicated that both § 243(h) and § 101(a)(42)(A) requests should be considered under the same standard. \textit{Stevic} v. Sava, 678 F.2d 401 (2d Cir. 1982) (as a result of the United States accession to the 1968 Protocol and passage of the Refugee Act of 1980, courts should apply the well-founded fear of persecution standard to evaluate both asylum requests under § 208 of the INA and requests for withholding of deportation under § 243(h)), rev'd sub nom. \textit{INS} v. \textit{Stevic}, 467 U.S. 407 (1984).

Following the Supreme Court's decision, the circuit courts were somewhat divided over whether the well-founded fear of persecution standard and the clear probability standard are different burdens, or in actual practice, virtually the same. The majority of the courts recognized the two standards to be different, with a minority, particularly the Third Circuit, describing the two standards as the same. Basically, the issue was settled by the Supreme Court in \textit{INS} v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), aff'g 767 F.2d 1448 (9th Cir. 1985) (the well-founded fear standard is more generous than the clear probability standard; they are not identical), discussed in text accompanying note 416 \textit{infra}. Before this, the circuits were fragmented on this issue. \textit{See}, e.g., Sankar v. \textit{INS}, 757 F.2d 532, 533 (3d Cir. 1985) (the well-founded fear standard "does not differ from the 'clear probability' standard") (natives and citizens of Syria); Sotto v. United States \textit{INS}, 748 F.2d 832 (3d Cir. 1984) (\textit{Stevic} does not undermine \textit{Rejaie}) (Marcos' Philippines); Marroquin-Manriquez v. \textit{INS}, 699 F.2d 129 (3d Cir. 1983) (the two standards equate) (deportation to Mexico), \textit{cert. denied}, 467 U.S. 1259 (1984); \textit{Rejaie} v. \textit{INS}, 691 F.2d 139 (3d Cir. 1982) (indicating the BIA did not err in equating the clear probability of persecution standard with the well-founded fear of persecution standard) (Iranian); \textit{but see} Bahramnia v. United States \textit{INS}, 782 F.2d 1243, 1248 (5th Cir. 1986) (does not decide whether clear probability test is more exacting because alien failed even under a less onerous burden of proof) (Iranian citizen); Young v. United States Dept. of Justice, \textit{INS}, 759 F.2d 450, 456 (6th Cir. 1985) (noting that the clear probability standard is "strict" while the well-founded fear standard is "possibly more liberal") (Guatemalans); Lemus v. \textit{INS}, 741 F.2d 765 (5th Cir. 1984) (error to follow the Second Circuit's decision in \textit{Stevic}).

The Sixth Circuit eventually joined the mainstream of judicial thought as well. \textit{See} Dolores v. \textit{INS}, 772 F.2d 223 (6th Cir. 1985) (repeating that the well-founded fear standard is "more generous" than the clear probability standard); Moosa v. \textit{INS}, 760 F.2d 715, 719 (6th Cir. 1985) (repeating the statement in \textit{Stevic} that the well-founded fear standard is "more generous" than the clear probability of persecution standard); Youkhanna v. \textit{INS}, 749 F.2d 360 (6th Cir. 1984) (well-founded fear requires less than the clear probability standard) (Iraqis); Reyes v. \textit{INS}, 747 F.2d 1045 (6th Cir. 1984) (applying clear probability standard in a petition for asylum or the withholding of deportation under § 243(h)), \textit{vacating} 693 F.2d 597 (6th Cir. 1982) (Philippines); Nasser v. \textit{INS}, 744 F.2d 542 (6th Cir. 1984) (indicating that the clear probability standard is very close to the well-founded fear of persecution standard) (Iraqi); \textit{but see} Dally v. \textit{INS}, 744 F.2d 1191, 1196 n.6 (6th Cir. 1984) (applying the clear probability of persecution standard to an asylum request made after the commencement of a deportation hearing since the
shall not deport any alien whose "life or freedom would be

regulations (8 C.F.R. § 208.3 (b) (1983)) suggested that "requests for asylum made after the institution of deportation proceedings 'shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h)." (Irakis).

Similarly, the Seventh Circuit adjusted to the Supreme Court's opinion in Stevic. See Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984) (the well-founded fear standard is similar, but not identical, to the clear probability standard) (native of Chile and former citizen of Argentina); but see Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977) ("the 'well founded fear' standard contained in the Protocol and the 'clear probability' standard . . . will in practice converge"; the Protocol and the § 243(h) standard are the same) (Iranian). The Eighth Circuit did not clearly speak on the issue: Perwolf v. INS, 741 F.2d 1109 (8th Cir. 1984) (dismissing a claim for refugee status by citing the Supreme Court's decision in Stevic, for the proposition that under § 243(h), a clear probability of persecution must be shown, thereby suggesting that the two standards are interchangeable and not clearly differentiating between the two) (Austrian); Minwalla v. INS, 706 F.2d 831 (8th Cir. 1983) (treats an asylum claim filed during a deportation proceeding as identical to an application for withholding of deportation) (Pakistani).

The Ninth Circuit most decidedly pronounced the distinctions between the two standards and the Supreme Court affirmed in INS v. Cardoza-Fonseca, 107 S. Ct. 1207 (1987), aff'g 767 F.2d 1448 (9th Cir. 1985). See also Canjura-Flores v. INS, 784 F.2d 985, 890 (9th Cir. 1985) (well-founded fear is "less stringent" than the clear probability standard); Vides-Vides v. INS, 783 F.2d 1463 (9th Cir. 1986) (well-founded fear is more generous than clear probability) (El Salvadoran denied asylum); Kaveh-Haghigy v. INS, 783 F.2d 955, 956 (9th Cir. 1986) (well-founded fear is "more generous" than clear probability); Larimi v. INS, 782 F.2d 1494, 1496–97 (9th Cir. 1986) (establishing well-founded fear "is less difficult") (Iranian); Diaz-Escobar v. INS, 782 F.2d 1488, 1491 (9th Cir. 1986) (well-founded fear is a "lesser burden" than clear probability) (Guatemalan); Hernandez-Ortiz v. INS, 777 F.2d 509, 513 (9th Cir. 1985) (section 208(a) requirements are considerably less stringent than section 243(h) requirements: also, "on November 5, 1982, the INS erroneously deported Hernandez-Ortiz to El Salvador [in violation of a stay pending an appeal]. Aware of its error, the United States government agreed to arrange and pay for her return to the United States."); Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985) (well-founded fear is more generous) (El Salvadoran); Garcia-Ramos v. INS, 775 F.2d 1370 (9th Cir. 1985) (clear probability is more stringent and well-founded fear is more generous) (El Salvadoran); Estrada v. INS, 775 F.2d 1018 (9th Cir. 1985) (well-founded fear is more generous than clear probability) (Guatemalan); Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985) (similar proposition) (El Salvadoran); Maroufi v. INS, 772 F.2d 597 (9th Cir. 1985) (similar proposition) (Iranian); Chatila v. INS, 770 F.2d 786 (9th Cir. 1985) (well-founded fear is more generous than the clear probability standard) (Lebanese living in Venezuela); Sarvia-Quintanilla v. INS, 767 F.2d 1387 (9th Cir. 1985) (the two standards are not the same); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984) (decided 1984, amended March and June 1985, superseding the opinion of 749 F.2d 1316) (well-founded fear standard is more generous than the clear probability of persecution standard); Sagermark v. INS, 767 F.2d 645, 648–49 (9th Cir. 1985) (Supreme Court in Stevic "strongly hinted . . . that the 'well-founded fear' standard was less stringent than the 'clear probability' test"); Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1985) (decided 1984, amended May 28, 1985) (does not decide what constitutes a prima facie showing of well-founded fear); Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985) (well-founded fear is
threatened in [the recipient country] on account of race, religion, nationality, membership in a particular social group, or political opinion.\textsuperscript{414} Similarly, section 101(a)(42)(A) states that refugee status will be conferred on any alien facing persecution at home "on account of race, religion, nationality, membership in a particular social group, or political opinion."\textsuperscript{415} Since the language is the same, one would expect the standards applicable to each section also to be the same. In \textit{Stevic}, however, the Court recognized two separate standards. It confined the "well-founded fear of persecution" standard to section 101(a)(42)(A) and applied the "clear probability of persecution" standard to section 243(h). The Court reaffirmed the use of these two distinct standards in \textit{INS v. Cardoza-Fonseca},\textsuperscript{416} where it held that the "well-founded fear of persecution" standard in section 101(a)(42)(A) is a more generous standard than the "clear probability" standard utilized in withholding of deportation proceedings under section 243(h).

The unfortunate consequence of using the "clear probability of persecution" standard is the difficulty in proof it engenders. Under this standard, it must be demonstrated that the threat of persecution is directed against the particular alien-applicant individually.\textsuperscript{417} This is typically an extraordinarily difficult thing to prove. The "clear probability" standard invokes an objective, rather than a subjective gauge for evaluating asylum requests\textsuperscript{418} which usually cannot be proven until the alien returns home and his or her fears tragically materialize.\textsuperscript{419} To impose this standard

\begin{itemize}
  \item more generous than clear probability of persecution) (El Salvadoran); Espinoza-Martinez v. INS, 754 F.2d 1536 (9th Cir. 1985) (Nicaraguan) (does not decide what constitutes a prima facie showing of well-founded fear) (Nicaraguan); Saballo-Cortez v. INS, 749 F.2d 1354 (9th Cir. 1984) (similar); Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984) (well-founded fear of persecution standard is more generous than clear probability test).
  \item 414. See note 399 \textit{supra}.
  \item 415. See note 400 \textit{supra}.
  \item 417. See cases at note 413 \textit{supra}.
  \item 419. On the factors affecting the creation of refugees, the country of El Salvador serves as one of the more controversial case studies. Information from reports compiled by the Americas Watch Committee follows. \textit{Cf. Country Reports on Human Rights Practices for 1982} (1983) (submitted to Congress by the Department of State).

On March 6, 1980, a state of siege was declared in El Salvador via State of Siege
on political asylum requests defeats the purpose of an asylum-

Decree (No. 155):

Article I of Decree No. 155 suspended, in accordance with the specific terms of Article 175 of the Constitution, the following four constitutional guarantees: freedom of movement and residence (Article 154); freedom of thought and expression (Article 158, par. 1); inviolability of correspondence (Article 159); and the right of assembly, except for meetings or assemblies for cultural or industrial purposes (Article 160).

(emphasis added). AMERICAS WATCH COMMITTEE AND THE AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS ON EL SALVADOR 17 (1982).

The conditions in El Salvador are that of an army at war with its own people: we believe that the overall situation must be considered in the light of the indiscriminate attacks by the Salvadoran armed forces on civilian noncombatants in conflict zones. Thousands of noncombatants are being killed in indiscriminate attacks by bombardment from the air, shelling, and ground sweeps. Thousands more are being wounded. And hundreds of thousands are being driven from their homes and forced into the misery of displacement.

As best we can determine, these attacks on civilian noncombatants in conflict zones are part of a deliberate policy. The aim seems to be to force civilians to flee these zones, depriving the guerrillas of a civilian population from which they can obtain food and other necessities. The cost of pursuing this policy, in terms of human suffering, is beyond measurement. And, of course, it is a policy that flagrantly violates the laws of war.

AMERICAS WATCH COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, FREE FIRE, A REPORT ON HUMAN RIGHTS IN EL SALVADOR iii (1984 5th Supp.). According to the report compiled by Americas Watch, the State Department comes "close to categorical[ly] rejecting any suggestion that the Salvadoran armed forces are engaged in such attacks." Id. at iv.

The overall report discusses the killing of civilian noncombatants by government forces; the approximately 1,000,000 displaced refugees within the country, or about 20% of the population, resulting from such government policies; the continued, albeit diminished, number of "disappearances" occurring in the country; and human rights violations by the guerrillas (which occurs on a much smaller scale than that perpetrated by the Salvadoran government forces).

There has been a decrease in the number of death squad killings which the report defines as "killings by paramilitary groups not in uniform." Id. at 1. As difficult as the numbers are to obtain, it appears that the number of deaths resulting from indiscriminate attacks by the government armed forces surpasses the number of killings formerly attributable to the death squads. According to the report:

We attribute the reduction in death squad killings in large part to pressure exerted by the United States Embassy in San Salvador during the past nine months. A highlight of that pressure was Vice President Bush's December 11, 1983 meeting with 31 top leaders of the Salvadoran armed forces in which the Vice President apparently made explicit and forceful statements that U.S. military aid would stop unless abuses were curbed.

Our findings indicate that pressure from the United States is vital—far more important than we previously realized—in shaping human rights practices in El Salvador.

Id. at 3. The report estimates the number of "internally displaced persons" within the country to be 500,000 people and that approximately 750,000 people have "left El Salva-
granting provision. To insist upon a “clear probability” standard
dor entirely” as a result of “indiscriminate attacks on the civilian population in conflict
zones.” Id. at 6. The report states that “most of the civilian noncombatants dying in El
Salvador are being killed in indiscriminate attacks by the armed forces in conflict zones.”
Id. at 7.

The number of displaced individuals which result from such wholesale destruction is
described by the report: “A recent study . . . estimates that as much as one-fifth of El
Salvador’s population of 5 million is now internally displaced.” Id. at 32 (footnote omit-
ted). Figures obtained from Tutela Legal, “the human rights monitoring office of the
Roman Catholic Archdiocese,” id. at i, state that in 1983 there were 3625 “civilian non-
combatants [killed] by the regular armed forces of El Salvador.” Id. at 40–41. In the first
6 months of 1984, there were 1331 such killings. Id. at 40. There is a degree of uncer-
tainty surrounding these figures because of the disruptive and dangerous conditions ex-
isting in El Salvador.

The issue of international law violations in El Salvador is also addressed in the re-
port. It notes that El Salvador is a contracting party to

Protocol II of the Geneva Conventions, which applies to conflicts of a non-interna-
tional character ‘which take place in the territory of a High Contracting Party
between its armed forces and dissident armed forces or other organized armed
groups.’ (Article I) As El Salvador is a contracting party, Protocol II applies to
the conflict underway there. Article 13 provides:

1) The civilian population and individual civilians shall enjoy general protec-
tions against the dangers arising from military operations. To give effect to
this protection, the following rules shall be observed in all circumstances.
2) The civilian population as such, as well as individual civilians, shall not be
the object of attack. Acts or threats of violence the primary purpose of which
is to spread terror among the civilian population are prohibited.
3) Civilians shall enjoy the protection afforded by this Part, unless and for
such time as they take a direct part in hostilities.

In our view, it appears that a purpose of the indiscriminate attacks by the
Salvadoran armed forces on villages in guerilla-controlled zones of El Salvador is
to spread terror among the civilian population so that they will flee those zones,
thereby depriving the guerrillas of a civilian population from which it can obtain
food and other necessities. Accordingly, we believe the Salvadoran armed forces
are engaged in systematic violations of their commitments under international
laws of war.

Id. at 42–43. The report turns to Protocol I of the General Conventions (Article 51) to
look to a definition of “indiscriminate attacks.”

The report also describes human rights abuses by the guerrillas, the Farabundo
Martí de Liberación Nacional (FMLN), Id. at 51–59, which, as of the date of the report,
paled in comparison to those abuses committed by the government armed forces.

The number of Salvadorans who have been displaced and turned into refugees ap-
proach 20% of the country’s population. Id. at 73. Additionally, “some 750,000
Salvadorans are estimated to have left the country since 1979.” Id. at 73 (note). The
Salvadorans who are in the United States are frequently here without permission of
the federal government, and thus their status as foreigners within the United States is as
“illegal aliens.” By and large, a Salvadoran’s request for asylum as a refugee in the
United States is almost always denied (see the cases involving El Salvadorans in note
413 supra). Estimates of the total number of illegal aliens present in the United States
vary widely because many of these individuals are hiding from the law and figures who
could represent authority. However, the estimates that have been compiled place the number of illegal aliens within the United States within the range, on the low side, of about 2 to 3 million aliens, to as many as 10 to 12 million on the high side. See, e.g., S. Rep. No. 132, 99th Cong., 1st Sess., at 5 (1985), which indicated that perhaps the number in 1978 was in the range of 3.5 to 6 million. Accepting a high estimate for just a moment, it is easy to see that if most, if not all, Salvadorans who have fled their unfortunate country have tried to come to the United States, their numbers in the United States could represent as low as 6.25% of the total illegal alien population in the United States, to a percentage which is substantially higher (i.e., as much as 75% of the total illegal alien population). It is not unreasonable to conclude that a large number of the 750,000 Salvadorans who have fled their country have tried, and probably been successful, in coming to the United States. In the first place, no other country in the Western Hemisphere is as attractive and as accessible to one who is severely limited financially as far as choice of transportation. In other words, it is relatively easy to come to the United States: one need not be able to afford a plane ticket. Second, the refugee camps in countries neighboring El Salvador, while holding several tens of thousands of Salvadorans, still do not adequately, or even remotely, account for all those who have fled El Salvador. In fact, Honduras, as of 1984, announced a "get tough" policy regarding Salvadoran refugees. According to the Americas Watch report under examination in this note:

A third factor accounting for the recent increase in El Salvador's displaced population [i.e., within its borders] is the Honduran government's announcement on December 30, 1983 that Salvadoran refugees living in border camps would be required to move deep into the Honduran interior. Salvadorans living in these camps strongly oppose the move, in part because they believe they will be more vulnerable to attacks by the Honduran military if they are relocated to the interior. A number of refugees in the border camps have already chosen to return to El Salvador rather than be relocated in Honduras.

Id. at 75-76. Therefore, the United States remains as one of the options available to a Salvadoran fleeing his or her country. Even the strongest measures the United States may take against an illegal alien are very minor when compared with the unrestrained license with which Honduras treats the Salvadoran refugees.

The America's Watch report evaluated the so-called "democratic" elections of 1984 which elected President Duarte.

[TH]ose political allies of the guerrillas who attempted to take part in the political process have paid dearly, among them, the six top leaders of the Democratic Revolutionary Front who were kidnapped from a press conference in November 1980 by a 200 man military contingent that surrounded the high school where it was taking place, who tortured, mutilated and then murdered them; the 17 leaders of the FDR and labor unions allied to it who were kidnapped in San Salvador in October 1982 and tortured, some of them turning up alive in prison, while others disappeared; and the October 1983 murder of Victor Manuel Quintanilla Ramos, the highest ranking spokesman for the FDR still in El Salvador. No attempt was made to guarantee physical safety to FDR activists if they would take part in the 1984 elections. Given what happened to their colleagues, an offer to take part in the elections could hardly be considered meaningful without such a guarantee.

Id. at 105 (also describing other election abuses).

The following conclusions can be drawn from this report for the purposes of this paper: (1) individuals fleeing Salvador are refugees who are entitled to asylum because
Protocol Relating to the Status of Refugees which invoked the "well-founded fear of persecution" language. Additionally, the "clear probability" standard is contrary to the changes made by the armed forces are persecuting, in an unchecked fashion, the entire population of that country; (2) the only serious way to curb the number of illegal aliens arriving in this country who are fleeing conditions at home which give them cause to fear their safety and well-being, is for the United States to use its influence to stop the persecution and repression. Admittedly, for many countries, this is not possible because the United States simply does not have the persuasive ability to cause repressive regimes to change their tactics. El Salvador is an exception: there, the United States has a great deal of influence. The Americas Watch Report of 1984 establishes that the most serious persecution in El Salvador could not be accomplished without United States materiel, training, financing, advice, and guidance. The responsibility of the United States for the intense and shocking level of persecution that has occurred in El Salvador is something which should disturb United States citizens to the very depths of their consciences.

the 1980 Refugee Act.421

IV. ALIENS AND DUE PROCESS OF LAW

The Burger Court considered a number of cases addressing the issue of due process of law and the operation of the Immigration and Nationality Act (INA). Since the federal government, rather than the individual states, is usually involved, the due process clause of the fifth amendment applies rather than that of the fourteenth amendment. The fifth amendment’s guarantee of due process of law as applied against the federal government was held, during the era of the Warren Court, to include the fourteenth amendment promise of equal protection under the laws.422

There are, however, many immigration issues where the Supreme Court has not ruled whether there is a fifth amendment guarantee of due process of law or, if one exists, how it should be applied. Other authority, namely statutes and regulations, according individuals with some degree of due process protection, must then be examined to fill in these gaps. Whether an individual will be accorded any level of due process, or the extent to which he or she will receive it, turns upon that individual’s status within the immigration law, the relief he or she seeks, and the particular procedural provision of the INA which is being invoked.423

Specifically, recent decisions discussed in

423. See, e.g., United States v. Mendoza-Lopez, 107 S. Ct. 2148 (1987) (Marshall, J.) (Rehnquist, C.J. dissenting, joined by White and O’Connor, J.J.) (Scalia, J., dissenting) where the Court indicated that “fundamentally fair” deportation hearings include adequately informing aliens of their right to counsel at the hearing. Additionally, the Court stated that any waiver by an alien of an important right, such as the right to apply for suspension of deportation, must be entered into knowingly. On the basis of Mendoza-Lopez, a deportation order that is not obtained in conformity with due process cannot later be used as an element forming the basis of criminal charges against the alien. There must be an opportunity for “some meaningful review of the administrative proceeding” by the judiciary. 107 S. Ct. 2154, 2155 n.15. See also Landon v. Plasencia, 459 U.S. 21, 25-27 (1982)(O’Connor, J.)(Marshall, J., concurring in part and dissenting in part), where Justice O’Connor highlighted the differences between the due process protection afforded an alien in a deportation hearing (§ 242(b) of the INA, 8 U.S.C. § 1252(b)(1982)) as contrasted with the relatively few procedural safeguards furnished in an exclusion hearing (§ 236 of the INA, 8 U.S.C. § 1226 (1982)). The cases have also limited the application of key constitutional protections in deportation hearings and re-
this section consider due process afforded nonimmigrant aliens,424 individuals claiming United States citizenship,425 legal permanent residents,426 and illegal aliens requesting "parole."427

lated criminal proceedings. See note 826 infra.

In a deportation hearing, the alien is physically present within the United States. In an exclusion hearing, the alien technically has not entered the United States, but seeks admission. Therefore, an exclusion hearing is generally held at the port of entry, whereas a deportation hearing may be held near the alien's residence within the United States. Under the federal regulations, an alien in a deportation hearing is generally provided with seven days notice of the charges against him (8 C.F.R. § 242.1(b) (1982)), whereas an exclusion hearing does not require advanced notice to the alien of the charges against him.

If an alien is unsuccessful in a deportation hearing, he or she may appeal directly to the court of appeals under § 106(a), as added by Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 651 (codified at 8 U.S.C. § 1105a(a)(1982)), but an alien may challenge a determination reached at an exclusion hearing only by a petition for a writ of habeas corpus under § 106(b) (8 U.S.C. § 1105a(b)(1982)). Within certain limits, an alien may choose the country to which he or she is deported under § 243(a), (8 U.S.C. § 1253(a)(1982)); or a deportable alien may be permitted to depart from the United States voluntarily, under § 244(e) (8 U.S.C. § 1254(e)(1982)); and following an order of deportation under § 244 of the INA (8 U.S.C. § 1254(1982)), an alien may seek a suspension of deportation. An alien in an exclusion hearing does not have these three options.

Finally, in seeking to return to the United States, although a deported alien technically has a more difficult route to follow, the obstacles may be circumvented by the deportable alien initially choosing a voluntary departure from the United States. Under § 212(a)(17) of the INA, as amended by Act of Dec. 29, 1981, Pub. L. No. 97-116, 95 Stat. 1611 (currently codified at 8 U.S.C. § 1182(a)(17)(1982)), a deported alien who did not obtain a voluntary departure must obtain a prior approval of the Attorney General before entering the United States within five years of deportation. Voluntary departure saves the alien from application of this rule under § 242(b) of the INA (8 U.S.C. § 1252(b)(1982)). No prior approval is needed for an excluded alien to return after one year's absence under § 212(a)(16) of the INA (8 U.S.C. § 1182(a)(16)(1982)). Further distinctions are discussed in Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).


426. A legal permanent resident is an alien whose status has been adjusted from that of an alien who has been admitted or paroled into the United States to that of an alien with a stronger claim for residence within the United States. Usually, this adjustment of status occurs under § 245 of the INA, 8 U.S.C. § 1255 (1982), although there are other routes available in order to achieve this status. As a legal permanent resident (lpr), the alien is assured a larger selection of rights which he or she may exercise in his or her relations with the federal and state governments. See the discussion of Landon v. Plasencia, 459 U.S. 21 (1982) at the text accompanying note 549 infra and § 101(a)(20)
Before passage of the Administrative Procedure Act of 1946 (APA), aliens depended almost exclusively upon habeas corpus in order to obtain review of an order of deportation. In 1953, in *Heikkila v. Barber*, the Court held that the validity of a deportation order issued under section 22 of the Internal Security Act of 1950, making membership in the Communist Party a ground for deportation, could be reviewed only by habeas corpus rather than through any review procedures in the APA. Section 10 of the APA of 1946 provided for more expansive judicial review of agency actions unless review was precluded by prior statutes. Section 19(a) of the Immigration Act of 1917 made a determination by the Attorney General final of the INA (8 U.S.C § 1101(a)(20) (1982)) (definition of “lawfully admitted for permanent residence”) quoted in note 840 infra.


430. 345 U.S. 229 (1953) (Clark, J.) (Frankfurter and Black, JJ., dissenting).


432. 60 Stat. 237, 243–44.

433. Id. Section 10 provided: “Except so far as (1) statutes preclude judicial review . . . .”

434. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874, 890 (“In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.”). Under § 1 of the Reorganization Plan No. V of 1940, 54 Stat. 1238, this power was transferred to the Attorney General. Although the Immigration Act of 1917, 39 Stat. 874, was repealed by passage of the INA of 1952, § 403(a)(13), 66 Stat. 163, 279, a different provision, § 242(b) of the INA of 1952, 66 Stat. 210, continued to provide that the Attorney General’s decision to deport an alien was final. However, § 242(c), (e), 66 Stat. at 210, 211, expressly recognized a right to judicial review of a final order of deportation. See Rubenstein v. Brownell, 206 F.2d 449, 452 (1953), aff’d, 346 U.S. 929 (1954).

The *Heikkila* Court recognized that there was not a clear-cut issue of law. “That the Attorney General’s decisions are ‘final’ does not settle the question. The appellant prop-
and was interpreted in *Heikkila* as barring the review contemplated in the APA of 1946.\(^{435}\) Under a proceeding in habeas corpus, the scope of review was limited to "enforcement of due process requirements" as defined under the Constitution.\(^{436}\) The judicial review provided under section 10(e) of the APA was much broader in scope.\(^{437}\) Under the result obtained in *Heikkila*, orders of deportation were rendered immune from "direct attack."\(^{438}\)

*Heikkila v. Barber* was distinguished to the point of being overruled in *Shaughnessy v. Pedreiro*.\(^{439}\) The Court held that since the language in section 242(b)\(^{440}\) of the INA, providing for determinations of deportability, did not expressly modify the language in the APA of 1946, language in the APA evincing a right to judicial review was unaffected by the subsequently passed INA.\(^{441}\) Under the result in *Pedreiro*, an alien with an
outstanding order of deportation would not have to wait for his or her arrest in order to challenge the order under a writ of habeas corpus. Rather, the alien could bring suit immediately upon receiving the order of deportation in a motion for a declaratory judgment, and thus be saved the personal hardship of waiting for confinement before initiating suit. Although this result is undoubtedly more in line with the intent of the APA, Pedreiro is a departure from the Heikkila decision, with only a brief per curiam opinion decided, by an equally divided Court between the time of these two decisions presaging the change.

The Court's 1955 decision in Pedreiro interpreted the "finality" of the agency action to allow judicial review rather than curtailment of all review. Since Heikkila did not consider the effect of final orders under the 1952 Act, the Court in Pedreiro was uninhibited from reexamining the new legislation. The Court concluded that the 1952 Act did not supersede the allowance in the APA that provided for more extended judicial review than is available through habeas corpus.

The quality of judicial review that will be applied to an administrative order depends upon whether the order is characterized as final. The courts of appeals have been statutorily vested with "exclusive jurisdiction to review final orders is-

442. Section 10(b) of the APA, 60 Stat. 243, allowed for declaratory judgments, writs of prohibitory or mandatory injunction, and habeas corpus.
444. Brownell v. Rubenstein, 346 U.S. 929 (1954) (per curiam), aff'd (by an equally divided Court), 206 F.2d 449 (1953) (deportation order can be reviewed in a declaratory action under § 10 of the APA).
445. 345 U.S. 229, 232 n.4.
446. 349 U.S. at 50.
447. Section 106(a) of the INA, as added by Act of Sept. 26, 1961, Pub. L. No. 87-
sued by specified federal agencies." Under section 106(a) of the INA, that exclusive jurisdiction is granted to the court of appeals, with certain exceptions, to review "all final orders of deportation" issued under section 242(b) or "comparable statutory provisions." Section 242(b) of the INA authorizes the agency to issue deportation orders. That section provides a "detailed administrative procedure for determining whether an alien may be deported." When circumstances arise in which section 106(a) is not applicable, the alien may be entitled to a district court proceeding. Section 106(a) economizes the use of judicial resources and limits access to the trial courts. The breadth of the section phrase "all final orders of deportation" has been ruled upon in a number of Supreme Court opinions.

In *Foti v. INS* the Supreme Court held that section 106(a) authorizes the federal appellate courts to exercise initial and exclusive jurisdiction to review directly the Attorney General's discretionary refusal to grant a request for suspension of an outstanding order of deportation. This result prevents an alien from exercising the delaying tactic, to avoid deportation, of appealing an order of deportation to the court of appeals while seeking review of a denial of a request for a suspension of deportation in a district court. *Foti* limited the scope of the review

449. Section 106(a) of the INA, 8 U.S.C. § 1105a(a) (1982).
452. Id. at 210.
453. For example, in Li Sing v. United States, 180 U.S. 486 (1901), described in text accompanying note 106 *supra*, the Court determined that a decision permitting an alien to enter the United States is not a final order for the purposes of limiting review of that decision to one particular administrative officer.
available in the appellate courts. Under section 106(a)(4), findings of fact supporting a determination of deportability are normally binding on the appellate court "if supported by reasonable, substantial, and probative evidence on the record considered as a whole."\footnote{457} Since the statutory provision under scrutiny in\footnote{Foti} provided for a discretionary form of relief from an order of deportation,\footnote{458} the Court limited the scope of appellate review of a denial of that relief to a restricted inquiry concerning whether the denial by Attorney General was either arbitrary or an "abuse of administrative discretion."\footnote{459}

The Court in\footnote{Foti} specifically did not pass upon whether section 106(a) grants the courts of appeals exclusive jurisdiction to review orders denying motions to reopen deportation proceedings.\footnote{460} In\footnote{Giova v. Rosenberg} the Court held that the court of appeals has jurisdiction to review the Board of Immigration Appeals'\footnote{BIA} denial of a motion to reopen\footnote{463} a deportation proceeding before the BIA.

In\footnote{Chen Fan Kwok v. INS} the Supreme Court slackened the trend toward increased direct access to the courts of appeals. Whereas the language of\footnote{Foti} suggested that final discretionary determinations relating to deportation would receive direct court of appeals review,\footnote{Chen Fan Kwok} held that a discretionary determination by a district director\footnote{465} denying a request for a stay of deportation\footnote{466} does not fall within the ambit of section 106(a), since such a denial is not entered under section 242(b) of the Act. Jurisdiction to review the denial of the stay vested in the district court rather than in the court of appeals.\footnote{467} Following

\footnotesize{\begin{itemize}
\item \footnote{457}{Section 106(a)(4), quoted in\footnote{Foti}, 375 U.S. at 228.}
\item \footnote{458}{See note 594 infra. The 1962 amendment, 76 Stat. 1247, modified the suspension of deportation provision significantly, although the relief remains discretionary. Section 244 of the INA is currently codified at 8 U.S.C. \S 1254 (1982).}
\item \footnote{459}{\footnote{Foti}, 375 U.S. 217, 228, 229 n.15.}
\item \footnote{460}{Id. at 231.}
\item \footnote{461}{379 U.S. 18 (1964)(per curiam), rev'g 308 F.2d 347 (9th Cir. 1962).}
\item \footnote{462}{The BIA is organized and authorized under 8 C.F.R. \S 3.1-3.8 (1987).}
\item \footnote{463}{Currently allowed by regulation. 8 C.F.R. \S 242.22 (1987).}
\item \footnote{464}{392 U.S. 206 (1968).}
\item \footnote{465}{District directors are delegated their authority under 8 C.F.R. \S 103.1(n) (1987).}
\item \footnote{466}{A stay of an order of deportation may be granted by a district director "for such time and under such conditions as he may deem appropriate." 8 C.F.R. \S 243.4 (1987).}
\end{itemize}}
Chen Fan Kwok, an alien who has received an order of deportation after a section 242(b) proceeding can obtain review in a district court by making an unsuccessful motion for a stay of deportation and then have a second opportunity of judicial review before the court of appeals. A deportable alien who fails to move for a stay of deportation will have but one opportunity of limited judicial review before the court of appeals when directly appealing the deportation order. Anomalously, an alien who has technically not entered8 the country, and who has been ordered excluded following an exclusion proceeding,469 may obtain judicial review before a district court, albeit under the strict limitations on judicial review inherent in a habeas corpus proceeding."470 If unsuccessful, before the district court, the excluded alien may procure judicial review a second time by advancing into the court of appeals. By contrast, an alien, long a resident in the United States, following a section 242(b) deportation proceeding, may discover he has but one chance to press his claim in court. The soundness of this result lies in the fact that a denial of a stay of deportation is not technically a final order of deportation and the denial can be issued months after the order of deportation in a proceeding "entirely distinct" from the original deportation proceeding.471 The result in Chen Fan Kwok restricts "the application of § 106(a) to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves."472

468. See the discussion of this term beginning at text accompanying notes 506–581 infra.


470. An alien who has been ordered excluded from the United States may obtain judicial review only by habeas corpus. Section 106(b) of the INA, 8 U.S.C. § § 1105a(b) (1982). But see Brownell v. Tom We Shung, 352 U.S. 180 (1956) (statutory scheme did not bar declaratory judgment action brought by excluded alien). Apparently, § 106(a) does not apply to alien crewmen who are deported under § 252(b) of the INA, 8 U.S.C. § 1282(b) (1982). See, e.g., INS v. Stanisic, 395 U.S. 62, 68 n.6 (1969), reh'g denied, 395 U.S. 987 (1969).


472. Id. at 215 (footnote omitted). Recently, as a peripheral issue, the Court noted that the jurisdictional grant in § 106(a) encompasses an alien's constitutional challenge to a final order of deportation issued by the Attorney General pursuant to a decision by one House of Congress, under 244(c)(2) of the INA, 8 U.S.C. § 1254(c)(2) (1982), to veto the Attorney General's prior decision to suspend that alien's deportation, even though such congressional determination was not made under a § 242(b) deportation proceeding,
The Supreme Court has indicated, in *Jay v. Boyd*, 473 that the extent of the Attorney General's discretion in deportation cases can be very broad. It is "unfettered" even where the alien has resided in the United States more than 40 years. 474 Congress may even eliminate an alien’s recourse to judicial proceedings and order that aliens be removed from the United States by executive proceedings. 475 Should the executive proceeding order deportation without a fair hearing, the alien can obtain judicial review through habeas corpus. 476 What constitutes a "fair hearing" depends largely upon the underlying reasons for the deportation and has varied through time. 477

If a person arrested is not an alien, the executive branch will lose jurisdiction that would otherwise empower it to order deportation. 478 If the person claiming to be a citizen makes a

nor with regard to a motion to reopen such proceeding. INS v. Chadha, 462 U.S. 919 (1983), discussed below at text accompanying note 603 infra. Chadha is consistent with Foti, discussed in text accompanying note 454 supra, to the extent that the Court in Foti decided § 106(a) provided for direct appellate review of a denial of an alien's request for suspension of deportation under § 244(a)(5) of the 1952 Act. 66 Stat. 214. Foti allowed § 106(a) review of a decision rendered pursuant to § 244. Since its inception, § 244 contained a one-House veto provision (§ 244(b), 66 Stat. at 216) and it was carried over to the provision under scrutiny in Chadha (§ 244 (c)(2)), which was an amendment of the 1952 language. Act of Oct. 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247, 1248 amending Act of June 27, 1952, Ch. 477, 66 Stat. 163, 214.


474. Id. at 354.

475. Id. at 362 (Warren, C.J., dissenting).

476. Ng Fung Ho v. White, 259 U.S. 276, 280 (1922) (Brandeis, J.), discussed supra at text accompanying note 203; Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (deportation "inquiry may be properly devolved upon an executive department or subordinate officials thereof").


478. For an example, an attempt to deport an alien alleged to be a member of, or affiliated with, the Communist Party under the Alien Registration Act of 1940, 54 Stat. 673, in Bridges v. Wixon, 326 U.S. 135, 156 (1945), failed because the executive proceeding misconstrued the term "affiliation" and evidence was improperly received in the proceeding without which it was "wholly speculative whether the requisite finding would have been made" leading to the order of deportation. But cf. Jay v. Boyd, 351 U.S. 345 (1956), where the use of undisclosed confidential information did not constitute an unfair practice. See those cases concerning § 235(c) of the Immigration and Nationality Act described in note 393 supra.

479. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); United States ex rel. Bilokum-
showing that his or her claim is not frivolous, he or she is entitled to a judicial determination of the claim and a writ of habeas corpus will be issued.\footnote{480}

\section*{B. Curtailing Judicial Review}

In \textit{Al-Karagholi v. INS},\footnote{481} Justice Douglas dissented from the Court's denial of certiorari in a case where the Board of Immigration Appeals (BIA) had observed that the denial of an Iraqi student's request by a special inquiry officer\footnote{482} "for an extension of his student visa—was not appealable or subject to review."\footnote{483} Justice Douglas pointed out that under rules promulgated by the Immigration and Naturalization Service (INS) "there is no review available of the decisions on applications for extension of student visas."\footnote{484} According to Justice Douglas, the denial of review violated a fundamental concept of due process of law. Justice Douglas maintained that a denial of extension of time on a valid visa is a "final order and must be subject to judicial review."\footnote{485} He asserted that the review contemplated by the agency regulations was "so limited as to be nonexistent"\footnote{486} and that the Administrative Procedure Act (APA) required judicial review.\footnote{487} His rationale was that the APA provides that where an

\begin{itemize}
\item Ng Fung Ho v. White, 259 U.S. at 284–85. See Agosto v. INS, 436 U.S. 748, at text accompanying note 494 infra.
\item 481. 409 U.S. 1086 (1972).
\item 482. Provision is made for a special inquiry officer who conducts deportation proceedings under § 242(b) of the INA (8 U.S.C. § 1252(b) (1982)).
\item 483. 409 U.S. at 1087.
\item 484. Id.
\item 485. Id. at 1088.
\item 486. Id. at 1089.
\begin{quote}
Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
\end{quote}
\end{itemize}
agency ruling is not "directly reviewable," that ruling becomes reviewable when the "final agency action" is reviewed. Justice Douglas's position is consistent with that of Justice Brandeis, who recognized that deportation can amount to a deprivation of liberty, "property and life; or all that makes life worth living." When such important matters are at stake, there is properly a concern that the safeguards of due process be enforced.

Although a denial of certiorari does not represent a ruling on the underlying substantive issues, Al-Karagholi is a minor portent along the way to later developments where the Burger Court more clearly has taken a stand on the due process and equal protection claims advanced by aliens in a number of different statuses. Historically, the road leads from concern for such rights as expressed by Justice Brandeis, through sharp curtailment and denial of such claims in opinions authored during the height of the Cold War, through expansion of some rights during the later days of the Warren Court, and a general reluctance to expand those rights, if not to restrict them, in the Burger Court.

C. Modern Protection Against Deportation of Citizens

From early times, an individual alleged to be an alien who asserted a claim of United States citizenship and who supported the claim by substantial evidence, would be entitled to a trial in the appropriate district court. The executive agency which otherwise administered the deportation proceeding would thereby lose jurisdiction. The point in time at which the judiciary intervened, however, might not be until after the executive agency had rendered a decision.

489. Id.
491. Kessler v. Strecker, 307 U.S. 22, 34-35 (1939) (dicta) (also, the decision pertaining to effect of membership in the Communist Party was set aside by § 23 of the Alien Registration Act of 1940, 54 Stat. 673); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 152-53 (1923)(Brandeis, J.); Ng Fung Ho v. White, 259 U.S. 276, 281, 283-85 (1922)(Brandeis, J.) (resident's claim of citizenship entitled, on habeas corpus, to judicial trial, since claim was supported by sufficient evidence); United States v. Sing Tuck, 194 U.S. 161, 167-170 (1904)(Holmes, J.) ( intimating that it may be beyond the power of Congress to make the decision of an executive agency final upon the question of citizenship). If the petitioner seeks entry upon a claim of citizenship, the hearing should be
The government has been given the burden of proving alienage in a deportation proceeding rather than placing the burden of proving citizenship upon the alleged alien.\footnote{492} The protection offered to the alien is diminished, however, since the Court has adopted the view that "[s]ilence is often evidence of the most persuasive character" and an individual who is mute in such a proceeding may be assumed to be an alien.\footnote{493}

In Agosto v. INS,\footnote{494} the INS had attempted to deport an individual who claimed to be a United States citizen by birth; the INS maintained the petitioner was born in Italy. The petitioner argued he had moved to Italy, from Ohio, as a very young child. At issue was the application of section 106(a)(5)(B) of the INA.\footnote{495} Although section 106(a) had eliminated district court review of INS deportation determinations, subsection 106(a)(5)(B) provides an exception where the petitioner claims to be a United States citizen. If a claim of citizenship is not made, the review directed to the district court: Kwok Jan Fat v. White, 253 U.S. 454 (1920); Chin Yow v. United States, 208 U.S. 8, 13 (1908)(Holmes, J.); but see Ng Fung Ho v. White, 259 U.S. at 276, 282; Tang Tun v. Edsell, 223 U.S. 673 (1912); United States v. Ju Toy, 198 U.S. 253 (1905)(Holmes, J.); see also Tod v. Wadman, 266 U.S. 113, 119-20 (1924)(issues of alien’s educational qualifications, eligibility for refugee status, and the likelihood of becoming a public charge, as affecting a question of entry into the United States, can be decided by appropriate executive agency).

\footnote{492} United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153 (1923)(Brandeis, J.); but see Ng Fung Ho v. White, 259 U.S. 276, 283 (1922)(Brandeis, J.)(some persons of the Chinese race, under § 3 of the Act of May 5, 1892, 27 Stat. 25, had the burden of establishing their right to remain in the United States); Ah How v. United States, 193 U.S. 65 (1904)(Holmes, J.); Chin Bak Kan v. United States, 186 U.S. 193 (1902).

\footnote{493} Bilokumsky, 263 U.S. at 153-54 (individual’s “failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien”); United States v. Sing Tuck, 194 U.S. 161 (1904).


(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner’s nationality is presented, transfer the proceedings to a United States district court where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code.

(emphasis added).
typically goes directly to the court of appeals which must base its decision upon the "administrative record." 496 In Agosto, while appealing the INS decision to deport him in the court of appeals, the petitioner requested and was granted a de novo judicial determination by the finder of fact in the district court.

Earlier, the BIA had decided the INS had demonstrated its case against the petitioner in a "clear, convincing and unequivocal" 497 fashion. Agosto, the petitioner, appealed to the court of appeals and requested a district court hearing. The Supreme Court was faced with deciding the applicable standard the court of appeals should use in order to arrive at a decision whether to send a claim from the court of appeals to the district court for a de novo hearing.

The INA requires that a claim of United States citizenship not be "frivolous," and that "a genuine issue of material fact" exists. 498 The Supreme Court announced that the "frivolous" standard is analogous to the one used in the Federal Rules of Civil Procedure (FRCP) 12(b)(6), 499 in which a motion to dismiss will be granted for failure to state a claim upon which relief may be granted. This goes "to the merits of the legal theory underlying the citizenship claim." 500 The Court also noted that the "genuine issue of material fact" standard in section 106(a)(5)(B) is "virtually identical" to the language used in FRCP 56, which governs motions for summary judgment. 501 Under the decision in Agosto, the language in section 106(a)(5)(B) is interpreted similarly with summary judgment principles controlling. 502 A de novo district court review of a claim of United States citizenship will be granted if the evidence presented would be sufficient to overcome a motion for summary judgment and entitle the petitioner to a trial. In considering the evidence, the court of appeals may not evaluate its credibility, because that function is reserved to the trier of fact. 503 In Agosto, the petitioner's evidence

496. 436 U.S. at 753.
497. Id. at 751.
498. See the statutory language in note 495 supra.
500. 436 U.S. 748, 754 n.4.
501. Id. at 754. The standard appearing in Fed R. Civ. P 56 examines whether there is a "genuine issue as to any material fact."
502. 436 U.S. at 756.
503. Id. at 756–57.
NOTE

consisted of testimony by live witnesses in which cross-examination, available in a district court proceeding, would have been valuable in assessing the credibility of the witnesses’ assertions. Although the documentary evidence which the INS submitted established a convincing case for its argument, the Supreme Court recognized the possibility that such evidence could be refuted if the trier of fact chose to believe the petitioner's witnesses.504 In accepting the summary judgment standard, as well as the nonfrivolousness requirement, the Court rejected applying the “reasonable, substantial, and probative evidence” standard to section 106(a)(5)(B) although this latter standard appears elsewhere in the INA.505

D. Development of the Reentry Doctrine

Under the early statutes,506 as is still true today,507 alien prostitutes are excludable. In the past, the test to determine whether such women were in fact prostitutes, within the meaning of the applicable statutory scheme, was whether they were discovered practicing the profession within a specified number of years following their entry into the United States.508 Under the Act of February 20, 1907,509 the applicable time period was three years following entry into the United States.510 In Lapina v. Williams,511 an alien remained in the United States beyond the three-year period and then made a temporary visit abroad. The issue became one of whether the three-year period started running anew upon her reentry into the United States. The recurring issue in numerous immigration cases is whether an alien’s subsequent reentries into the United States should be

504. Id. at 760–61.
505. E.g., 106(a)(4), 8 U.S.C. 1105a(a)(4)(1982). Section 106a(5) is an exception to that standard.
508. Congress has the power to place such restrictions on the activities of aliens following their entry into the United States. Zakonaite v. Wolf, 226 U.S. 272 (1912).
509. 34 Stat. 898.
511. 232 U.S. 78 (1914).
subjected to the same scrutiny that an alien's first-time entry into the United States receives.

In Lapina, a woman who first entered the United States in 1897 or 1898, remained within the country for about ten years, and then made a short trip to Russia. Fourteen months after her return to the United States she was arrested for engaging in prostitution. The issue in similar cases is basically one of whether an alien who makes a brief departure from the United States can be considered "domiciled" in the United States and thereby, in some fashion, exempted from the exclusion provisions of the immigration statutes. Lapina provided an answer to this question by dening reentry into the United States.

Similarly, in Lewis v. Frick, an alien who resided in the United States for approximately six years and who was found to have spent one day in Canada for the purpose of importing a woman into the United States for an immoral purpose, was held to be deportable upon his attempted reentry into the United States. Under the statutory scheme involved in Lewis, as was also the case in Lapina, the executive had three years after the

512. Id. at 82–83.
513. Id. at 87–91.
514. In earlier cases, the Court was reluctant to find that all people entering the United States were covered by the reach of the terms of exclusion in the then current immigration statutes. For example, in Taylor v. United States, 207 U.S. 120 (1907), Justice Holmes found that an alien sailor who jumped ship was not the type of individual Congress had in mind when it passed legislation penalizing the relevant shipowners and ship officers for the prohibited landing of such an alien into the United States under the Act of Mar. 3, 1903, ch. 1012, § 18, 32 Stat. 1213, 1217. See also Lau Ow Bew v. United States, 144 U.S. 47 (1892), where a returning Chinese merchant who had a residence in the United States for 17 years and who made a return visit to China for 11 months was held not to fall within the terms of the Chinese Restriction Act of May 6, 1882, 22 Stat. 58, ch. 126, as amended by Act of July 5, 1884, ch. 220, 23 Stat. 115, which otherwise required all Chinese (other than laborers) coming into the United States to possess a certificate from the Chinese Government permitting their entry into the United States. The Court reasoned that the requirement of a certificate from the Chinese Government involve[d] the exaction of the unreasonable and absurd condition of a foreign government certifying to the United States facts in regard to the place of abode and the business of persons residing in this country, which the foreign government cannot be assumed to know, and the means of information in regard to which exist here, unless it be construed to mean that Congress intended that the certificate should be procured only by Chinese residing in China or some other foreign country, and about to come for the first time into the United States for travel or business or to take up their residence. Lau Ow Bew, 144 U.S. at 60–61 (emphasis added).
515. 233 U.S. 291 (1914).
alien’s entry to effect the deportation.\textsuperscript{516} In \textit{Lewis}, the Court decided that the three-year period “runs not from the date when the alien first entered the country, but from the time of the prohibited entry” which was the alien’s return to the United States.\textsuperscript{517} The Court also stated that if the alien departed the country “even for a brief space of time” he would be subject to exclusion “as if he had had no previous residence or domicile in this country.”\textsuperscript{518}

In \textit{United States ex rel. Claussen v. Day},\textsuperscript{519} an alien seaman who first entered the United States in 1912, and who subsequently served as a seaman on other American ships, was found to have departed the United States as soon as the vessel he sailed upon visited a foreign port. His return to the United States was treated like an initial entry. In \textit{Claussen}, the statutory scheme required the deportation of any alien sentenced to imprisonment for one year or more because of a conviction of a crime involving moral turpitude, such as manslaughter, within five years of entry into the United States. The five-year period was calculated on the basis of the seaman’s most recent entry into the United States.\textsuperscript{520}

In \textit{United States ex rel. Stapf v. Corsi},\textsuperscript{521} the alien seaman remained beyond a three-year period described in the Immigration Act of 1917 for instituting a deportation proceeding.\textsuperscript{522} The Court stated that the alien’s stay in the United States could “not be converted into . . . lawful residence by the mere fact that the then applicable statute limited the time within which deportation proceedings could be had.”\textsuperscript{523} While the alien sea-

\textsuperscript{517} \textit{Lewis}, 233 U.S. at 297.
\textsuperscript{518} Id.
\textsuperscript{519} 279 U.S. 398 (1929)(interpreting § § 19, 32, 33, and 35 of the Immigration Act of 1917).
\textsuperscript{520} Statutes may place the burden of proof upon the aliens to show they have the right to reenter. United States v. Trudell, 284 U.S. 279 (1932) (Holmes, J.) (interpreting § § 13(a), (b), and 23 of the Immigration Act of 1924, 43 Stat. 153, 161, 165). \textit{See also}, United States \textit{ex rel. Stapf v. Corsi}, 287 U.S. 129, 130 (1932)(The “vessel stayed in Germany two and a half days; but it does not appear whether petitioner went ashore.”).
\textsuperscript{521} 287 U.S. 129 (1932).
\textsuperscript{522} Section 34, 39 Stat. 874, 896.
man in *Stapf* resided in the United States, the Immigration Act of 1924 eliminated the three-year limitation.\(^{24}\) When the alien seaman subsequently sailed as a crew member aboard a vessel going to Germany, under the rule in *Claussen*, his return to the United States constituted a separate entry which left him vulnerable to, and excludable under, the provisions of the more recent legislation.

Similarly, the Court held in *United States ex rel. Volpe v. Smith*,\(^ {25}\) that a resident alien who is convicted in the United States of a crime involving moral turpitude, such as counterfeiting, who leaves the United States temporarily, may be excluded upon his attempted reentry. Under the rationale of this case, the ability to deny entry into the United States “includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one.”\(^ {26}\) This result is obtained although it is possible that a resident alien convicted of the same crime in the United States who never left the country could, through the passage of time, become nondeportable on the basis of the prior conviction because the time period in which a deportation proceeding could be commenced, if so limited by the statute, has expired.\(^ {27}\)

The severity of these prior decisions has been lessened to

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\(^{24}\) Section 20(d) of the Immigration Act of 1924, ch. 190, 43 Stat. 153, 165.

\(^{25}\) 289 U.S. 422 (1933).

\(^{26}\) *Id.* at 425.

\(^{27}\) *Id.* at 426. In *Volpe*, the resident alien was convicted of a crime involving moral turpitude more than five years after his initial entry into the United States. Section 19 of the Immigration Act of 1917, ch. 29, 39 Stat. 874, 889 provided for the deportation of any alien convicted within five years after entry. Therefore, if Volpe had remained in the United States, the statutory deportation requirement might not have applied to him. Upon his attempted reentry into the United States within three years of his conviction, the deportability provision became operative and he was excluded.
some extent in relatively recent opinions. In *Delgadillo v. Carmichael*,\(^{528}\) for example, a resident alien working aboard a torpedoed American merchant ship was rescued and taken to Havana, Cuba during World War II. The alien's return to the United States, after receiving care for about one week in Cuba, was held not to constitute an “entry” that would be subjected to the statutory restrictions in effect at the time.\(^{529}\) Thus, when the alien in *Delgadillo* was convicted of second-degree robbery within two years of his return to the United States, the statutory requirement of deportation of any alien so convicted within five years of making an entry into the United States was held to be inapplicable. The Court started the process of distinguishing the earlier “entry” cases by confining prior decisions to those factual circumstances where the alien “plainly expected or planned to enter a foreign port or place.”\(^ {530}\) The Court looked for a voluntary act by the alien to reach foreign soil, but found none.\(^ {531}\)

When confronted with two entries by an alien, in *Bonnetti v. Rogers*,\(^{532}\) one in 1923 and the other in 1938, combined with the fact that after the 1923 entry the alien was a member of the Communist Party but quit the Party before leaving the United States in 1937, relinquished all claim of right to residence in the United States, fought in the Spanish Civil War, and following his 1938 return to the United States never rejoined the Communist Party, the Court selected the alien's 1938 return to the United States as the relevant entry where the statutory scheme required that any alien should be deported who became a member of the Communist Party after his entry into the United States.\(^{533}\) *Delgadillo* and *Bonnetti* can be harmonized. The

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531. Id. at 391. It is arguable that this trend toward ameliorating an otherwise potentially harsh rule concerning the reentry doctrine was set in motion by Judge Learned Hand in *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947) (reentry does not occur when an alien takes an overnight sleeper railroad car from Buffalo to Detroit via Canada: the necessary intent to leave the country and must include knowledge by the alien that he will in fact go to foreign territory and cross the United States border).
Court in *Bonnetti* based its analysis upon the alien's most recent entry into the United States following the alien's earlier voluntary departure. In *Delgadillo*, the Court looked to the alien's original entry when his intervening departure was involuntary.

The sequence of decisions aiming to avoid hardship or surprise, as well as to ameliorate the possibly severe and unexpected consequences of a temporary trip abroad, reached a high point in *Rosenberg v. Fleuti.* Fleuti, a resident alien in the United States, made an "afternoon trip" across the border into Mexico and was denied reentry into the United States under the charge that he was excludable as an alien afflicted with a "psychopathic personality" in so much as he was a homosexual. Following *Delgadillo v. Carmichael,* the Immigration and Nationality Act of 1952 (INA) had been enacted, which included "entry" into the United States in its list of definitions. A number of Supreme Court cases had also addressed the issue

deportation of any alien who becomes a member of the Communist Party "at any time" after entering the United States. Section 22 of the Internal Security Act of 1950 also provided for exclusion on the basis of membership in the Communist Party, 64 Stat. 1006, but was not applicable when the alien returned to the United States in 1938. Upon the alien's return to the United States in 1938, in *Bonnetti,* federal "law did not exclude members or past members of the Communist Party." *Bonnetti* at 700 (dissenting opinion of Justice Clark). Cf. *Klig v. Brownell,* 244 F.2d 742 (D.C. Cir. 1957) (permitting deportation on the basis of past membership in the Communist Party), vacated and remanded as moot sub nom., *Klig v. Rogers,* 355 U.S. 605 (1958).


534. 374 U.S. 449 (1963) (Goldberg, J.) (Clark, Harlan, Stewart, and White, JJ., dissenting).

535. Id. at 451. The relevant statutory provision was § 212(a)(4) of the Immigration and Nationality Act, 66 Stat 182, (currently codified at 8 U.S.C. § 1182(a)(4) (1982)).


537. "Entry" is currently defined in the statute at § 101(a)(13) of the INA (codified at 8 U.S.C. § 1101(a)(13) (1982)). The definition appears *infra* at note 556. Under the language of the definition, the suggestion in *Delgadillo v. Carmichael,* 332 U.S. 388, that an alien's departure from the United States must be, in some fashion, voluntary in order to constitute a subsequent "entry," would appear to be confined to cases involving resident aliens (legal permanent residents) rather than applying broadly to all categories of aliens.
and general problems arising out of the definition of this term.538

538. Entry cases: I.L.W.U. Local 37 v. Boyd, 347 U.S. 222, 223 (1954) (Frankfurter, J.) (Black and Douglas, JJ., dissenting)(absence of valid case or controversy barred the Court from enjoining the District Director from so construing the Act of 1952 “as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time” under § 212(d)(7) of the INA, (currently codified at 8 U.S.C. § 1182(d)(7) (1982))); Barber v. Gonzales, 347 U.S. 637, 638–39 (1954) (Warren, C.J.) (Minton, Reed, Burton, JJ., dissenting) (individual “who was born a national of the United States in the Philippine Islands, who came to the continental United States as a national prior to the Philippine Independence Act of 1934, and who was sentenced to imprisonment in 1941 and 1950 for crimes involving moral turpitude” did not make an “entry” for the purposes of a deportation statute under the Immigration Act of 1917 because prior to the 1934 Philippine Independence Act the islands could not be regarded as a foreign port or place); but cf. Rabang v. Boyd, 353 U.S. 427, 431 (1957) (Brennan J.), reheg denied, 354 U.S. 944 (1957) (under the Act of 1931, 46 Stat. 1171, as amended, 54 Stat. 673 (1940), an individual born in the Philippine Islands, who lived in the United States since 1930, was deportable for violating federal narcotics laws despite the fact that when he came to the United States the Philippines were a territory of the United States and not a foreign country because the 1931 Act was “silent as to whether ‘entry’ from a foreign country [was] a condition of deportability” thereby distinguishing Gonzales v. Williams, 192 U.S. 1 (1904), discussed in note 138 supra); Mrvica v. Esperdy, 376 U.S. 560 (1964) (interpreting § 249 of the INA, 66 Stat. 163, 219, as amended, 72 Stat. 546 (1958) (codified at 8 U.S.C. § 1259 (1982), as amended by Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3405), which, in some instances, will grant an alien present in the United States a record of lawful admission for the purposes of gaining permanent residence). Compare also the different results obtained in Costello v. INS, 376 U.S. 120 (1964) (Stewart, J.) (White and Clark, JJ., dissenting)(Harlan, J., taking no part), with United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950) (Burton, J.) (Frankfurter, Black, Jackson, JJ., dissenting) (Douglas and Clark, JJ., taking no part). In Costello, a statutory provision for deportation of any alien who was convicted of two crimes after entry was held not to apply to an individual who committed the crimes while in the status of a naturalized citizen, although he was subsequently denaturalized and restored to the status of an alien when the deportation proceeding was attempted. In the earlier case, Eichenlaub, naturalized citizens convicted of offenses in violation of the Espionage Act of 1917, 40 Stat. 217, upon their subsequent denaturalization, were held deportable even though the convictions were obtained when they enjoyed the status of citizens. The difference between the two results was explained in Costello as dependent upon a statutorily available form of relief in the latter case which apparently did not apply in the earlier Eichenlaub decision. Under the deportation statute in Costello, § 241(a)(4) of the INA of 1952, (currently codified at 8 U.S.C. § 1251(a)(4) (1982)), following a conviction, the sentencing court could recommend that the alien not be deported via operation of § 241(b)(2), 8 U.S.C. § 1251(b)(2) (1982). This provision allowed for such relief to aliens upon their conviction, but did not so provide for naturalized citizens. The sentencing court thus lacked jurisdiction to provide such relief to a citizen. Since the relief Congress accorded to an alien who was found deportable under § 241(a)(4) did not apply to an individual who is a naturalized citizen when convicted, the Costello Court refused to apply the deportation requirement of § 241(a)(4) to an individual who was a citizen at the time of his convictions. Costello, 376 U.S. at 126–128. The statute under consideration in Eichenlaub, the Act of May 10, 1920, 41 Stat. 598–94, did not have a similar relief
Since Fleuti made his first entry into the United States several months before the 1952 Act became effective, he was not then excludable as a "psychopathic personality" as that exclusion provision was not yet law. Rather, the issue was whether Fleuti's return to the United States in 1956 after a brief trip across the Mexican border was an "entry" that would call into play all of the various provisions for excluding aliens.

The Court noted that earlier Supreme Court cases which created a judicial definition of entry were harsh in application and in the consequences which they wrought upon returning aliens, thereby suggesting the 1952 Act had, at least on this point, taken the sting out of prior Supreme Court doctrine, since Congress had implemented the exception in Delgadillo concerning involuntary departures from the United States. Fleuti defined a departure from the United States as an absence from the United States that is "meaningfully interruptive of the alien's permanent residence." For an absence to be "meaningfully interruptive of the alien's permanent residence," it must be intentional. Without defining intent, the Court indicated that lack of intent is established where a resident alien's trip outside the United States is "innocent, casual, and brief." An alien's intention to depart, according to Fleuti, may be drawn by inference. The Court listed three factors which will help decide whether such an inference is warranted. These factors are (1) length of time the trip takes; (2) the purpose of the trip; and (3) whether travel documents are required for the trip. A trip which has as its purpose "some object which is itself contrary to some policy reflected in our immigration laws" would likely, al-

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540. The 33 current grounds for exclusion are listed at § 212(a)(1-33) of the INA, 8 U.S.C. § 1182(a)(1-33) (1982).

541. Fleuti, 374 U.S. at 453.


543. Fleuti, 374 U.S at 462.

544. Id.

545. Id.
though not definitely, constitute a meaningful interruption of the alien’s residence. Also, whether an alien must procure travel documents “might well cause the alien to consider more fully the implications involved in leaving the country.” The result in Fleuti is “that an innocent, casual, and brief excursion by a resident alien outside the country’s borders may not have been ‘intended’ as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an ‘entry’ into the country on his return.”

E. Extension of Due Process in Some Exclusion Hearings

Some additional rights have been extended to aliens involved in exclusion proceedings in Landon v. Plasencia. In an exclusion proceeding, the rights of an alien to any due process guarantees are de minimis. In Justice O’Connor’s majority opinion in Plasencia, the right to some due process of law was extended to a legal permanent resident who underwent an exclusion proceeding after returning to the United States from a short trip to Mexico. The wisdom, however, of assigning a resident alien to an exclusion hearing rather than a deportation proceeding is not clearly established. The legal permanent resident in Plasencia naturally desired a deportation hearing, rather...

546. The language the Court uses is “it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful.” Fleuti, 374 U.S. at 462. The Court did not require that all trips which have as a purpose an object contrary to some immigration policy must necessarily constitute a meaningful interruption of the alien’s residence in the United States. But cf. Landon v. Plasencia, 459 U.S. 21 (1982), discussed at text accompanying note 549 infra.

547. Fleuti, 374 U.S. at 462.

548. Id.


551. See note 426 supra.

552. See notes 423 supra.

553. Section 242(b) of the INA (currently codified at 8 U.S.C § 1252(b) (1982), as...
than an exclusion hearing, since an alien is vested with more rights under the INA in a deportation hearing.\footnote{554} Justice O'Connor decided, however, that the proper forum in which to hear the legal permanent resident was an exclusion hearing.

An alien who has not entered the United States may be excluded from admission into the United States for any of at least 33 reasons enumerated in section 212 of the INA.\footnote{555} In order to fall within the excludability provisions in section 212 of the INA, the alien must also be engaged in making an "entry"\footnote{556} into the United States. The word "entry," in immigration law, has developed into a technical word of art.\footnote{557} Arguably, upon her return to the United States, a legal permanent resident is making an "entry" and is subject to the exclusion qualifications in section 212(a) in an exclusion hearing under section 236(a) of the INA.\footnote{558} This conclusion, however, counters the great weight of the cases previously discussed.\footnote{559} The purpose of restricting the


\footnote{554. \textit{See} note 423 \textit{supra}.}

\footnote{555. 8 U.S.C. § 1182 (1982). In \textit{Plasencia}, the returning legal permanent resident was charged with bringing into the United States a number of aliens in violation of law. This is a basis for exclusion under § 212(a)(31) of the INA, 8 U.S.C. § 1182(a)(31) (1982). Similarly, the smuggling of aliens into the United States is also a basis for deportation of the alien smuggler who is within the United States, under § 241(a)(13), 8 U.S.C. § 1251(a)(13) (1982). Since an alien has a greater repertoire of rights in a deportation proceeding, there is a motivation for the alien to argue for the latter, rather than an exclusion hearing.}

\footnote{556. This term is defined at § 101(a)(13) of the INA, 8 U.S.C. § 1101(a)(13) (1982):

The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was \textit{not intended or reasonably to be expected} by him or his presence in a foreign port or place in an outlying possession was \textit{not voluntary}. \textit{Provided}, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be entitled to such exception. (emphasis added).}

\footnote{557. \textit{See} text accompanying note 506-48 and note 556 \textit{supra}.}

\footnote{558. 8 U.S.C. § 1226 (1982).}

\footnote{559. \textit{See} cases discussed at text accompanying notes 506-48 \textit{supra}. Additionally, in \textit{Kwong Hai Chew v. Colding}, 344 U.S. 590 (1953), a legal permanent resident returning to the United States was held to be entitled to some due process rights in a proceeding to expel him from the country.}
NOTE

definition of “entry” to certain types of border crossings is to protect a legal permanent resident who briefly leaves the United States during an “innocent, casual, and brief” excursion.\textsuperscript{660} Where the brief departure is too short-lived to disrupt the alien’s legal permanent resident status, the alien is entitled to the protections of a deportation hearing rather than an exclusion hearing. When the alien’s departure is not “meaningfully interruptive”\textsuperscript{661} of his permanent residence, his return to the United States is not an “entry” and exclusion proceedings are inappropriate.

Although the Court’s decision in \textit{Plasencia} extended some additional rights to a legal permanent resident in an exclusion proceeding, non-legal permanent resident aliens did not receive these additional protections. Paradoxically, \textit{Plasencia} represents a curtailment on some fronts regarding the right of a legal permanent resident to appear in a deportation proceeding. On the face of the facts, it was not clear in \textit{Plasencia} that the legal permanent resident had been away from the United States in any manner as to constitute a meaningful departure as defined in \textit{Rosenberg v. Fleuti}.\textsuperscript{662} By placing the returning legal permanent resident alien in an exclusion hearing, she was effectively denied the opportunity to answer the charges of smuggling other aliens into the United States which had been levied against her. Through this procedural mechanism, the Court foreclosed upon the woman’s ability to present evidence to defend herself.

\textbf{F. Requests for Parole}

The Immigration and Nationality Act allows aliens to be paroled into the United States pending a determination whether they will be excluded or permitted to enter the United States.\textsuperscript{663}

\textsuperscript{560}. \textit{Fleuti}, 374 U.S. at 462.
\textsuperscript{561}. \textit{Id.}
\textsuperscript{562}. 374 U.S. 499 (1963).
\textsuperscript{563}. Section 212(d)(5)(A) of the INA, 66 Stat. 188 (current version at 8 U.S.C. § 1182(d)(5)(A) (1982)) (Parole of Alien Applying for Admission into the United States) provides:

The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the
Parole will not alter the alien's status in the eyes of the immigration law. If an exclusion hearing ultimately determines the alien is excludable from the United States, the alien will not be considered to be "within the United States" for the purposes of eligibility for suspension or withholding of deportation. According to the Court in *Leng May Ma v. Barber*, "parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted."

purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States. This section of the statute is implemented by regulations in 8 C.F.R. § 212.5 (1987).


565. Under § 243(h) of the INA, 8 U.S.C. § 1253(h) (1982). The case which announced this rule is *Leng May Ma v. Barber*, 357 U.S. 185 (1958). See also *Kaplan v. Tod*, 267 U.S. 228 (1925) discussed supra at text accompanying note 208; *Zartarian v. Billings*, 204 U.S. 170 (1907), discussed supra at text accompanying note 145; *United States v. Ju Toy*, 198 U.S. 253 (1903), discussed supra at text accompanying note 142. Indeed, these cases were decided prior to the passage of the 1952 Act. Therefore, although the 1952 provision has been amended to remove the phrase "within the United States," the rule barring a change of immigration status on the basis of a grant of parole predates the statute and was not affected by the subsequent statutory amendment.

566. 357 U.S. 185, 190 (1958) (Clark, J.) (Douglas, J., concurring). The Court also stated on the same page that "[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. . . . Certainly this policy reflects the humane qualities of an enlightened civilization." Recently, the rule became the exception and at least one observer commented that the decision whether or not to grant parole became dependent upon such factors as skin color or country of origin. See, E. HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHT OF ALIENS (1985). For some groups, lengthy confinement replaced parole. Compare the treatment accorded to various subgroups of the Cubans in the Mariel Boatlift, described in note 404 supra and the different treatment accorded to the Haitians, described in note 568 infra. Some groups never make it to the United States because they are selectively interdicted upon the high seas and returned to their home countries. See Executive Order No. 12324, 46 F.R. 48,109 (1981), reprinted in 8 U.S.C. § 1182 app., at 992-93 (1982); Proclamation No. 4865, 46 F.R. 48107 (1981), reprinted in 8 U.S.C. § 1182 app. at 993 (1982). This practice, of course, violates the nonrefoulement provisions of the 1969 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223. T.I.A.S. No. 6577. In the cases concerning the Haitian Boatlift, Haitians were picked up by the Coast Guard and asked, in the presence of Haitian government officials, whether they sought asylum...
In *Jean v. Nelson* [567] a group of Haitians who were illegally in the United States requested to be paroled [568] into the country. The Haitians claimed the INS officials had denied them parole and had discriminated against them on the basis of race and national origin. Justice Rehnquist directed the petitioning Haitians to look to the rules and regulations promulgated by the INS [569] for whatever protection the law might afford them. In dicta throughout the opinion, Justice Rehnquist demonstrated his fundamental agreement with the INS "that the equal protection component of the Fifth Amendment has no bearing on an unadmitted alien's request for parole." [570] The aliens were directed to turn to the rules of the INS to find protection from discrimination which, according to Justice Rehnquist, would not


As with the Cubans, the Haitian Boatlift resulted in a myriad of litigation. See note 404, supra, discussing the Cuban litigation. The factual conditions in Haiti from which the Haitians were fleeing, as well as a contrast in subsequent treatment which the Haitians were afforded once in the United States, as compared with the much more welcome reception granted the Cubans in the Mariel Boatlift, can be discovered in a reading and comparing of the Cuban litigation and the Haitian efforts to obtain asylum in the United States.


In particular, 8 C.F.R. § 212.5 (1985).

*Jean*, 472 U.S. at 554.
otherwise be prohibited by the Constitution of the United States. Justice Rehnquist concluded that because the regulations do not explicitly permit the INS officers to take race or national origin into account when deciding whether to grant parole to aliens, that the regulations thereby require "that INS parole decisions must be neutral as to race or national origin." Justice Rehnquist did not indicate the source of the authority that required race neutrality.

Justice Marshall, in his dissent, stated that neither the INA nor the INS regulations prohibit the discrimination of which the aliens had complained. There were, in other words, no "nonconstitutional constraints" on the agency's authority to employ "national-origin distinctions." Turning to the fifth amendment, however, Justice Marshall concluded that there are constitutional constraints upon making such distinctions, stating that the Haitians had a "Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin." He pointed out that the majority's restrictive interpretations of the INS regulations concerning the Attorney General's parole authority could affect and similarly restrict the Attorney General's discretion in other areas. Further, Justice Marshall explained that the proposition that excludable aliens do not come within the reach of the fifth amendment is one which has been applied in instances where the government faced national security concerns which were not present in Jean. Justice Marshall

571. Id. at 857.
573. Jean, 472 U.S. at 856 (footnote omitted).
574. Id. at 858.
575. Id. at 859 (footnote omitted).
576. Id. at 858.

In consideration of the aliens' fifth amendment claim, Justice Marshall in Jean sought to narrow the application of Mezei. Justice Marshall pointed out that in Mezei, the Court considered that aliens legally or illegally within the country are entitled to some measure of due process when faced with expulsion. Also, Justice Marshall explained that the language in Kwong Hai Chew v. Colding, 344 U.S. at 600, supporting the proposition that excludable aliens are not covered by the protection of the fifth amendment, is dictum, because the actual holding in Chew was that the "alien's due process rights had been violated." Jean, 472 U.S. at 872.
maintained that the rights of unadmitted aliens include a degree of equal protection and due process rights; he denied that the issue is "whether the Due Process Clause can be invoked at all." Justice Marshall concluded that the INS may not take race or national origin into account when deciding whether to grant parole or when there is lacking any connection between such discrimination and proper "immigration concerns" such as national security. The older cases support the conclusions that aliens, even ones illegally present in the United States, are persons protected under the fifth amendment who are entitled to some degree of due process of law as well as the equal protection of the laws.

V. REQUESTS FOR SUSPENSION OR WAIVER OF DEPORTATION AND THE ATTORNEY GENERAL'S DISCRETION

Once an alien has made an "entry" into the United States, section 241(a) of the Immigration and Nationality Act (INA) lists 20 grounds for deportation. Coupled with the procedures established in section 242, the statute makes possible the removal of aliens who are in the United States. The power

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578. Jean, 472 U.S. at 877. Justice Marshall invoked Plyler v. Doe, 457 U.S. 202, (1982); Mathews v. Diaz, 426 U.S. 67 (1976); and Yick Wo v. Hopkins, 118 U.S. 356 (1886) as illustrative of how these rights have been extended to aliens within the territorial jurisdiction of the United States, and would extend some protections to unadmitted aliens physically upon the nation's border. These cases are discussed in the text accompanying notes 1088 and 1115 infra, and note 47 supra.

579. Jean, 472 U.S. at 882.


581. Under Bolling v. Sharpe, 347 U.S. 497 (1954) (Warren, C.J.), the fourteenth amendment's equal protection clause may be invoked against the federal government through the fifth amendment's due process clause. Additionally, there are occasions where "discrimination may be so unjustifiable as to be violative of due process." Bolling, 347 U.S. at 499 (footnote omitted).

582. See discussion of this term in text accompanying notes 506-81 supra.


585. This may be contrasted with § 212(a) of the INA, 8 U.S.C. § 1182(a) (1982,
of Congress to prescribe such categories of removable aliens is well established within boundaries developed by the judiciary.\(^{586}\)

It is currently a felony punishable by up to two years imprisonment for a deported alien to return to the United States\(^{587}\) unless certain statutory exemptions apply.\(^{588}\)

Some types of relief under the INA are available to deportable aliens to prevent their initial removal from the United

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\(^{586}\) United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J.) (returning resident aliens must depend on rights granted them by the government when seeking to return from a trip abroad); United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927) (alien could subsequently be found deportable for previously being a member of an excluded class during his original entry into the United States); United States ex rel. Tisi v. Tod, 264 U.S. 131 (1924) (Brandeis, J.) (warrant of deportation will be upheld where the proceeding was not hasty, arbitrary, unfair, nor an abuse of discretion); but cf. Mahler v. Eby, 264 U.S. 32 (1924) (defect in a warrant of deportation is jurisdictional where the executive agent failed to make a finding of undesirability as required in the statutory framework).

\(^{587}\) Section 275 of the INA, 8 U.S.C. § 1325 (1982) (felony illegal entry), as amended by Act of Nov. 10, 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3542; § 276 of the INA, 8 U.S.C. § 1326 (1982) (reentry by a deported alien); see, e.g., United States v. Rojas-Contreras, 106 S.Ct. 555 (1985) (Burger, C.J.) (Blackmun J., concurring, joined by Brennan, J.), where the Court applied the Speedy Trial Act, 18 U.S.C. § 3161(c)(2) (1982), to an illegal alien indicted for the felony of returning to the United States. According to the Court, the unambiguous language in the Act required a determination that the thirty-day trial preparation period begins to run from the date when the defendant first makes an appearance through counsel, and not from the date of the filing of a superseding indictment when the purpose of the superseding indictment was to correct the date given on the previous indictment concerning a predicate conviction for the crime of making an illegal entry into the United States. See also United States v. Mendoza-Lopez, 107 S.Ct. 2148 (1987) (Marshall, J.) (Rehnquist, C.J., dissenting, joined by White and O'Connor, J.J.) (Scalia, J., dissenting) (alien may assert invalidity of underlying deportation order when subsequently prosecuted in a criminal proceeding for illegal entry following deportation under § 276 of the INA (codified at 8 U.S.C. § 1326 (1982))).

\(^{588}\) A deported alien who desires to return to the United States must obtain permission from the Attorney General to reapply for admission. Section 276(1), (2)(A) of the INA, 8 U.S.C. § 1326(1), (2)(A) (1982). This requirement remains upon an excluded alien for one year following his exclusion from the United States, § 212(a)(16) of the INA, 8 U.S.C. § 1182(a)(16) (1982), and for five years for certain types of aliens who were deported following a deportation proceeding. Section 212(a)(17) of the INA, 8 U.S.C. § 1182(a)(17) (1982).
States.\textsuperscript{589} With the exception of "powers, functions, and duties conferred upon the President, the Secretary of State, or diplomatic or consular officers," the Attorney General is "charged with the administration and enforcement" of the INA,\textsuperscript{590} including the power to decide whether to grant relief from deportation.\textsuperscript{591} The Attorney General is authorized to delegate these responsibilities to the INS, the Commissioner of Immigration, the Department of Justice, or to others.\textsuperscript{592} Some forms of relief from deportation allow for broad discretion by the officer making the decision whether to grant it while other relief may be required if the statutory prerequisites are established.\textsuperscript{593}

\section*{A. Discretionary Suspension of Deportation}

The INA provides that an alien may obtain a suspension of an order of deportation when certain statutory requirements are met.\textsuperscript{594} The relief may be accorded to an alien by the Attorney

\begin{footnotesize}
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\item \textsuperscript{589} E.g., § 244(a) of the INA, 8 U.S.C § 1254(a) (1982)(discretionary suspension of deportation), as amended by Act of Nov. 6, 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3439; § 241(f) of the INA, 8 U.S.C. § 1251(f) (1982) (discretionary waiver of deportation); § 243(h) of the INA, 8 U.S.C. § 1253(h) (1982) (nondiscretionary political asylum, or withholding of deportation).
\item \textsuperscript{590} Section 103 of the INA, 8 U.S.C. § 1103 (1982).
\item \textsuperscript{591} The Attorney General is charged with administering the provisions pertaining to relief from deportation listed in note 589, supra.
\item \textsuperscript{592} Section 103 of the INA, 8 U.S.C. § 1103 (1982).
\item \textsuperscript{593} See sections cited in note 589, supra.
\item \textsuperscript{594} The requirements are set forth in § 244(a) of the INA, 8 U.S.C. § 1254(a)(1982):
As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . . who applies to the Attorney General for suspension of deportation and—
  (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and
  is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.
\end{itemize}
\end{footnotesize}
General or by his appointed delegate. In *INS v. Rios-Pineda*, the Supreme Court held the Board of Immigration Appeals (BIA) did not exceed its discretionary authority in denying a motion brought by two Mexican citizens, a married couple, to reopen a request for suspension of deportation. Prior to the initiation of their deportation proceeding, the wife bore a child, a United States citizen, and before the couple’s appeal reached the Supreme Court, she bore another child, also a United States citizen. The Supreme Court approved the BIA holding that the section 244(a)(1) requirement that an alien maintain a continuous presence in the United States for seven years in order to become eligible for a suspension of deportation was not satisfied when the seven-year period accrued during the pendency of the aliens’ appeals from the date the suspension of deportation was first denied. This result is at variance with

sidered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.” Act of Nov. 6, 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3439.


597. Motions to reopen are provided for in 8 C.F.R § 3.2 (1987). The decision to grant such a motion is discretionary. *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981).

598. Since the children were born in the United States and were subject to its jurisdiction, they were citizens at birth. Section 301 of the INA, 8 U.S.C. § 1401 (1982). Giving birth to a child in the United States does not give an alien an open door to remaining in the United States, as is illustrated in the deportations in *Rios-Pineda*, and in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam), rev’d 622 F.2d 1341 (9th Cir. 1980), reh’g denied, 451 U.S. 964 (1981), discussed *infra* at text accompanying note 600. An alien couple may argue that deportation would result in “extreme hardship” to their United States citizen children and possibly obtain a suspension of deportation, but only at the discretion of the Attorney General, § 244(a)(1) of the INA, 8 U.S.C. § 1254(a) (1982). The other provisions of that section must be complied with as well. See note 594 *supra*.

In *INS v. Hector*, 107 S.Ct. 379 (1986) (per curiam) (Marshall, J., dissenting) (Brennan, J., would grant the petition and set the case for oral argument), the Supreme Court limited consideration of extreme hardship only as it applies, in the event of an alien’s deportation, to the alien’s “spouse, parent, or child.” The Court refused suspension of deportation regardless of a “parental type relationship” demonstrating strong family ties between the alien woman and her two nieces, both of whom were United States citizens. *Id.* at 381. The two nieces were 10 and 11 years old and had resided with their aunt in the United States.

599. *Rios-Pineda*, 471 U.S. at 449-50. The Court also approved the BIA denial of the
the explicit recognition in INS v. Jong Ha Wang\textsuperscript{600} that the seven-year requirement may accrue during the course of the aliens' litigation. In Jong Ha Wang, an alien couple was authorized to remain in the United States from 1970 to 1972. The subsequent five years the couple spent unsuccessfully in litigation over their deportability and their requests for adjustment of status. By 1977, the couple made a claim for suspension of deportation under section 244 of the INA, and the Supreme Court stated, albeit in dictum, that the aliens "by then had satisfied the 7-year-continuous-physical-presence requirement of that section."\textsuperscript{601}

In both Rios-Pineda and Jong Ha Wang, the Court deferred to the authority of the Attorney General and his delegates whose responsibility it is to administer the INA.\textsuperscript{602} The deference in Rios-Pineda is misplaced because it fails to take into account the intervening result obtained in INS v. Chadha,\textsuperscript{603} in

motion to reopen based upon the aliens' violation of provisions of the INA. For example, the aliens violated federal law in entering the United States and in failing to depart voluntarily after one alien's request for voluntary departure had been granted by the INS. Accordingly, the Attorney General may distinguish among aliens "on the basis of the flagrancy and nature of their violations." Rios-Pineda, 471 U.S. at 451.  


\textsuperscript{601} Jong Ha Wang, 450 U.S. 139, 142 (1981). The alien couple ultimately failed in their claim on the basis of their inability to meet the narrow "extreme hardship" requirement of § 244 of the INA (currently codified at 8 U.S.C. § 1254 (1982)). Their motion to reopen after deportation had been ordered was ultimately denied.

\textsuperscript{602} Referring to § 103 of the INA, 8 U.S.C. § 1103 (1982). See, Rios-Pineda, 471 U.S. at 451, and Jong Ha Wang, 450 U.S. at 144. The Court has seen fit, however, to interfere with the exercise of the Attorney General's discretion to the extent of ordering the INS as to which subsection of a former version of the suspension of deportation statute, § 244(a)(1), 66 Stat. 163, 214 (current version at 8 U.S.C. § 1254(a)(1)(1982)), was to be considered in evaluating an alien's request for waiver of deportation. Desalernos v. Savoretti, 356 U.S. 269 (1958).

\textsuperscript{603} 462 U.S. 919 (1983) (Burger, C.J.) (Powell, J., concurring) (White, J. dissenting) (Rehnquist and White, JJ., dissenting). Almost five years have passed since Chadha and although the Republic has still not fallen, the commentary the decision has spawned continues: see, Horan, Adjusting the Separation of Powers: the "Legislative Veto" and the United States Supreme Court's Decision in the Chadha Case, 14 ANGLO-AM. L.REV. 205 (1985); Gaetke, Separation of Powers, Legislative Vetoes, and the Public Lands 56 U. COLO. L. REV. 559 (1985); Buchanan, In Defense of the War Powers Resolution:
which section 244(c)(2) (the one-House veto)\(^6\) of the INA was held unconstitutional. Accordingly, Congress lost the method it had chosen to regulate the powers it had granted to the Attorney General to suspend deportations.\(^7\) Section 244(c)(2) indicated a congressional design to oversee the Attorney General’s decision to grant suspension of deportation. In both Rios-Pineda and Jong Ha Wong the aliens were in a converse situation in

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\(^6\) 8 U.S.C. § 1254(c)(2) (1982), which provides:

In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien’s voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

Prior statutes which gave Congress a veto over the Attorney General’s decision to suspend deportation appear in the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 671 (concurrent resolution); Act of July 1, 1948, ch. 783, 62 Stat. 1206 (concurrent resolution to approve the Attorney General’s suspension); Immigration and Nationality Act of 1952, § 244, 66 Stat. 214 (concurrent resolution approving suspension required as well as allowing one-House veto).

\(^7\) Section 244(c)(2) provided that once the Attorney General decided upon a suspension of deportation, either the Senate or the House alone could veto such a determination. If neither the Senate nor the House acted within a prescribed period of time, the suspension of deportation became effective. Section 406 of the INA, 8 U.S.C. § 1101, note (1982), provided for separability of the remainder of the provisions of the Act if a particular provision were declared unconstitutional. Thus, § 244(c)(1), granting the Attorney General the discretion to suspend deportation, survived the decision in Chadha. It is to be noted that the concurrent resolution proviso of § 244(c)(3) (the two-House veto), which avoids presidential presentment, was not ruled upon in Chadha and conceivably may still be effective, although suffering from one of the shortcomings decried in Chadha, namely presentation to the President.
that the Attorney General decided not to exercise his discretion to grant a suspension of deportation. Before the Chadha decision in 1983, the Court was properly concerned about the judiciary "improvidently encroach[ing] on the authority which the Act confers on the Attorney General and his delegates" because there existed in place a congressional mechanism to regulate the Attorney General's power in section 244(c)(2). The effect of Chadha was to change the administrative environment regarding suspension of deportation issues. Congress has not yet responded to curtailment of its reviewing scheme over the Attorney General. One would expect the Court to proceed cautiously when construing the breadth of the power conferred to the Attorney General and his delegates, now that the congressional role as watchdog has been eliminated by judicial decree. Rios-Pineda fails to consider the absence of reviewable authority over the Attorney General created by Chadha. This is somewhat surprising when one considers that Rios-Pineda's author, Justice White, raised a dissenting voice in Chadha where he expressed concern over precisely the effect achieved in Rios-Pineda—namely that Congress would lose its check on the power granted the Attorney General. In Rios-Pineda, the case of Jay v. Boyd is cited in delineating the scope of the Attorney General's discretion to suspend deportation. According to

607. Justice White stated in Chadha:
   If Congress may delegate lawmaking power to independent and Executive agencies, it is most difficult to understand Art. I as prohibiting Congress from also reserving a check on legislative power itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature.
462 U.S. at 986-87.
608. 351 U.S. 345 (1956) (Reed, J.) (Warren, C.J., and Black, Frankfurter, and Douglas, JJ., each separately dissenting). In Jay v. Boyd, the alien entered the United States in 1921 and remained there until 1952 when he was ordered deported for having been a member of the Communist Party from 1935 to 1940. He was qualified for suspension of deportation, but the Attorney General, exercising his discretion, refused to grant it. According to Chief Justice Warren's dissent, suspension was denied "on the basis of undisclosed 'confidential' information." 351 U.S. at 362. He cautioned that "[i]f sanction of this use and effect of 'confidential' information is confirmed against this petitioner by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways." Id. Justice Black characterized the "unfettered discretion" which the Court recognizes in the Attorney General as "more accurately, 'arbitrary power.'" Id. at 366.
Boyd, such discretion is "unfettered" and even a legal permanent resident alien is not entitled to a hearing in which there is "full disclosure of the considerations entering into a decision."  

B. Discretion Pretermitting Consideration of Statutory Eligibility

Where a provision in the INA vests an INS officer with discretion in deciding whether to grant available statutory relief that officer may exercise his or her discretion without reaching a decision on the individual statutory eligibility requirements. This allows for a potentially arbitrary application of the law. In *INS v. Bagamasbad* the Supreme Court upheld the exercise of the district director's discretion where the director and an immigration judge had denied a request by an alien for a section 245(a) adjustment of status to that of a legal permanent resident. The alien had "overstayed her tourist visa by 4 years." The basis for the refusal to exercise discretion on the alien's behalf was that the alien "had made serious misrepresentations to the United States consul who had issued her visa." Section 245(a) does not list misrepresentation as a factor affecting its eligibility requirements. In appealing the adverse decision, she claimed the INS had failed to determine whether she met the statutory eligibility requirements of section 245(a). The Court held the agency did not have to make such determinations since whether or not she met the requirements of section 245(a), her initial misrepresentations would disqualify her, as a matter of discretion, from obtaining an adjustment of status. The alien argued any future application for a visa to the United States

609. 351 U.S. at 354.
610. 429 U.S. 24 (1976) (per curiam), rev'g. 531 F.2d 111 (3rd Cir. 1976).
611. 8 U.S.C. § 1255(a) (1982) (Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence). Subsection (a) provides: The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. (emphasis added).
612. 429 U.S. at 24.
613. Id. at 25.
would meet with prejudice since the government officers would examine her record to find a denial of her section 245(a) request and would therefore assume she had not met its particular requirements. The Supreme Court indicated, however, that it would "be clear . . . no eligibility determination" had been made if the alien later applied for another visa and the United States consul would therefore not give the discretionary denial of a section 245(a) request undue weight. According to the Court, the review of the alien's initial request for adjustment of status was properly confined to a finding of misrepresentation without examining whether or not the specific section 245(a) requirements had been met.

C. Continuous Presence

The Supreme Court opinion in INS v. Phinpathya, interpreted another aspect of section 244(a)(1) of the INA. In Phinpathya, an alien woman left the United States for Thailand in January 1974 and returned three months later. The issue, upon her attempted return to the United States, was whether her "continuous presence" within the United States had been broken by her brief return to her native land. One requirement for eligibility for suspension of deportation under section 244(a)(1) is that the alien be "physically present in the United States for a continuous period of not less than seven years immediately preceding" the requested suspension of deportation.

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614. Id. at 26.
617. 464 U.S. at 186.
618. See note 594 supra.
Justice O'Connor, writing for the majority, defined the "continuous physical presence" requirement by basing her interpretation upon "the plain meaning" rule of statutory interpretation. Justice Brennan pointed out in his concurrence that this rule of construction can cut both ways. The majority, however, insisted upon referring to the "ordinary meaning" of the words in the statute in such a way as would not allow any breaks in the seven-year-continuous-presence requirement of section 244(a)(1).

Justice O'Connor used the phrase "continuous physical presence" in her argument for a literal interpretation of section 244(a)(1) even though this phrase does not appear in section 244(a)(1). Rather, section 244(a)(1) requires a "continuous period of not less than seven years." The "continuous physical presence" requirement appeared in former section 301(b) of the INA and was repealed in 1978, five and one-quarter years...

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619. This is the language adopted in the opinion, although the statutory section under scrutiny does not contain this exact phrase. See, e.g., 464 U.S. at 185.
620. 464 U.S. at 188.
621. In his concurrence, Justice Brennan stated: Moreover, if we are to understand that the Court implicitly approves of a literal interpretation of the statute, the error of the analysis is patent. It is a hornbook proposition that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of law in such case should prevail over its letter."

Phinpathya, 464 U.S. at 198, (quoting United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868)).
622. Phinpathya, 464 U.S. at 189.
623. Id.
624. See note 594 supra.
625. Former § 301(b) of the INA, added by Act of Oct. 27, 1972, Pub. L. No. 92-584, 86 Stat. 1289 (formerly codified at 8 U.S.C. § 1401(b)), stated: (b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; . . . In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.

(emphasis added). This subsection was repealed by an Act of Oct. 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046. The reference in former § 301(b) to paragraph (7) of subsection (a) is an allusion to § 301(a)(7) of the Act of June 27, 1952, 66 Stat. 163, 223, and is repro-
prior to the Phinpathya decision. The repealed section stated requirements with which United States citizens born abroad had to comply or lose their citizenship. The statutory provision under scrutiny in Phinpathya, however, pertained to requests for suspension of deportation. Former section 301(b) of the INA mandated that foreign-born United States citizens reside for a period of not less than two years within the United States while between the age of 14 and 28. The section provided that the individual claiming United States citizenship "be continuously physically present" within the United States during that two-year period. In Phinpathya the language in section 244(a)(1) of the INA was interpreted to connote the same rigorous standard requiring the alien who applied for a suspension of deportation to be continuously physically present during all of the seven-year period specified in section 244(a)(1).

Prior to Phinpathya, the Supreme Court had relaxed the standard with which it analyzed the continuity of an alien's "continuous presence" within the United States. Additionally, the repeal of section 301(b) of the INA suggests Congress sought to eliminate reliance upon that section for the purpose of judicial construction. The Court in Phinpathya, however, concluded that because Congress was once capable of requiring "two years of 'continuou[s] physica[l] presen[ce]'" for the purposes of former section 301(b), and that because Congress expressly provided under former section 301(b) that "absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence" that Congress could be explicit when it wanted to be, and could state in clear language when an absence from the

626. See § 301(b)(1) of the INA at note 625 supra.
627. See text at notes 506-81 supra supporting this conclusion. See also, McLeod v. Peterson, 283 F.2d 180, 186 (3rd Cir. 1960) (dicta: "circumstances can be suggested where an absence of even several years would not prevent an alien from being continuously present").
United States would not affect the alien's rights. The former judicial presumption that Congress intended to allow breaks in prescribed periods of continuity unless explicitly stating the contrary was reversed in *Phinpathya*.

In an earlier case, *Rosenberg v. Fleuti*, a similar provision in section 316 of the INA concerning the required period in which a legal permanent resident must reside in the United States before being naturalized was interpreted to permit brief departures by aliens from the United States. A number of cases have similarly held that brief absences from the United States do not constitute a meaningful departure from the United States. In *Fleuti*, Justice Goldberg argued that the general body of immigration law had been "liberalized" and provided with an "enlightened concept of what constitutes a meaningful interruption of the continuous residence" requirement by the language of section 316 of the INA. Section 316(a) is a residence

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632. Section 316 of the 1952 Act, 66 Stat. 242-43 (codified at 8 U.S.C. § 1427 (1982)). This section is still effective and allows for absences from the United States by aliens for periods of less than half of a required five-year waiting period leading to a legal permanent resident's naturalization. Section 316(b) permits any absence to be up to six months before affecting or endangering the alien's status. Justice O'Connor could have easily used this section of the Code, rather than repealed § 301(b) to make her argument, and thereby have obtained a contrary result consistent with earlier decisions. Section 316(a), (b) (8 U.S.C. § 1427(a), (b) (1982)) provides:

(a) No person, except as otherwise provided in this title, shall be naturalized, unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of petition up to the time of admission to citizenship . . .

(b) Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, unless the petitioner shall establish to the satisfaction of the court that he did not in fact abandon his residence in the United States during such period.

(emphasis added).
633. See text at notes 506-81 supra.
634. 374 U.S. at 459.
635. *Id.*
requirement for legal permanent residents who petition for naturalization. The requirement that the legal permanent resident have "resided continuously" within the United States for a set period before applying for naturalization is defined by section 316(a)(1) as a period where the legal permanent resident is actually "physically present" in the United States for a period "totalling at least half" of the pre-naturalization time-period requirement. An absence from the United States for up to 50 percent of the five-year time period, or two and one-half years, is permissible and is not considered as terminating the alien's continued physical presence in the United States. Certainly, an argument can be advanced that by repeal of section 301(b) of the INA, and by the continued effectiveness of section 316 of the INA, the latter section's interpretation of continuous presence is controlling.

Justice O'Connor argued in Phinpathya, however, that Fleuti was irrelevant to a section 244(a)(1) claim since Fleuti was an "entry" decision based on the definition of that term in section 101(a)(13). This fact does not undermine section 316 of the INA, nor Justice Goldberg's interpretation of it in Fleuti, especially since the alternative basis of the opinion, section 301, had been repealed. The concept of an "entry" into the United States in Fleuti achieved significance only to the extent that the alien had meaningfully departed from the United States. In Fleuti, the Court found no meaningful departure from the United States when the legal permanent resident made an excursion into Mexico. The alien's brief departure from the United States did not constitute an interruption of his continuous presence in the United States. Indeed, in current section 316(b) of the INA, a legal permanent resident is not considered to have abandoned his residence in the United States until his absence lasts at least six months but it may be as long as one year without terminating such residence.

The passage of the Immigration Reform and Control Act of 1986 put these controversies to rest by overruling INS v.

636. See note 632 supra (emphasis added).
637. See note 556 supra.
638. See the discussion of Fleuti at text accompanying note 534 supra.
639. See note 632 supra.
Section 315(b) of the 1986 Act added a third paragraph to section 244(b) which provides that an alien's "continuous physical presence in the United States" shall not be considered disrupted if the departure "was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence." The legislative history indicates that the intention behind the provision was to overrule Phinpathya.

D. Waiver of Deportation and the Attorney General's Discretion

Section 241(f) of the INA provides relief from deportation to some deportable aliens who are relatives of United States citi-

641. See note 594 supra.


Section 315(b) permits an alien to maintain a continuous physical presence if his absence from the United States was brief, casual, and innocent. This amendment would overrule INS v. Phinpathya, 104 S.Ct. 584 (1984), which held that any absence, however brief, breaks the continuity of physical presence. See also, INS v. Hector, 107 S.Ct. 379, 383 n.7 (1986).


(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or an alien lawfully admitted for permanent residence.


The House Judiciary Committee Report on the 1981 amendment noted the confusion concerning § 241(f). The Report indicated that the purpose behind restricting the applicability of § 241(f) to immigrants (rather than nonimmigrants) who make either an innocent or fraudulent misrepresentation, as well as the purpose behind making administration of § 241(f) a matter of the Attorney General's discretion, was to reduce the amount of litigation that has occurred over § 241(f). 1981 U.S.Code Cong. & Admin. News, 2593, 2593–94. However, neither the Report nor the amendment answer the question raised by the cases described in the text accompanying note 646 infra which is whether § 241(f) applies to § 241(a)(2) deportations. Since the decision whether to grant the waiver of deportation is now discretionary, the decisions by the Attorney General or his delegates should be less subject to challenges.

In the time period between INS v. Errico, 385 U.S. 214 (1966), and Reid v. INS, 420
zens or permanent residents. It is another statutory remedy to deportation which aliens may pursue along with a request for suspension of deportation under section 244(a)(1).\textsuperscript{644} Section 241(f) provided relief from deportation to those aliens who were otherwise admissible into the United States when they entered, but who "sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation" and who were either "the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."\textsuperscript{645} The Warren and Burger Courts each ruled upon this section with differing results.

In \textit{Reid v. INS},\textsuperscript{646} two aliens from British Honduras who were husband and wife entered the United States by falsely representing themselves to be United States citizens. Subsequently, they had two children born in the United States who were citizens at birth.\textsuperscript{647} The INS sought to deport the parents on the basis of section 241(a)(2) of the INA\textsuperscript{648} for entering the United States without proper inspection at the border.\textsuperscript{649} The aliens contended that they were eligible for relief from deportation under section 241(f) of the INA since they had entered the country by fraud or misrepresentation and they were parents of United States citizens. The Court held, however, that section

\textsuperscript{644} See note 594 \textit{supra.}

\textsuperscript{645} See note 643 \textit{supra.}


\textsuperscript{647} Children born in the United States and subject to its jurisdiction are citizens at birth. Section 301 of the 1952 Act, 8 U.S.C. § 1401 (1982).

\textsuperscript{648} 8 U.S.C. § 1251(a)(2) (1982). The applicable provision provides:

\texttt{Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States

\texttt{...}}
241(f) was inapplicable.

Under the statutory scheme at the time of the Reid decision, section 241(f) relief applied to aliens deportable under section 241(a)(1) of the INA if they were deportable by reason of having been excludable at the time of entry into the United States under section 212(a)(19) of the INA. The Court decided section 241(f) relief did not apply to an alien who is deportable under section 241(a)(2) of the INA, even where the underlying basis for deportability pursuant to section 241(a)(2) is section 212(a)(19) excludability. The Court reached this conclusion based on the similarity in language between section 241(f) and section 212(a)(19). Section 241(a)(1) incorporated by reference all 33 grounds for exclusion contained in section 212(a), including section 212(a)(19). According to Justice Rehnquist's majority opinion in Reid, since section 212(a)(19) was incorporated by reference into section 241(a)(1), the relief provided by section 241(f) applied to section 241(a)(1) deportations. Under this logic, section 241(f) did not apply to section 241(a)(2) deportations since the link between section 212(a)(19) and section 241(a)(2) was not present.

It is interesting to note that section 241(f) physically followed presentation of all of the grounds for deportability listed in section 241(a). Section 241(f) did not explicitly limit its appli-

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650. 8 U.S.C. § 1251(a)(1) (1982). The applicable provision provides:

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . . .

651. Thirty-three grounds for exclusion at the time of entry are listed in § 212(a) of the INA, 8 U.S.C. 1182 (1982).

652. 8 U.S.C. § 1182(a) (1982) states:

Except as otherwise provided in this Chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact . . . .

(emphasis added). This section was amended by the Act of Nov. 10, 1986, Pub. L. No. 99-639, § 6(a), 100 Stat. 3543.

653. Compare the language emphasized in notes 643 and 652 supra.

654. I.e., § 241(a)(1) refers to all aliens who were excludable at the time of entry under the body of law existing at the time of that entry. Currently, § 212(a) is the subsection which lists the grounds for excludability.
cation to aliens who were deportable under section 241(a)(1). Section 241(f) provided relief from deportation to those aliens who were within certain categories of relatives of United States citizens or of legal permanent residents, but who obtained entry through willful misrepresentation or fraud. Logically, an alien who violated section 241(a)(2) by eluding inspection upon entry into the United States by misrepresenting himself or herself to be a United States citizen was the type of alien for whom section 241(f) contemplated relief. The decision in Reid rendered the set of all aliens to whom section 241(f) relief was available to be the null set, since any alien who was deportable under section 241(a)(1) because he or she was excludable under section 212(a)(19) was generally also deportable under section 241(a)(2). The Court in Reid, however, refused to apply section 241(f) relief to an alien deportable under section 241(a)(2). Reid signalled the judicial repeal of section 241(f) of the INA.

In INS v. Errico,656 the Warren Court had extended the availability of relief from deportation under section 241(f) to aliens who entered the United States without complying with documentary requirements specified in the existing version of section 211 of the INA.656 The result in Errico supported the holdings by administrative authorities that section "241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry.'"657 The purpose of section 241(f) is to keep families with United States citizens or legal permanent residents together and to avoid overly technical readings of the statute that would invite draconian results. In Reid, the Court shifted from this perspective. Congress followed this

657. 385 U.S. at 217 (footnote omitted). The administrative decisions which support this position under the forerunner of current § 241(f) (namely, § 7 of Pub. L. No. 85-316, Act of Sept. 11, 1957, 71 Stat. 639, 640) are e.g.: In re S,—, 7 I & N Dec. 715, 716 (BIA 1958) ("it is immaterial that the respondent's deportation is not sought under section 241 of the Immigration and Nationality Act"); In re Y,—, 8 I & N Dec. 143, 149 (1953)(deportation relief provided by forerunner of § 241(f) applies regardless of section of the statute under which alien was deportable).
lead by expressly disallowing application of section 241(f) relief to aliens excludable under current section 212(a)(19) of the Act. With this move, Congress also circuitously expressed dissatisfaction with Reid, because the underlying rationale in that decision was that section 241(f) relief applied only to a deportation subsection in section 242 that was linked to the section 212(a)(19) exclusion provision.

VI. FOURTH AMENDMENT DEFERENCE TO THE NATURALIZATION CLAUSE

Article I, section 8, clause 4 of the Constitution empowers Congress to regulate the nation's borders. It is a grant of authority over immigration and naturalization. It empowers Congress to require all entrants into the United States to identify themselves as "entitled to come in." The extent of permissible governmental intrusion into individual lives cannot be evaluated properly without considering the safeguard which the fourth amendment guarantees to individuals to "be secure in their persons . . . against unreasonable searches and seizures." The tension between the power of the government to regulate its borders, and the right of the individual to be free from unreasonable searches and seizures resurfaces continually in fact patterns involving the government and one of the least protected of all groups—aliens. As there is no singular set of physical traits that distinguish aliens from non-aliens, there is a constant danger that a government technique which may prove effective to regulate the lives of aliens may easily be applied to encroach upon the lives of citizens. The rights which accompany United States citizenship are one of the most valuable of all possessions and they must be zealously protected. They should not be dispensed with in the government's pursuit of economically efficient tech-

659. Article I, § 8, cl. 4 of the United States Constitution grants "The Congress shall have power . . . To establish an uniform Rule of Naturalization."
661. The fourth amendment provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
A. Bodily Integrity Subordinated to National Integrity

In *United States v. Montoya de Hernandez*, customs officials at a Los Angeles airport detained Rosa Elvira Montoya de Hernandez, a woman who had arrived on a flight from Bogotá, Colombia, because she met the criteria of a drug-courier profile and was suspected of smuggling balloons filled with cocaine within her alimentary canal. Justice Rehnquist's majority decision described the circumstances which gave the customs officials a reasonable suspicion the woman was trafficking drugs: Bogotá is considered a "source city" of narcotics; Montoya de Hernandez arrived around midnight at the airport; she had made eight recent trips to the United States; she could not speak English and had no friends or relatives in the United States; she explained she had come to the United States in order to take taxicabs to various retail stores to purchase items for her husband's business in Bogotá; she carried $5,000 in cash; she had no hotel reservations; she could not remember the events surrounding the purchase of her airline ticket; she had four changes of clothing, and only a pair of high heels which she was wearing. Based upon these observations and responses to their questioning, the customs officials suspected de Hernandez as an alimentary-canal smuggler and she underwent frisking and a strip search which revealed she was wearing "two pairs of elastic underpants with a paper towel lining the crotch area." She agreed to have an x-ray, but then stated she was pregnant. Then she consented to a pregnancy test, but withdrew her consent when she was told she would be required to go to a hospital in handcuffs. Her request to make a telephone call was denied. She was given a choice to return to Colombia on the next flight, or to submit to an x-ray, or to remain in continued detention until she


664. 473 U.S. at 533.

665. Id. at 534.
had a "monitored bowel movement."\textsuperscript{666} She decided to return to Colombia but the next available flight was on a Mexican airline which declined to take her since she did not have a visa to land in Mexico City. At that point the customs officials refused to release her and she "was informed she would be detained until she agreed to an x-ray or her bowels moved."\textsuperscript{667} Following her detention for 16 hours, the customs officials requested a court order from a federal magistrate which was obtained 8 hours later "which authorized a rectal examination and involuntary x-ray, provided that the physician in charge considered [the] claim of pregnancy."\textsuperscript{668} An initial examination discovered a balloon filled with cocaine, and eventually eighty-seven other cocaine-filled balloons were discovered.

Justice Rehnquist prefaced the Supreme Court opinion with a basic proposition that the fourth amendment requires that searches and seizures must be reasonable. Reasonableness requires consideration of "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."\textsuperscript{669} As in fourth amendment cases generally, the necessary inquiry required a balancing between the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."\textsuperscript{670} From these general premises, Justice Rehnquist proceeded to the legal particulars of the case. Because the woman's seizure occurred at an "international border,"\textsuperscript{671} the Court tipped the scales in favor of the sovereign's interests. Justice Rehnquist explained that "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant"\textsuperscript{672} to aid its efforts to collect duties and to regulate the flow of contraband. According to Justice Rehnquist, the "Fourth Amendment's balance of reasonableness is qualitatively different at the international border

\begin{itemize}
\item \textsuperscript{666} \textit{Id.}
\item \textsuperscript{667} \textit{Id.} at 535.
\item \textsuperscript{668} \textit{Id.}
\item \textsuperscript{669} \textit{Id.} at 537.
\item \textsuperscript{670} \textit{Id.}, (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983), discussed at note 719 infra); see Delaware v. Prouse, 440 U.S. 648, 654 (1979).
\item \textsuperscript{671} 473 U.S. at 537.
\item \textsuperscript{672} \textit{Id.}
\end{itemize}
than in the interior\textsuperscript{673} and requires neither reasonable suspicion nor probable cause to conduct a routine search.

Since Montoya de Hernandez's detention was far from routine, however, the Court analyzed the level of suspicion which the customs agents must have in order to justify detention. The Court noted that the lower court utilized a "'clear indication' [standard] as an intermediate fourth amendment standard between 'reasonable suspicion' and 'probable cause'."\textsuperscript{674} Justice Rehnquist rejected what he considered to be a new fourth amendment level of suspicion. He explained that the "clear indication" standard is one which necessitates a "particularized suspicion"\textsuperscript{675} that the individual under scrutiny is carrying narcotics within his or her body and is therefore a facet of the "reasonable suspicion" standard.\textsuperscript{676}

The Court held that the fourth amendment's reasonable suspicion standard is the appropriate measure by which to gauge the justifiability of a nonroutine customs search. The suspicion may arise based upon all of the facts pertaining to the traveler and her trip.\textsuperscript{677} Under a reasonable suspicion standard, the customs officials must have a "'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling."\textsuperscript{678} In light of United States v. Cortez,\textsuperscript{679} the customs inspector may act upon "common-sense conclusions about human behavior."\textsuperscript{680} According to the Court, the reasonable suspicion standard justified the frisking and strip search that immediately followed the initial observation and questioning of de Hernandez. Furthermore, the ensuing twenty-four-hour incommunicado detention prior to issuance of a federal magistrate's order

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\textsuperscript{673} Id. at 538.
\textsuperscript{674} Id. at 540. The intermediate standard was taken from Schmerber v. California, 384 U.S. 757, 770 (1966).
\textsuperscript{675} Montoya de Hernandez, 473 U.S. at 540.
\textsuperscript{676} Id. at 541. See also, United States v. Cortez, 449 U.S. 411, at 417 (1981) (employing particularized suspicion standard in meeting the reasonableness requirement); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (requiring "specific articulable facts" about an individual to meet the reasonable suspicion standard).
\textsuperscript{677} See e.g., United States v. Cortez, 449 U.S. 411 (1981), discussed at text accompanying note 781 infra.
\textsuperscript{678} 473 U.S. at 541–42, (quoting United States v. Cortez, 449 U.S. at 417 (1981)).
\textsuperscript{679} 449 U.S. 411(1981).
\textsuperscript{680} Cortez, 449 U.S. at 418, quoted in Montoya de Hernandez, 473 U.S. at 542.
"was not unreasonably long" because alimentary-canal smuggling cannot be detected by mere frisking and strip searches. Since the episode occurred at an international border, "the Fourth Amendment balance of interests leans heavily to the Government." He would have held that the treatment which Rosa Montoya de Hernandez received is not permissible "without the sanction of a judicial officer." He would not have allowed such detention when "based on nothing more than the 'reasonable suspicion' of low-ranking investigative officers that something might be amiss." Justice Brennan lamented that "[i]ndefinite involuntary incommunicado detentions 'for inspection' are the hallmark of a police state, not a free society." He would not differentiate between an impermissible detention in the interior of the country as compared with the border and he would require approval by a magistrate under a standard of probable cause for criminal investigations undertaken at the border.

Justice Brennan's simple message is that at some point much earlier in Rosa Montoya de Hernandez's detention, the low-ranking executive officers could have sought a magistrate's permission to carry on their invasive procedures. This is not such a burden to law enforcement as would allow criminals to go free.

Justice Brennan reported that a low percentage of the people singled out for "'internal searches'—rectal and vaginal examinations and stomach pumping" are discovered to be carry-
ing illicit contraband. Many innocent people are therefore subjected to the humiliation of body searches. Justice Brennan would require that a detention or search, although conducted at the border, must be founded upon probable cause when consent is otherwise lacking. Any claim of concern for “national self-protection” must be subject to the Bill of Rights. According to Justice Brennan, the deplorable result in *Montoya* is that once the alien is on United States soil at the border, “he is fully subject ‘to the criminal enforcement powers of the Federal Government’ [but] he is not fully protected by the guarantees of the Bill of Rights applicable everywhere else in the country.”

**B. Workplace Searches and Seizures**

In *INS v. Delgado*, the Supreme Court ruled on the permissibility of INS factory sweeps seeking illegal alien employees. The INS technique of posting armed agents at the entrances and exits of the factories while other armed agents moved among the employees and questioned them concerning their citizenship was upheld. The Court held that factory sweeps were not a seizure of the entire work force, and that questioning employees individually about their citizenship does not constitute a “detention or seizure under the Fourth Amendment.” Four employees had warrant. Arguably, the right to be secure in one’s person has a greater liberty interest attached to it than does the right to privacy in the mail system. Justice Rehnquist saw the two as roughly the same. 473 U.S. at 538.

689. 473 U.S. at 563 (quoting Carroll v. United States, 267 U.S. at 154 (1925)).

690. *Id.*


692. 466 U.S. at 212.
challenged the INS practice: two of them were United States citizens; the other two were legal permanent residents. The factory sweeps lasted "from one to two hours." The entire work force was ruled not to have been seized during each factory sweep since the employees were able to continue working. Justice Brennan pointed out in his separate opinion that the workers’ mere agreement to be at the workplace for the sake of their employers did not constitute consent to undergo government interrogation.

The majority opinion also ruled that no individual employee had been seized by the agents’ questioning. The Court announced a standard to determine whether there is a seizure of an individual under the conditions of a factory-wide sweep: "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." Under the "so intimidating" standard, none of the employees in the factory sweeps had been seized nor detained by the mere questioning. Although the raids occurred in privately owned factories, the INS had either the consent of the employer or warrants to search for illegal aliens. The warrants had been "issued on a showing of probable cause by the INS that numerous illegal aliens" were present. Under these circumstances, the Court stated that the standard of regulating the INS conduct while questioning the employees involved "the same considerations attending contacts between the police and

693. Id. at 213, n.1.
694. Id. at 214.
695. Id. at 225. Justice Brennan referred to the majority’s view that there was no seizure of the individual employees with stinging epithets. He alluded to the majority opinion’s “studied air of unreality,” its “considerable feat of legerdemain,” and its “sleight of hand,” that allowed the Court to conclude that the complaining parties had not been “seized” within the meaning of the fourth amendment. 466 U.S. at 226. Justice Brennan described the majority’s efforts as “rooted more in fantasy than in the record of the case” and as “unrealistic” and “fanciful.” 466 U.S. at 229.
696. Justice Brennan wrote: “The mere fact that the employer has consented to the entry of the INS does not mean that the workers’ expectation of privacy evaporates.” 466 U.S. at 238.
697. 466 U.S. at 216.
698. Id. at 212.
citizens in public places." 699

The Court referred to United States v. Brignoni-Ponce, 700 for the proposition that "the protection against unreasonable seizures also extends to 'seizures that involve only a brief detention short of traditional arrest.'" 701 Since the Court concluded that neither the work force nor any individual employee had been seized, those protections were not applicable. More precisely, however, Brignoni-Ponce stands for the proposition that interrogations of individuals are not justified when the only reason for questioning them is their apparent Mexican ancestry. 702 In the factory sweeps in Delgado it is likely employees were singled out for interrogation on the basis of their apparent ancestry.

Justice Brennan agreed with the majority's first conclusion that the factory sweeps "did not result in the seizure of the entire work force for the complete duration of the surveys." 703 He nonetheless emphasized that the issue of whether individuals were seized may be determined by events occurring during a factory sweep. Under this analysis, Justice Brennan concluded that there was an unreasonable seizure by the INS agents of the four employees bringing the suit.

Justice Brennan recognized the two competing fourth amendment interests at stake: the individual's right to be free of "unwarranted governmental interference" 704 versus the necessary police "latitude in gathering information from those individuals who are willing to cooperate." 705 Within this framework, Justice Brennan concluded that the four employees had been seized. He cited a number of factors leading to this conclusion. First, the "show of authority" 706 by the INS was "of sufficient size and force to overbear the will of any reasonable person." 707

699. Id. at 217 n.5.
700. 422 U.S. 873 (1975) See the discussion of Brignoni-Ponce, 422 U.S. 873 (1975), at text accompanying note 739, and of Ortiz, 422 U.S. 891 (1975), at 758 infra.
701. Delgado, 466 U.S. at 215 (quoting United States v. Brignoni-Ponce, 422 U.S. at 878 (1975)).
702. See text accompanying note 739 infra. See Brignoni-Ponce, 422 U.S. at 886–87.
703. Delgado, 466 U.S. at 225.
704. Id. at 226.
705. Id.
706. Id. at 229.
707. Id.
Next, "the widespread disturbance among the workers . . . and the intimidating atmosphere created by the"708 INS using surprise searches with agents moving "systematically through the rows of workers"709 while handcuffing suspected illegal aliens as well as conspicuously posting INS agents at factory exits, achieved an overall effect that was a "frightening picture of people subject to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers."710

Justice Brennan invoked Brignoni-Ponce711 for the proposition that "brief detentions may be justified on 'facts that do not amount to the probable cause required for an arrest.'"712 The individual searches must conform to the requirements of the reasonable suspicion standard of the fourth amendment.713 In a factory sweep situation, this translates into a requirement that there be a "particularized suspicion"714 that the person about to be questioned is in fact an illegal alien. In conformity with Brignoni-Ponce, an individual may not be questioned solely on the basis of physical appearance or ancestry.

An underlying concern of Justice Brennan's opinion was to protect the rights of United States citizens who happen to work alongside illegal aliens in factories that are raided by the INS.715 In United States v. Martinez-Fuerte716 for example, fixed automobile checkpoint stops were permitted in part because their fixed and permanent locations eliminated the element of surprise and discomfort which citizens experienced when required to stop. In a factory sweep, however, the elements of surprise and anxiety are integral components. Additionally, the INS agents in a factory sweep have "unfettered discretionary judgment"717 in selecting whom to stop and question. Such discre-

708. Id. at 229–30.
709. Id. at 230.
710. Id. at 231.
711. 422 U.S. 873. See text accompanying note 739 infra.
713. Delgado, 466 U.S. at 232.
714. Id. at 233.
715. For example, Justice Brennan did not object to Congress' broad powers over aliens. He referred to Kleindienst v. Mandel, 408 U.S. 753 (1972) and Fiallo v. Bell, 430 U.S. 787 (1977) which represent broad powers to regulate aliens.
717. Delgado, 466 U.S. at 237.
tion could easily be abused. In instances where fixed traffic checkpoints have been upheld, the discretionary judgment invested in low-level INS officers has been reduced to a minimum. This means that personal passions play less a role in the process that determines who will be chosen for questioning. Rather, high-level officers who are removed from the scene make command decisions such as selecting the locations for fixed checkpoint sites, as well as deciding when to apply for judicial consent to conduct further investigations. In further distinguishing a factory sweep situation from a permissible fixed traffic checkpoint, Justice Brennan pointed out that the workplace possesses "an element of privacy"\textsuperscript{718} which one cannot expect when using the public highways. The basic thrust of Justice Brennan's position is that merely because Congress has not provided the necessary funding for the INS to carry out its responsibilities, fundamental constitutional rights of United States citizens should not be jeopardized or eliminated when the INS attempts to regulate aliens through the most economically efficient means available.

C. Border Traffic Stops and Searches

This section is organized along the lines suggested in \textit{Almeida-Sanchez v. United States:}

The Border Patrol conducts three types of surveillance along inland roadways, all in the asserted interest of detecting the illegal importation of aliens. Permanent checkpoints are maintained at certain nodal intersections; temporary checkpoints are established from time to time at various places; and finally, there are roving patrols such as . . . one that stop[s] and search[es moving vehicles].\textsuperscript{719}

\textsuperscript{718} Id. at 238.

\textsuperscript{719} 413 U.S. 266, 268 (1973) (Stewart, J.) (Powell, J., concurring)(White, Burger, Blackmun, and Rehnquist, JJ., dissenting). The government has greater freedom to inspect boats on open waters. See United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (Rehnquist, J.) (Brennan and Marshall, JJ., dissenting)(Stevens, J., joining in part one of Justice Brennan's dissent)(suspicionless boarding of sailboat in a waterway offering ready access to the open sea is permissible under the fourth amendment, although random stops without any articulable suspicion of cars or other motor vehicles on land away from the border are not permissible); see also Maul v. United States, 274 U.S. 501 (1927)(Brandeis and Holmes, J.J., concurring)(Coast Guard could seize an American ves-
In fact, Supreme Court decisions have not drawn sharp distinctions in the law between permanent as opposed to temporary traffic checkpoints. A distinction, albeit one that appears to be diminishing, exists between the standards applicable to roving patrols and investigations conducted at fixed checkpoints. A key factor determining whether a traffic stop or search passes constitutional muster is whether the location of the stop or search can be said to be at the international border of the United States. Fourth amendment requirements are considerably less in an area that is part of the country's border region. However, it is not always easy to determine whether a stop or search has occurred within the border region of the United States. For example, an international airport in the heart of the country is plainly regarded as part of the international border to which the border exception applies. In the Southwest, where there are long stretches of highway in isolated areas, various factors contribute to the determination: the number of land or air miles from the border; frequency of intersections by roads leading into the interior; how well-traveled or populated the surrounding countryside. Congressional pronouncements in the form of legislation and subsequently promulgated regulations have been considered, if not endorsed, by the Court. Even whether a road runs parallel with the border so as not to intersect it for long distances will go into the consideration. In short, the law has been less than well-illumined by the Court on this point. These factors are not always determinative, and others may shape the Court's opinion, including the distinction described above between a roving patrol or fixed checkpoint investigation. In this regard, whether the controversy involves merely stopping a vehicle to question its occupants, or to make a full-blown...


722. See generally, cases cited at note 726 infra.


724. For example, in United States v. Ortiz, 422 U.S. 891, 892-93 (1975), a checkpoint site was 62 air miles (66 land) from the Mexican border. The government did not contend the checkpoint was the functional equivalent of the border, and neither did the Court, despite the availability of such provisions as 8 C.F.R. § 287.1 (1987).

search, will direct the Court to the appropriate fourth amendment standard.\textsuperscript{726} As the Court has struggled to enunciate a consistent standard, the border-exception to the fourth amendment has been extended at various times to apply to situations touching more closely upon the traditional notion of this country's interior. At other times, the exception's application has been constricted, and a fuller array of fourth amendment protections have been enforced despite mere proximity to the border.

1. Roving Patrols and Automobile Searches Beyond the Border Area

In \textit{Almeida-Sanchez v. United States},\textsuperscript{727} a Mexican citizen who possessed a United States work permit was stopped and searched by the Border Patrol about 25 miles from the Mexican border. The Border Patrol stopped the car he was driving without having probable cause to believe any wrongdoing had occurred or was in progress. The Border Patrol also lacked a reasonable suspicion that the law was being broken. A search of the alien's car uncovered 161 pounds of marijuana. Justice Stewart held that there must be probable cause to believe a law was being broken in order to permit a "search of a moving automobile" at a location removed from the border or its functional equivalent.\textsuperscript{728} The basic authority for this view appeared in \textit{Carroll v. United States},\textsuperscript{729} which allowed a search of an automobile without a warrant when there was probable cause to believe it was transporting illegal alcoholic beverages.

The element of probable cause was absent in \textit{Almeida-Sanchez}. There was no reason to believe the car had crossed the border or was involved in any violation of law. Justice Stewart recognized that searches may be conducted by the federal government to exclude aliens at the border as well as at the border's


\textsuperscript{727} Id. at 269.

\textsuperscript{728} 267 U.S. 132 (1925); see also Husty v. United States, 282 U.S. 694 (1931) (Stone, J.).
“functional equivalents.” A remote location at least 20 miles from the Mexican border did not come within a border-excep-
tion to the fourth amendment. A search conducted at such a locale had to respect the dictates of the fourth amendment. Justice Stewart was concerned with the untold number of “perfectly innocent drivers” who had been searched without any proba-
ble cause to believe they were engaged in any wrongdoing. De-
spite a need to enforce the country’s immigration laws, accord-
ing to Justice Stewart, the Supreme Court must uphold “the Constitution’s protections of the individual against certain ex-
cesses of official power.” Justice Stewart emphasized the rights of the individual over the authority of government. By the time of the decision in INS v. Delgado, the Court’s emphasis had changed.

Justice Powell’s concurrence in Almeida-Sanchez indicated that there may be “under appropriate limiting circumstances . . . a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.” However, one who travels near the border cannot automatically be consid-
ered to have given up fourth amendment rights in exchange for some special benefit granted in border areas. According to Jus-
tice Powell, there must exist probable cause to suspect some wrongdoing to justify a warrantless search of a moving vehicle. Probable cause is defined as “specific knowledge about a partic-
ular automobile.” Justice Powell suggested relevant factors in considering whether probable cause exists:

they include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of inno-

730. 413 U.S. at 272.
731. Id. at 273.
732. Id. at 273 n.5.
733. Id. at 273.
735. 413 U.S. at 279.
736. Id.
cent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.\textsuperscript{737}

Additionally, a warrantless search of an automobile may be conducted when probable cause is present, since the automobile could move out of the local jurisdiction before a warrant can be obtained.\textsuperscript{738} The requirement of probable cause underwent significant revisions in subsequent Court decisions.

2. Roving Patrols and Automobile Stops within the Border Area

In \textit{United States v. Brignoni-Ponce},\textsuperscript{739} the Supreme Court held that a roving border patrol may not stop automobiles in areas near the Mexican border when the only reason to do so is that the automobile's occupants appear to be of Mexican descent. The Court interpreted \textit{Almeida-Sanchez}\textsuperscript{740} to stand for the proposition that “the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents.”\textsuperscript{741} The dispute in \textit{Brignoni-Ponce} did not concern the Border Patrol's authority to search such vehicles which would require a showing of probable cause; the controversy involved the Border Patrol's authority to question individuals in the stopped vehicle concerning “their citizenship and immigration status.”\textsuperscript{742}

Justice Powell's opinion in \textit{Brignoni-Ponce} repeated a number of themes suggested in his concurrence in \textit{Almeida-Sanchez}. He posited that under appropriate conditions, merely question-

\textsuperscript{737} Id. at 283–84 (footnote omitted).
\textsuperscript{740} 413 U.S. 266 (1973).
\textsuperscript{741} 422 U.S. at 875.
\textsuperscript{742} Id. at 874.
ing an individual can amount to a seizure.\textsuperscript{743} According to Justice Powell, such seizures must be reasonable.\textsuperscript{744} "Reasonableness" depends upon "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."\textsuperscript{745} Justice Powell noted that facts not amounting to the probable cause standard used for making an arrest could justify a modest intrusion into a private individual's life.\textsuperscript{746} Concerning automobiles, a permissible modest intrusion includes "visual inspection . . . limited to those parts of the vehicle that can be seen by anyone standing alongside"\textsuperscript{747} and may permit brief questioning of one's "'right to be in the United States.'"\textsuperscript{748} In balancing the public interest against the individual's right to privacy, the Court suggested that the factor that will tip the scales in the government's favor is an "absence of practical alternatives for policing the border."\textsuperscript{749}

In \textit{Brignoni-Ponce}, the Court did not renounce entirely the individual's right to privacy, since it maintained a Border Patrol must have a "reasonable suspicion to justify roving patrol stops."\textsuperscript{750} However, the Court more precisely defined its position concerning the two components of a roving patrol stop. The initial stop of a vehicle in a border area may be based upon a reasonable suspicion there is or has been a violation of the immigration laws. \textit{Almeida-Sanchez} did not squarely address the level of suspicion required to make the initial stop. According to \textit{Brignoni-Ponce}, the second component of a roving patrol stop, the actual search of the automobile must be motivated according to the standards of probable cause, as was the case in \textit{Almeida-Sanchez}. In \textit{Brignoni-Ponce}, the Court was unable to find a justifiable reasonable suspicion for the Border Patrol's stop where the only reason for stopping the automobile was its occupants' apparent Mexican ancestry.

The Court presented the concept of the border-exception to

\textsuperscript{743} Id. at 878.
\textsuperscript{744} Id.
\textsuperscript{745} Id.
\textsuperscript{746} Id. at 880. In other passages, the Court refers to such an intrusion as a permissible "limited 'search' or 'seizure.'" 422 U.S. at 881.
\textsuperscript{747} Id. at 880.
\textsuperscript{748} Id. Justice Powell quoted from the government's brief.
\textsuperscript{749} Id. at 881.
\textsuperscript{750} Id. at 882 (footnote omitted).
the fourth amendment, and thereby limited the applicability of \textit{Almeida-Sanchez}. When a roving patrol is away from the border it must have probable cause to stop a vehicle, which must include "specific articulable facts, together with rational inferences from the facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."\textsuperscript{751} In this regard, \textit{Almeida-Sanchez} is to be read as a case which occurred away from the border. The Court, through Justice Powell, cited a number of factors which are to be considered in deciding whether a reasonable suspicion is warranted, but it did not indicate that such a list is exhaustive. The enumeration is a refinement of the position Justice Powell adopted in his concurrence in \textit{Almeida-Sanchez}\textsuperscript{752} listing factors to determine whether the Border Patrol has probable cause to search a vehicle:

Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual pattern of traffic on the particular road, and previous experience with alien traffic are all relevant. . . . They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. . . . Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare-tires, are frequently used for transporting concealed aliens. . . . The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. . . . The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. . . . In all situations, the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.\textsuperscript{753}

\textsuperscript{751} Id. at 884 (footnote omitted).
\textsuperscript{752} The list appears at the text accompanying note 737 supra.
\textsuperscript{753} 422 U.S. at 884–85.
Brignoni-Ponce stands for the proposition, however, that reliance upon the one single factor of "apparent Mexican ancestry" is not a sufficient basis for arriving at a reasonable suspicion, although such appearance remains a "relevant factor."

3. Fixed Traffic Checkpoints and Searches Beyond the Functional Equivalent of the Border

In line with the preceding decisions on roving patrols, the Supreme Court held that a search by the Border Patrol at a fixed checkpoint 62 miles from the Mexican border must be on probable cause. In United States v. Ortiz, the respondent was discovered smuggling aliens in his car. The Border Patrol did not have a "special reason" to stop the driver. Justice Powell's majority decision considered two differences between fixed checkpoints and roving patrols. First, the discretion involved in choosing a particular fixed checkpoint site is exercised "by high-level Border Patrol officials, using criteria that include the degree of inconvenience to the public and the potential for safe operation," whereas the individual officers in roving patrols are less restrained and less answerable for their actions. Second, checkpoint stops are less intrusive than roving patrols since they are less frightening and annoying to the motorist.

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754. Id. at 885-86.
755. Id. at 887. In response to this, see Justice Brennan's opinion in INS v. Delgado, 466 U.S. 210, 234 n.4 (1984):

Indeed, the proposition that INS agents, even those who have considerable experience in the field, will be able fairly and accurately to distinguish between Spanish-speaking persons of Mexican ancestry who are either native-born or naturalized citizens, and Spanish-speaking persons of Mexican ancestry who are aliens is both implausible and subject to discriminatory abuse. The protection of fundamental constitutional rights should not depend upon such unconstrained administrative discretion, for, as we have often observed, "[w]hen . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."


756. The phrase "a functional equivalent of the border" occurs in United States v. Ortiz, 422 U.S. 891, 892 (1975).
759. Id. at 892.
760. Id. at 894.
Nonetheless, Justice Powell reached the conclusion that “[w]hile the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop . . . they do not appear to make a difference in the search itself.”

The rationale behind placing the roving patrol and the fixed checkpoint together to gauge the propriety of searches rests upon Justice Powell's consideration that a fixed checkpoint does not necessarily limit “to any meaningful extent the officer's discretion to select cars for search.” Therefore, the potential for favoritism and abuse remains even at a fixed checkpoint. Justice Powell stated that “[a] search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court has always regarded probable cause as the minimum requirement for a lawful search.” Justice Powell restricted the decision to automobile searches, but indicated that “[n]ot every aspect of a routine automobile ‘inspection’ . . . necessarily constitutes a ‘search’ for purposes of the Fourth Amendment.”

Justice Rehnquist's concurrence confined the requirement of probable cause to "full searches," adding that the decision "does not extend to fixed checkpoint stops for the purpose of inquiring about citizenship."

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761. Id. at 895.
762. Id.
763. Id. at 896 (footnote omitted).
764. Id. at 897 n.3.
765. Id. at 898.
766. Id. Additionally, in United States v. Peltier, 422 U.S. 531 (1975) (Rehnquist, J.) (Stewart, J., dissenting) (Douglas, J., dissenting) (Brennan, J., dissenting, joined by Marshall, J.), and Bowen v. United States, 422 U.S. 916 (1975) (Powell, J.) (Douglas, J., dissenting) (Stewart, J., dissenting) (Stewart, J., dissenting) (Brennan, J., dissenting, joined by Marshall, J.), the Court held Almeida-Sanchez, 413 U.S. 266 (1973) will not be applied retroactively. In Peltier, the respondent had been stopped by a roving border patrol which found 270 pounds of marijuana in the trunk of his car. Justice Rehnquist wrote that Almeida-Sanchez will not be applied retroactively “[d]espite the conceded illegality of the search under” that decision. Peltier, at 534. In Bowen, the Border Patrol stopped the petitioner's camper at a traffic checkpoint about 36 miles from the Mexican border. After determining the petitioner was a United States citizen, the Border Patrol found 356 pounds of marijuana and some benzedrine tablets. The government did not contend that the Border Patrol had probable cause to open the camper.
4. Permanent Checkpoints and Traffic Stops Beyond the Border Area

The next Supreme Court decision concerning traffic stops and aliens was *United States v. Martinez-Fuerte*, where permanent traffic checkpoints were operated by the Border Patrol away from the Mexican border. The Supreme Court held that a vehicle could be stopped for "brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." Additionally, no warrant was necessary to operate the fixed checkpoint stops. *Martinez-Fuerte* considered two traffic checkpoints. At one, vehicles were slowed and singled out without cause for further questioning about the occupants’ rights to be in the United States. At a second checkpoint, every motorist was questioned except for those local inhabitants whom the Border Patrol recognized.

The Court decided that routine stops and interruptions do not offend the fourth amendment. As in prior decisions, the Court weighed the public interest in effective immigration law enforcement against the individual's fourth amendment rights. The Court interpreted *Almeida-Sanchez* to require probable cause for a roving patrol's search of an automobile, and interpreted *Ortiz* to require probable cause for a search at a fixed checkpoint site. Although the Court, in *Martinez-Fuerte*, depicted checkpoint stops as seizures under the fourth amendment, such stops were not prohibited even when a reasonable suspicion was absent, notwithstanding the rule laid down in *Brignoni-Ponce*.

One reason for the Court’s determination to dispense with the reasonable suspicion standard was the impracticality of administering the immigration laws on major highways, where traffic is frequently heavy and it is difficult to form a reasonable

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768. 428 U.S. at 545.
769. 413 U.S. at 266 (1973). See text accompanying note 727 supra.
770. 428 U.S. at 555.
771. 422 U.S. at 891. See text accompanying note 758 supra.
772. 428 U.S. at 556.
773. Id. at 556.
suspicion as to any particular vehicle. The Court reasoned that any intrusion upon the fourth amendment rights of individuals is limited. The Court reported that motorists are less surprised and frightened at a fixed checkpoint stop than during a roving patrol's examination. The Court explained that fixed sites "involve less discretionary enforcement activity." That is, there can be "post-stop judicial review" of both the choice of the site and the manner in which the site is operated. There is also "less room" for harassment of individuals at fixed sites than during a roving patrol's surveillance. Operation of the permanent checkpoint sites encouraged "effective allocation of limited enforcement resources." Finally, according to Martinez-Fuerte, an individual's interest in privacy is not as great in an automobile on a public highway as it is at home.

As a result of Martinez-Fuerte, no individualized suspicion is necessary to stop and question a vehicle's occupants at a permanent fixed checkpoint. Drivers and passengers can be singled out for additional examination "on the basis of criteria that would not sustain a roving-patrol stop [including] referrals . . . made largely on the basis of apparent Mexican ancestry." Justice Brennan's dissent recognized the Court's departure from the development in Ortiz, Brignoni-Ponce, and Almeida-Sanchez. He stated:

"Almeida-Sanchez and Ortiz . . . required a showing of probable cause for roving-patrol and fixed checkpoint searches, and Brignoni-Ponce . . . required at least a showing of reasonable suspicion based on specific articulable facts to justify roving-patrol stops. Absent some difference in the nature of the intrusion, the same minimal requirement should be imposed for checkpoint stops." Justice Brennan would have applied the "reasonable suspicion" standard from Brignoni-Ponce, and saw the majority opinion

774. 428 U.S. at 559.
775. Id. (footnote omitted).
776. Id.
777. Id.
778. Id. at 563 (footnote omitted).
779. Id. at 570.
780. Id. at 571. See discussion of Brignoni-Ponce at text accompanying note 739 supra.
in *Martinez-Fuerte* as abandoning the *Brignoni-Ponce* principle that Mexican appearance alone is an insufficient basis to interrogate suspected aliens.

5. Roving Patrols and a New Formulation for Stopping Vehicles

In *United States v. Cortez*,\(^7\) a roving Border Patrol stopped a van that was transporting a number of aliens from the Mexican border in violation of section 274(a) of the Act.\(^7\) The Court did not mention any distinction between a roving border patrol and a fixed checkpoint. Rather, the Court addressed the issue of "what cause is sufficient to authorize police to stop a person."\(^7\) The Court utilized a "totality of the circumstances"\(^7\) standard to decide the justifiability of the search: "Based upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."\(^7\) *Cortez* employed some of the factors listed in *Brignoni-Ponce*: (1) information about recent border crossings; and (2) type of motor vehicle involved.\(^7\) The Court reiterated that probable cause is not the test to be used in deciding whether to stop the vehicle. The issue involved the propriety of the stop and not the subsequent search, since one of the passengers voluntarily opened the van's door. According to the Court, stops "may be justified under the circumstances less than those constituting probable cause for arrest or search."\(^7\) The "totality of the circumstances" standard is an analysis which considers "various objective observations, information from police reports, if such are available, and consideration of the mode or patterns of operation of certain kinds of vehicles."\(^7\)

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782. 8 U.S.C. § 1324(a) (1982) (punishable by up to five years in prison and a two thousand dollar fine). Although this section was amended by the Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3381, the basic prohibition remains.
783. 449 U.S. at 417.
784. Id.
785. Id. at 417–18.
786. The factors appear in this text accompanying note 753 supra.
787. 411 U.S. at 421.
of lawbreakers." The considerations must yield a "particularized suspicion . . . that the particular individual being stopped is engaged in wrongdoing." Justice Stewart concurred in believing that the Brignoni-Ponce factors had been met in this case of alien smuggling. The decision in Cortez, however, did not cite compliance with every factor listed for consideration in Brignoni-Ponce.

D. The Exclusionary Rule Does Not Apply to Deportation Proceedings

In INS v. Lopez-Mendoza, the Supreme Court balanced arguments for application of the exclusionary rule in a deportation proceeding against concern for administrative convenience in enforcing the immigration laws. Respondents were two citizens of Mexico by the name of Lopez-Mendoza and Sandoval-Sanchez. Lopez-Mendoza claimed he was arrested illegally by the INS while at his place of employment. The arresting agents did not have a warrant to search the work premises nor to arrest any particular individual. The employer refused to allow the INS agents to interview employees, but one agent questioned Lopez-Mendoza while another agent kept the employer distracted. In response to their questioning, Lopez-Mendoza admitted he was from Mexico. Sandoval-Sanchez, after being detained by the INS, admitted to his unlawful entry into the United States, but later contended "he was not aware that he had a right to remain silent." Both aliens argued their fourth amendment rights had been violated; in particular, they claimed

788. Id. at 418.
789. Id.
790. See text accompanying note 753 supra.
792. 468 U.S. at 1037.
entry into evidence of their admissions violated the exclusionary rule's proscription against receiving into evidence "the fruit of an unlawful arrest." 793

Justice O'Connor first dismissed Lopez-Mendoza's claim. She observed that a deportation is a civil action and not a criminal proceeding. Regardless of the categorization, she explained that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 794 Since Lopez-Mendoza objected to an unlawful arrest alone, the Court was unwilling to ignore the other evidence offered against him. In the context of a deportation proceeding, this additional evidence is basically the physical body of the deportable alien. 795

Justice O'Connor proceeded to Sandoval-Sanchez's claim that evidence offered at his proceeding was suppressible by operation of the exclusionary rule. Justice O'Connor explained that the exclusionary rule in its general application requires that "in a criminal proceeding ... statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated." 796 Justice O'Connor stated that the purpose of, and the benefit derived from, application of the exclusionary rule is to "deter future unlawful police conduct." 797 She decided that the rule does not apply in deportation proceedings by balancing "the likely social benefits of excluding unlawfully seized evidence against the likely costs." 798 Cost, however, is a relative term with various meanings, and in one context is merely equivalent to raising the issue of whether Congress has authorized enough funding to permit a particular agency to

793. Id.
794. 468 U.S. at 1039.
795. But for the illegal arrest, the INS would have had no "body" to present in the deportation proceeding.
796. 468 U.S. at 1040–41.
797. Id. at 1041 (quoting United States v. Janis, 428 U.S. at 446 (1976), which refused to extend the exclusionary rule to a "civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." 428 U.S. at 460.). The quoted passage in the text concerning deterrence also appears in United States v. Calandra, 414 U.S. 338, 347 (1974).
798. 468 U.S. at 1041.
achieve its legislated goals. By deciding not to apply the exclusionary rule to deportation proceedings, Justice O'Connor decided that Congress can circumvent the Constitution through refusal to exercise its power of the purse. According to Justice O'Connor, the social costs of applying the rule include the “loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.” However, the Court failed to give appropriate emphasis to the costs accompanying a failure to apply the exclusionary rule which, in the light of INS practices, amounts to the continual spectre of potentially extensive government interference into the lives of private citizens. Justice O'Connor reasoned that the “likely deterrence value of the exclusionary rule in deportation proceedings is difficult to assess.” The rule is “likely to be most effective when applied to ‘intrasovereign’ violations of the fourth amendment where the “agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action.” Deterrence is nonetheless diminished when “evidence not derived directly from the arrest is sufficient to support deportation, since all the government need establish in order to obtain a deportation are the identity as well as the alienage of the detainee. Under Justice O'Connor's first ruling concerning Lopez-Mendoza, the alienage and identity of a detainee are easily established by mere presentation of the detainee's body along with any other evidence obtained independently of the alien's arrest. Justice O'Connor explained that a suspected alien's “person and identity . . . are not . . . suppressible” in a deportation hearing. Under this line of logic, it does not matter how the INS gets the body before an immigration judge. Justice

799. Id.
800. Id. at 1042.
801. Id. at 1043.
802. Id.
803. Id.
804. Id.
805. 468 U.S. at 1043.

806. This position contrasts with the statement by Justice Brandeis that “[i]t may be assumed that evidence obtained by the [executive agency] through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings.” United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).
O'Connor concluded that the exclusionary rule has no place in deportation hearings. 807

Justice O'Connor also reasoned that since the INS has its own rules for governing its agents, additional supervision by the courts is unnecessary. 808 According to Lopez-Mendoza, the existence of the INS's own regulations diminishes the deterrence value that application of the exclusionary rule would have in deportation proceedings. Although the aliens argued that application of the exclusionary rule "is necessary to safeguard the Fourth Amendment rights of ethnic Americans," 809 Justice O'Connor concluded that the deterrence value of applying the rule is too slight to "add significant protection to [such] Fourth Amendment rights." 810 First, the majority of deportable aliens never challenge the circumstances of their arrest, so even if the exclusionary rule applied in such challenges, INS agents would realize the circumstances of the arrest would rarely be attacked. Thus, agents would not be deterred from undertaking such unlawful conduct. Since a key purpose of the exclusionary rule is to deter future police misconduct, a deportable alien who is about to leave the country has no interest in whether or not such practices by the INS are curtailed. 811 The fact that INS agents know

807. Justice O'Connor drew distinctions between a criminal proceeding and the civil nature of a deportation hearing. Justice White argued to the contrary. Justice O'Connor stated that "regardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation." 468 U.S. at 1043. Justice White responded that the same is true in criminal proceedings, so the distinction is really no distinction at all. Justice White stated: "The suppression of some evidence does not bar prosecution for the crime, and in many cases even though some evidence is suppressed a conviction will nonetheless be obtained." Id. at 1054. In response to Justice O'Connor's argument that the exclusionary rule should not be used in deportation proceedings since few aliens ever bring a fourth amendment challenge, and thus no deterrence effect upon INS agents would result, Justice White explained "that the fact that many criminal defendants plead guilty [does not dilute] the rule's deterrent effect in criminal cases" Id. at 1054.

808. Basically, this relegates fourth amendment protection to the status of a mere regulation.

809. 468 U.S. at 1045.

810. Id.

811. Lopez-Mendoza did not confront the issue of an alien's standing to make the fourth amendment challenge. As a fait accompli, the two aliens in Lopez-Mendoza did so without the Court dismissing them for a failure to have standing. The Court referred to standing in a brief passage where it contemplated "the possibility of declaratory relief against the agency . . . when standing requirements for bringing such an action can be met." 486 U.S. at 1045. The Court referred to INS v. Delgado, 466 U.S. 210 (1984), dis-
beforehand that the Bill of Rights, in practice, would rarely be raised against them is not a compelling reason to dispense with it.

On the other side of the balance, Justice O'Connor reasoned that "the social costs of applying the exclusionary rule in deportation proceedings are both unusual and significant." She shifted the terminology customarily given as the reason for the existence of the exclusionary rule and offered that terminology to support the objective of deportations. Justice O'Connor stated that the purpose of a deportation proceeding against an alien is "not to punish past transgressions but to prevent their continuance or renewal." The Court implicitly found that all deportable aliens continuously break the law by their continued presence in the United States. The Court depicted illegal alienage as a "status" crime that is a continuing, ongoing offense as long as the alien remains in the United States. The Immigration and Nationality Act (INA) does not support this blanket conclusion.

Justice White's dissent pointed out that the INA does not make all aliens who are in the United States without permission of the federal government into criminals unless the alien is willfully unregistered with the INS pursuant to sections 262 and 266 of the INA. Since it was not shown that Sandoval-Sanchez...
had "willfully failed to register," his release following the invocation of the exclusionary rule would not necessarily promote the continuation of a crime. To support his position, Justice White explained that case law has resisted application of a "continuing offense" analysis concerning illegal aliens and has restricted their violation of the immigration laws to discrete points in time when actual transgressions occurred.

Justice White also pointed out that Justice O'Connor argued that the deterrent value of applying the exclusionary rule is minimal because "immigration officers receive a thorough education in Fourth Amendment law." According to Justice White, in the same breath, Justice O'Connor argued that in a deportation proceeding "[n]either the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law." Justice White concluded that "[t]he implication that hearing officers should defer to law enforcement officers' superior understanding of constitutional principles is startling indeed." According to the majority, however, the administrative concern for "streamlined" justice in deportation proceedings outweighs the fourth amendment interests at stake. Justice White indicated that the deportation proceeding at issue was not in any sense "collateral" to some other procedure for which the disputed evidence

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816. 468 U.S. at 1058.
817. E.g., in United States v. Cores, 356 U.S. 405, 408 n.6 (1958), the Court stated in dictum that "[t]he offense here is unlike the crimes of illegal entry set out in § § 275 and 276 of the Act. . . . Those offenses are not continuous ones, as 'entry' is limited to a particular locality and hardly suggests continuity." Cores held, however, that an alien crewman who willfully remains in the United States past the date allowed on his landing permit is guilty of a continuing offense. Cores interpreted a different section of the statute. The crewman was in violation of § 252(a) of the INA, 66 Stat. 220 (1952) (currently codified at 8 U.S.C. § 1282(a)(1982)).
818. 468 U.S. at 1058.
819. Id. at 1048.
820. Id. at 1058.
821. Id. at 1048.
822. Justice Marshall would have applied the exclusionary rule in deportation proceedings in order to enable "the judiciary to avoid the taint of partnership in official lawlessness and [to assure] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behaviour, thus minimizing the risk of seriously undermining popular trust in government." 468 U.S. at 1060–61 (quoting United States v. Calandra, 414 U.S. at 357 (1974)).
823. 468 U.S. at 1053.
was obtained. The evidence gathered by the INS was obtained for the direct purpose of the deportation proceeding. This distinguishes *Lopez-Mendoza* from other cases where the exclusionary rule had been held not to apply. According to Justice White, the exclusionary rule has been held inapplicable in those cases where evidence was gathered for other proceedings illegally and such evidence was never intended to be used in the proceeding for which it was finally offered.

In *Lopez-Mendoza* the INS claimed to instruct its agents in fourth amendment law and to have regulations in effect which uphold that amendment’s standards.\(^{824}\) Justice White reasoned that INS regulations already respected some fourth amendment standards because the agency was originally concerned that the exclusionary rule would be enforced by the courts. He argued in favor of applying the exclusionary rule to deportation hearings because its application would ensure that “the agency [would continue] to adopt policies and procedures that conform to Fourth Amendment standards.”\(^{825}\) The effect of *Lopez-Mendoza* may be that the INS will dispense with fourth amendment concerns altogether.\(^{826}\)

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\(^{824}\) For example, up until the decision in *Lopez-Mendoza*, it was unclear whether the exclusionary rule applied in deportation proceedings. According to Justice White, many commentators thought that it did, thus supplying a reason why the INS would have some regulations adhering to the exclusionary rule’s standards. 468 U.S. at 1055.

Addressing the issue of misconduct by INS agents, Justice White stated that “over a period of four years 20 officers were suspended or terminated for misconduct toward aliens . . . and it appears that the 11 officers who were terminated were terminated for rape or assault.” 468 U.S. at 1054 n.2. See the cases listed at note 255 supra.

\(^{825}\) *Id.* at 1054.

\(^{826}\) Other constitutional guarantees have been held not to apply to aliens in a deportation proceeding. For example, in the following cases, the Court either stated or held that the ex post facto clause does not afford an alien protection in a deportation proceeding: Marcello v. Bonds, 349 U.S. 302 (1955); Galvan v. Press, 347 U.S. 522 (1954) (Frankfurter, J.); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (Jackson, J.); Mahler v. Eby, 264 U.S. 32 (1924). In *Carlson v. Landon*, 342 U.S. 524 (1952), the Court held in part that the eighth amendment does not forbid holding an alien in custody without bail when that alien is awaiting a deportation proceeding and is charged with either membership in a group advocating the violent overthrow of the United States government or who is otherwise classifiable as a threat to the security of the United States.

In *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) (Brandeis, J.) the Court accepted the rule that an involuntarily obtained confession may be used in a deportation proceeding, but limited the application of this rule to bar confessions or evidence when a procedural defect or executive practice is so unfair as to lead “to a denial of justice” or where “one of the elements deemed essential to due process” is absent. *Bilokumsky* at 157. It appears logical to read the *Bilokumsky* formula in light of present
VII. ALIENS WITHIN THE LAND OF OPPORTUNITY: FEDERAL AND STATE REGULATION

Once in the United States, aliens are subject to discrimination from the federal and state governments, as well as from private understanding of what constitutes due process.

The Supreme Court has also considered, or actually limited, the protections afforded to aliens by the Bill of Rights in contexts that extend beyond deportation proceedings. See Abel v. United States, 362 U.S. 217 (1960) (disapproving use of an INS warrant for the purpose of collecting evidence in a criminal case, but finding that a search of an alien's hotel room by the INS, during the alien's arrest by the INS, while FBI agents observed, was conducted for the purpose of discovering weapons and evidence of alienage and therefore was a search properly incidental to a valid administrative arrest, and was not a search conducted for the purpose of circumventing restrictions on criminal law enforcement; the Court stated: "If anything, we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches and seizures made for the purpose of turning up proof to convict than we are to protect them from searches for matters bearing on deportability," id. at 237; and while this is undoubtedly wise, the Court then proceeded to allow into evidence in the criminal proceedings the items formerly seized from the alien's hotel room for the original purpose of, and under the lesser standard pertaining to, a deportation proceeding).

Outside the context of the deportation proceeding, the alien has fared little better. Although the Supreme Court has not ruled directly on the issue of Miranda warnings, Justice Blackmun, in his dissent in United States v. Campos-Serrano, 404 U.S. 293, 301 (1971) (Stewart, J.) would have decided whether Miranda warnings are necessary before asking an alien to produce his alien registration card. The majority avoided the issue by adhering to a strict statutory interpretation.

In a criminal setting, alienage may play a factor in restricting the defendant's rights. Concerning traditional sixth amendment protections, the Supreme Court has ruled that an illegal alien may be denied the right to confrontation when witnesses have been deported. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (Rehnquist, J.) (Blackmun J., concurring) (O'Connor, J., concurring) (Brennan, J., dissenting, joined by Marshall, J.). Concerning a criminal defendant's right to an impartial jury, the Supreme Court held there was no reversible error in the voir dire afforded a smuggler of aliens although the trial judge failed to ask prospective jurors whether they would be prejudiced against the defendant on the basis of his Mexican descent. Rosales-Lopez v. United States, 451 U.S. 182 (1981) (White, J.) (Rehnquist, J., concurring, joined by Burger, C.J.) (Stevens, Brennan, and Marshall, JJ., dissenting).

In Rosales-Lopez, the petitioning defendant was a Mexican descendant. He was tried for illegally bringing aliens to the United States in violation of several statutory provisions. The Supreme Court indicated the trial judge's failure to ask the prospective jurors whether they would be prejudiced on account of the defendant's Mexican ancestry would be "reversible error only where the circumstances of the case indicate that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury." 451 U.S. at 191. This standard was not met. The decision whether the prejudice existed lay with the trial judge. An additional mollifying factor was that the trial judge "questioned the prospective jurors as to their attitude toward aliens." 451 U.S. at 193.

In Valenzuela-Bernal, the respondent was a citizen of Mexico who was charged with smuggling aliens in the United States. He was an alien who had illegally entered the United States through the aid of some smugglers for whom he later agreed to drive a car
vate parties. The distinction between alien and citizen is highlighted in the workplace and in eligibility to receive community financial benefits. The Supreme Court’s responses to these distinctions have depended on the legal source authorizing the discrimination and the status of the aliens involved.

A. Federal Regulation of Employment

To a large extent, the Immigration Reform and Control Act (IRCA) has nullified the effect of the Burger Court opinions concerning illegal aliens and employment. The basic doctrines which the Court has delineated, however, such as that concerning federal preemption, remain unaffected. Additionally, the analytical methods which the Burger Court utilized in arriving at its determinations remain unchanged.

transporting several other illegal aliens to Los Angeles. After he was apprehended by the Border Patrol he admitted his illegal entry as well as knowingly transporting other illegal aliens.

One of the illegal aliens "was detained to provide a nonhearsay basis for establishing that respondent had transported an illegal alien in violation of" statute while the others were deported. 458 U.S. at 861. The respondent claimed violation of fifth amendment due process and the sixth amendment’s guarantee “to compulsory process for obtaining favorable witnesses." Id. The respondent claimed he had been denied an “opportunity to interview the two remaining passengers to determine whether they would aid in his defense.” Id. In upholding the government’s tactics, the Court permitted the fifth and sixth amendment claims to be susperseded by the executive’s responsibility to enforce the immigration laws passed by Congress. The Court provided that in order for the respondent to prevail upon his sixth amendment claim, he would have to show the deportees’ testimony “would have been material and favorable to his defense.” Id. at 873. Justice Brennan’s dissent voiced a concern that

when the Executive Branch chooses to prosecute a violation of federal law, it incurs a constitutional responsibility manifestly superior to its other duties: namely, the responsibility to ensure that the accused receives the due process of law.

Id. at 880–881. Compare Justice Rehnquist’s opinion in Valenzuela-Bernal with Chief Justice Marshall’s opinion in United States v. Burr, 25 F. Cas. 187 (C.C. Va. 1807)(No. 14,694) for a contrast between a twentieth century reading of the Constitution, and the understanding of an individual present during the framing of that document. See also, Hurtado v. United States, 410 U.S. 578 (1973) (Stewart, J.) (Brennan, J., concurring in part and dissenting in part)(Douglas, J., dissenting)(neither the just compensation nor the due process clause of the fifth amendment are violated when illegal aliens are paid one dollar per day by the federal government while incarcerated and waiting to appear as material witnesses prior to a trial of those who illegally smuggled them into the United States).

1. Migrant Workers

Saxbe v. Bustos involved a dispute over whether a group of aliens was illegally employed in the United States. Members of the group had homes in Canada and Mexico, and they commuted, either daily or seasonally, to employment in the United States with INS consent. Suit for an injunction was brought by United States laborers through their collective bargaining agent to discontinue this allowance. At issue was the predecessor of current section 101(a)(27)(A) of the Immigration and Nationality Act (INA), which had created a class of aliens known as "special immigrants." Under the INA, one category of "special immigrants" included legal permanent resident aliens returning from a temporary visit abroad. They could reenter the United States "without being required to obtain a passport, immigrant visa, reentry permit or other documentation." Instead, they needed only a "green card" to reenter without regard to quotas or labor certification requirements.

Justice Douglas started his statutory analysis by noting that the INA "presumes that an alien is an immigrant 'until he establishes . . . that he is entitled to a nonimmigrant status.'”
This presumption was created by section 214(b) of the INA.\textsuperscript{835} The rationale behind it is that all foreigners are expected to intend to take permanent root, as immigrants, within the United States unless it can affirmatively be shown that they plan to leave. Further, an “immigrant” is every alien who does not fit into one of the specific temporary-visitor nonimmigrant classes enumerated in section 101(a)(15).\textsuperscript{836} In Saxbe, the collective bargaining agent argued that both the seasonal and daily commuting aliens were nonimmigrants who fell within section 101(a)(15)(H)(ii) of the INA,\textsuperscript{837} as aliens “having a residence in a foreign country which [they have] no intention of abandoning . . . (ii) who [are] coming temporarily to the United States to perform temporary services or labor, [where] unemployed persons capable of performing such service or labor cannot be found in”\textsuperscript{838} the United States. Aliens who enter the United States under a visa issued pursuant to section 101(a)(15)(H) have to

\textsuperscript{835.} 8 U.S.C. § 1184(b)(1982) provides:
Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under § 1101(a)(15) of this title.

\textsuperscript{836.} 66 Stat. 163, 167. The current version appears in 8 U.S.C. § 1101(a)(15) (1982) and begins “[t]he term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens.”


\textsuperscript{838.} 419 U.S. 70 (quoting § 101(a)(15)(H)(ii) of the 1952 Act, as amended by the 1970 Act). See the section cited in note 837 supra. The early predecessor to this proviso was discussed by the Court in Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929), where the Court held that a British subject and an alien alleging Canadian citizenship who were both seeking employment in the United States could be barred from entering the United States by the operation of statutory provisions regulating the entry of immigrants into the United States and that the aliens did not fall within an exception to this ban provided to aliens coming to the United States temporarily for business purposes as otherwise allowed in § 3(2) of the Immigration Act of 1924, ch. 190, 43 Stat. 153, 154. This result was obtained despite article III of the Jay Treaty of 1794, 8 Stat. 116, 117, between Great Britain and the United States, which had allowed for free passage by British subjects into the United States. The Court reasoned that the War of 1812 had terminated operation of article III “since the passing and repassing of citizens or subjects of one sovereign into the territory of another is inconsistent with a condition of hostility.” 279 U.S. at 239.
comply with labor certification requirements under section 212(a)(14) of the INA.\footnote{839} These requirements basically necessitate a finding by the Secretary of Labor that there are not enough workers in the United States to perform the specified labor and that the employment of the aliens will not adversely affect working conditions for other workers in the United States similarly employed. Under these restrictions, the collective bargaining agent in \textit{Saxbe} sought unsuccessfully to terminate the ability of the commuting aliens to work in the United States. The Court concluded that the commuters were in fact aliens lawfully admitted for permanent residence under section 101(a)(20) of the INA.\footnote{840} Therefore, the commuters were eligible for "special immigrant" status since, under the statutory definition, one kind of special immigrant is an immigrant lawfully admitted for permanent residence.\footnote{841} As immigrants, Justice Douglas reasoned that section 101(a)(15)(H)'s regulation of nonimmigrants was inapplicable and the requirement of a labor certification which goes along with operation of section 101(a)(15)(H) also did not apply. Further, in compliance with section 101(a)(20), the commuting aliens had not lost their status as legal permanent residents through the operation of any


(a) Except as otherwise provided in this chapter the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.


The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

According to Justice Douglas, as a legal permanent resident, the aliens were not required to take up a permanent residence within the United States but could live as commuters moving between countries. The fact that the legal permanent resident commuters may not have originally complied with the labor certification requirements in the INA was an acceptable possibility, since many of the aliens were originally able to enter the United States and obtain permanent resident status in 1964 or earlier when a program known as the bracero program was in effect. The Court explained that aliens under the bracero program with Mexico were originally nonimmigrants, but many changed their status to that of immigrants by becoming permanent residents.

In 1965 the labor certification requirements were made stricter by Congress. Justice Douglas explained: "We find in the reports in the 1965 Act no suggestion that the commuter program was to be uprooted in its entirety." The implicit assertion therefore is that these aliens maintained their immigrant status and fell within the provision concerned with "special immigrants" rather than one dealing with temporary workers as nonimmigrants.

Prior to the 1965 amendment, a nonimmigrant alien who fulfilled all other statutory requirements was admissible unless the Secretary of Labor had affirmatively certified there were sufficient United States workers for the job sought or the Secretary of Labor had determined the presence of the alien workers would adversely affect United States workers. After the amendment, the presumption reversed, and all aliens were assumed to be taking a job away from United States citizens or were assumed to affect adversely United States workers, unless the Sec-

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843. 419 U.S. 75-76, referring to the Act of July 12, 1951, 65 Stat. 119 (establishing an agricultural worker program), as well as 56 Stat. 1759 (agreement between United States and Mexico of August 4, 1942, respecting the temporary migration of Mexican agricultural workers).
844. 419 U.S. at 76.
846. 419 U.S. at 76 n.29.
retary of Labor expressly certified otherwise. These provisions were worked into the 1965 legislation.\textsuperscript{847} The result of \textit{Saxbe} is that the Court found the commuting workers were not employed illegally since they were "special immigrants" rather than nonimmigrants.

2. The Immigration Reform and Control Act (IRCA) of 1986

The Immigration Reform and Control Act (IRCA) of 1986 greatly affected the role of temporary foreign workers in United States agriculture. Section 301(a) of the 1986 Act amended section 101(a)(15)(H)(ii) to create a visa to allow for aliens to enter the United States specifically to "perform agricultural labor or services" while also providing for visas for aliens to enter the United States "to perform other temporary service or labor."\textsuperscript{848} Section 301(c) of the IRCA added a new section 216 to the INA prescribing the preconditions necessary for approval of a visa request under new section 101(a)(15)(H)(ii)(a). To the extent that \textit{Saxbe} involved special immigrants who were already permanent residents in the United States, that decision's limited result is unchanged. As \textit{Saxbe} noted, the \textit{bracero} program, which had provided the basis for the Mexican workers to first enter the United States, had lapsed by 1964.\textsuperscript{849} Seasonal or daily commuters coming to the United States in pursuit of agricultural labor now must follow the requirements under the recent legislation. Section 302 of the IRCA has created a new category of alien status for eligible agricultural workers which is known as lawful temporary residence.\textsuperscript{850} In harmony with the \textit{Saxbe} rule, the IRCA allows alien agricultural workers who possess the status of lawful temporary residence to commute from a residence abroad.\textsuperscript{851}

\begin{itemize}
\item \textsuperscript{847} See note 839 \textit{supra}. The presumption that was reversed by the 1965 amendment appeared in the 1952 Act, 66 Stat. 183.
\item \textsuperscript{848} 100 Stat. 3411 (creating new subsections (ii)(a), (b) in 8 U.S.C. § 1101(a)(15)(H) (1982)).
\item \textsuperscript{849} 419 U.S. 76.
\item \textsuperscript{850} 100 Stat. 3417, adding a new § 210 to the INA providing for lawful temporary residence, 8 U.S.C.S. § 1160 (Law. Co-op. Supp. 1987).
\item \textsuperscript{851} Section 302(a) of the IRCA of 1986, 100 Stat. 3417, 3418, providing a new § 210(a)(4) in the INA (8 U.S.C.S. § 1160(a)(4) (Law. Co-op. Supp. 1987)). See also, § 303(a) of the IRCA of 1986, 100 Stat. 3422, providing similarly for agricultural workers who may be admitted up through 1993, in a new section 210A(d)(3) of the INA (8

In *De Canas v. Bica*, employers violated a California statute by knowingly employing aliens not “lawfully admitted to residence in the United States” with a resulting “adverse effect on lawful resident workers.” The Court held that the state law did not violate the supremacy clause of the United States Constitution; that the field had not been preempted by the federal INA; and that the state law was not an impermissible attempt to regulate immigration and naturalization. The California statute imposed criminal penalties on “employers who knowingly employ aliens who have no federal right to employment within the country.” The Court stated “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”


CAL. LAB. CODE § 2805(a) (West Supp. 1987) (“No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”).

424 U.S. at 353.

Id. at 352, quoting CAL. LAB. CODE § 2805(a) (West Supp. 1987).

U.S. CONST. art. VI, cl. 2.


424 U.S. at 355. *But cf.* Truax v. Raich, 239 U.S. 33, 41 (1915)(State may not forbid employment of lawful resident alien; the Court stated that “[i]t requires no argument to show that the right to work for a living . . . is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”). The Court in *De Canas*, referred to *Griffiths*, 413 U.S. 717 (1973), and *Richardson*, 403 U.S. 365 (1971), but these cases are distinguishable since the aliens there were legal permanent residents. In general, the *Sugarman*, 413 U.S. 634 (1973), line of cases focuses on legal permanent residents, and not aliens who are unlawfully within the United States. Under the California statute in *De Canas*, however, it was possible that additional burdens were imposed upon lawfully admitted aliens, or even citizens, who
The Court did not find that the federal statute had preempted the field. Rather, it referred to the state’s broad police powers to regulate employment. Part of the rationale it provided was that “acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.” The Court also stated that there had been no showing “Congress intended to preclude even harmonious state regulation touching on aliens in general.” The Court concluded that whether the California statute conflicted with the INA would be a question to be decided on remand.

The Court indicated that unlike the National Labor Relations Act (NLRA), Congress will not exclude any and all state regulations “even if harmonious” with the INA, because Congress did not “require national uniformity of regulation.” The Court recognized that the then applicable version of section 274(a) of the INA excluded employers who hire illegal aliens from the criminal sanctions imposed against individuals who otherwise harbor illegal aliens. But the Court interpreted this provision of the INA as a “peripheral concern with employment of illegal entrants.” De Canas gave the states considerable leeway in regulating the employment of illegal aliens. Since the Court was uncertain as to the construction of the California statute, it remanded to the California court prior to determining might be refused employment by being mistaken for illegal aliens. For a discussion of Sugarman and the related cases, see text accompanying note 975 infra.


860. 424 U.S. at 358.

861. The opinion is inconsistent with Truax v. Raich, 239 U.S. 33 (1915), which decided upon a resident alien’s right to work for a living.


863. 424 U.S. at 359 n.7.

864. Id.

865. 66 Stat. 228, 229, provided: “for the purposes of this section, employment (including usual and normal practices incident to employment) shall not be deemed to constitute harboring.” This proviso has been repealed by § 112 of the IRCA of 1986, 100 Stat. 3381. See discussion below at text accompanying note 889 infra.

866. 424 U.S. at 360 (footnote omitted).
whether the statute could be "enforced without impairing the federal superintendence of the field" covered by the INA."\textsuperscript{867} The precise holding of the Court was that the California Court of Appeal "erred in holding that Congress in the INA precluded any state authority to regulate the employment of illegal aliens."\textsuperscript{868} With the passage of the IRCA barring employment of illegal aliens, the point of inquiry now is how far each state may advance its laws along humanitarian lines to aid impoverished and unemployed aliens without running afoul of the preemption doctrine and the harsh and ungenerous policies expressed in the recent legislation.\textsuperscript{868}

In \textit{De Canas}, the state regulation of employment of illegal aliens was not per se preempted by federal authority. The Court recognized that the federal government has exclusive authority to regulate immigration,\textsuperscript{870} and thereby acknowledged that where Congress is constitutionally empowered, if it expressly so desires, it may occupy the legislative field entirely.\textsuperscript{871} This is in

\textsuperscript{867} 424 U.S. at 363 (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. at 142 (1963)). \textit{E.g.}, the \textit{De Canas} Court pointed out employed aliens under \textit{CAL. LAB. CODE} § 2805(a) "must be 'entitled to lawful residence'." 424 U.S. at 364. Under the INA, there are some aliens who are not entitled to lawful permanent residence yet are entitled to be employed, such as the new class of lawful temporary residents, in § § 301–303 of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3358, or are entitled to other benefits. See, \textit{e.g.}, Elkins v. Moreno, 435 U.S. 647 (1978), and Toll v. Moreno, 458 U.S. 1 (1982), (101(a)(15)(G)(iv) visa-holders), discussed at text accompanying note 1070 infra.

\textsuperscript{868} 424 U.S. at 356. Two cases are contrary to this result: Hines v. Davidowitz, 312 U.S. 52 (1941); and Pennsylvania v. Nelson, 350 U.S. 497 (1956).

\textsuperscript{869} See the discussion of the provisions requiring fines and possible imprisonment for employers who hire illegal aliens, \textit{infra} at text accompanying note 881.

\textsuperscript{870} \textit{Fong Yue Ting} v. United States, 149 U.S. 698 (1893) is customarily cited for this principle, but see the discussion of this case at text at note 73 \textit{supra}. \textit{See also}, Henderson v. Mayor of New York, 92 U.S. 259 (1876)(state may not tax aliens arriving by ship nor require posting of enormous bonds to safeguard against such aliens becoming public charges); Chy Lung v. Freeman, 92 U.S. 275 (1876)(similarly); Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 282 (1849)(state tax on aliens arriving from a foreign port is a regulation of foreign commerce which power is vested exclusively in Congress); \textit{but see} Mager v. Grima, 49 U.S. (8 How.) 503 (Taney, C.J.) (state may tax a French subject residing in France on an inheritance of property even though state citizens were not similarly taxed).

\textsuperscript{871} \textit{Cf.} Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ware, 414 U.S. 117 (1973)(federal preemptive will not occur when the federal act illustrates a congressional intent that state policies should operate vigorously); New York Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) (dicta: congressional intention to preempt state regulation concerning a field in which Congress is constitutionally empowered to act may be accomplished when Congress expresses such intention in direct and unambiguous lan-
fact what has happened by passage of the IRCA.\footnote{Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359.} Section 101\footnote{100 Stat. 3360 (inserting a new \$ 274A into the INA, 8 U.S.C. \$ 1324a (Law. Co-op Supp. 1987)).} of the recent legislation has made it illegal for an employer to hire an unauthorized alien or to hire an individual without complying with various verification and identification requirements.\footnote{See \$ 274A(a)(1), and \$ 274A(b), contained in \$ 101 of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3360. This effectively repealed the former proviso in \$ 274 (8 U.S.C. \$ 1324 (1982)), which allowed employers under the federal scheme to hire illegal aliens.} An unauthorized alien is defined as an individual who is neither lawfully admitted for permanent residence nor authorized to work by any other provisions of the Act or by the Attorney General.\footnote{Section 274A(h)(3), contained in \$ 101 of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3368.} The new federal statute states specifically that it preempts all state laws in the field.\footnote{Section 274A(h)(2), contained in \$ 101 of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3368 states that “[t]he provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”} Similarly, any state or local law purporting to regulate the admissibility of temporary nonimmigrant workers has been preempted by express language in the new section 216(h)(2) of the INA.\footnote{Added by \$ 301(c) of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3416.} Admissibility of these workers is regulated by the federal scheme established in the new section 216 of the INA and the amended section 214 of the INA.\footnote{Section 214(c) of the INA, 8 U.S.C. \$ 1184(c) (1982), was amended by \$ 301(b) of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3411.}
4. Nullification of the Right of Illegal Aliens to Unionize

By section 274A of the INA, the employment of unauthorized aliens was made unlawful. An employer can be subjected to fines ranging from $250 to $10,000 or imprisonment for up to 6 months for a violation resulting from the employment of illegal or unauthorized aliens. Section 274A does not provide for new penalties against an unauthorized alien who is found working in the United States. Indeed, nowhere in the new IRCA are comparable penalties prescribed against an individual alien who works in the United States without proper authorization, other than against the fraud or perjury which the unauthorized alien may commit by falsely using documentation or giving false attestations as to his eligibility to work in the United States.

The penalties against an unauthorized alien who works in the United States remain what they were under the former immigration scheme—primarily deportation. Although the IRCA creates a new class of aliens authorized to work in the United States, who are known as temporary legal residents, those

879. This section was added to the INA by § 101 of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3360.

880. For a description of what constitutes an unauthorized alien, see text and accompanying notes starting at notes 873–75 supra.


882. Section 274A(b)(2) (codified at 8 U.S.C.S. § 1324a(b)(2)(Law. Co-op Supp. 1987)), provides for enforcing the penalty against perjury against someone who makes a false attestation, but this subsection appears to apply against the “person or entity [who] must attest . . . that it has verified that the individual [seeking employment] is not an unauthorized alien” as expressed in § 274A(b)(1)(A) (8 U.S.C.S. § 1324a(b)(1)(A)(Law. Co-op Supp. 1987)). In other words, the penalty provided for in § 274A(b)(2) applies against the employer.


884. The general penalty provisions in existence before passage of the IRCA can be found in § 271–280 of the INA, (codified at 8 U.S.C. § 1322–1330 (1982)). For an illustration that deportation can immediately follow, see Sure-Tan v. NLRB, 467 U.S. 883, 887 (1984), discussed at text accompanying note 889 infra.

885. Section 201 of the IRCA, 100 Stat. 3394, adding § 245A to the INA (codified at 8 U.S.C.S. § 1255a(Law. Co-op. Supp. 1987)). Section 245A(a) creates a temporary resident status. One of the requirements under this section is that the alien “entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under
aliens working in the United States who do not fall within this
new categorization or any other authorized category, remain ex-
actly what their ancestors under the former version of the INA
were—illegal aliens.

The Act does not fully address whether the rights of illegal
aliens are diminished, in some areas, in comparison with their
rights under preexisting law. For example, *Sure-Tan, Inc. v.
NLRB* held that the NLRA applied to unfair labor practices
committed against illegal aliens and that illegal aliens have a
right to unionize in the United States. In *Sure-Tan*, the em-
ployer was found to have committed an unfair labor practice
when he notified the INS some of his employees were illegal
aliens in retaliation against their participation in union activi-
ties. Under the new labor environment created by the IRCA,
employers operate under a great disincentive to hire illegal
aliens. If the employer sanctions in the IRCA are not actively
enforced, employers will lose this disincentive. External factors
existing outside the United States, such as heightened violence
in other countries, or worsening economies, may still propel
illegal aliens to come to the United States and descend more
deeply underground than has yet been observed. To the extent
that third countries, such as Canada, do not receive this flow of
illegal aliens, these aliens may consider the risk and hardship in
the United States under the new law an acceptable alternative
when compared with what would await them at home. In other
words, there may still be a pool of illegal aliens in the United
States after the IRCA, although the disincentives against their
continued presence in the United States, at least on paper, are
stronger than at any time in United States history. This new
subclass, as all people, will have to seek food and shelter and

887. Full cite appears at note 862 supra.
888. See, e.g., note 419 supra describing conditions in El Salvador.
therefore employment. To those employers who find that the IRCA is not a strong disincentive when weighed against whatever perceived benefits they see in employment of illegal aliens, the two groups will find a complementing need and use for each other. Should this happen, the issue will then arise as to the continuing validity, if any, of the Sure-Tan decision.

a. The Sure-Tan Decision

In Sure-Tan, Inc. v. NLRB, an employer reported undocumented alien employees to the INS in retaliation for their efforts to unionize. The Court held that the employer had violated the National Labor Relations Act (NLRA) by discharging the illegal aliens but did not support the court of appeal’s award of back pay to the aliens. The Court reasoned that the NLRA applied to “unfair labor practices committed against undocumented aliens.” The Court also considered that to include the undocumented aliens within the definition of “employees” in the NLRA protects and encourages “the collective-bargaining process” while maintaining the wage level of United States citizens. The result in Sure-Tan was designed to avoid the creation of a subclass of unprotected workers.

The Court also discovered no conflict between the INA and the NLRA concerning undocumented aliens. At the time of the decision, the INA specifically exempted employment of aliens from the prohibition against the harboring of aliens in section 274(a) of the INA. Under that proviso it was not a crime for the employer to hire them and it was not a crime for them to accept the work. The entire relationship was therefore not illegal. This has now been changed by the IRCA of 1986 which

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890. Full cite appears at note 862 supra.
891. Sure-Tan, 467 U.S. at 891.
892. Id. at 892.
894. Sure-Tan, 467 U.S. at 893.
makes the employer’s participation in the relationship illegal.\footnote{895} The \textit{Sure-Tan} decision was also based upon the consideration that “Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally.”\footnote{896}

Under the IRCA, it is now true that an employer may not knowingly employ an illegal alien\footnote{897} nor continue the employment of an unauthorized alien once the employer learns the individual is present in the United States in violation of the immigration laws.\footnote{898} Under the NLRA, the employer’s motivation for dismissing employees has been closely scrutinized even where the employer can lay a claim that the dismissal occurred in order to comply with the law rather than to punish union membership.\footnote{899} But even an otherwise lawful act by the employer in this regard will run afoul of the NLRA when the employer’s efforts to comply with the law are nothing more than a transparent attempt to destroy the union.\footnote{900} In \textit{Sure-Tan}, it was clear on the facts that the employer’s only purpose in calling the INS to have his employees deported was to break the union.\footnote{901} Following the rule in \textit{Sure-Tan} in the post-IRCA world, an employer who selectively observes section 274A(a)(2)’s requirement by firing illegal aliens who support union efforts while knowingly keeping in his employment those illegal aliens who oppose unionization would violate the NLRA. The employer’s option is either to fire all the illegal aliens or to keep them all. Since the penalties provided by the IRCA against the employer can become rather ex-

\footnotesize{\begin{tabular}{ll}
\textbf{895.} & See the discussion at text accompanying note 879 \textit{supra}. \\
\textbf{899.} & \textit{Cf.} \textit{NLRB v. Transportation Management Corp.}, 462 U.S. 393 (1983)(employer must bear the risk that the confluence of his legal and illegal motives in discharging an employee cannot be separated).
\textbf{901.} & The employer in \textit{Sure-Tan} knew about the employees’ illegal status for months, but did not notify the INS until the union was certain to win the organization election. 467 U.S. at 895.
\end{tabular}}
pensive and lead to imprisonment,\textsuperscript{903} doubtlessly the employer will decide to fire the illegal employees. Firing them is a far different result from reporting them to the INS to face deportation. There is no requirement under section 274A(a)(2) that the employer who must discontinue the employment of illegal aliens must also turn them into the INS. An employer who does so in retaliation against his employees' pro-union efforts is very likely exhibiting the degree of anti-union animus which the rule in \textit{Sure-Tan} prohibited. Following \textit{Sure-Tan} and the IRCA of 1986, an employer can fire an illegal alien employee, who is a union member, and not run afoul of the NLRA when the employer's motivation is not solely one of anti-union animus. Should the disgruntled employer, in the process, call the INS, he is doing more than the IRCA requires and more than \textit{Sure-Tan} permits.

The passage of the IRCA of 1986 sharpens the conflict between immigration and national labor policies. The existence of these competing policies is analogous to other situations which the Court has already addressed, such as where the requirements of Title VII of the Civil Rights Act of 1964,\textsuperscript{903} have conflicted with NLRA provisions that would otherwise uphold a collective bargaining agreement. In \textit{W.R. Grace & Co. v. Local Union 759}\textsuperscript{904} precisely this type of conflict arose when an employer agreed with the Equal Employment Opportunity Commission (EEOC)\textsuperscript{905} to keep women strike replacements despite the fact that in doing so, the company was in violation of the seniority provisions of its collective bargaining agreement with an existing union. Collective bargaining agreements are the favored child of the NLRA.\textsuperscript{906} In \textit{W.R. Grace}, a conflict arose between a collective bargaining agreement that the NLRA would promote and an EEOC order to alleviate sex-based discrimination that the Civil Rights Act disallowed. In \textit{W.R. Grace}, the Court required the employer to assume both liabilities by paying

\textsuperscript{902} Section 274A(e)(4) of the INA (8 U.S.C.S. § 1324a(e)(4) (Law. Co-op. Supp. 1987)).


\textsuperscript{904} 461 U.S. 757 (1983).

\textsuperscript{905} The EEOC operates under Title VII of the Civil Rights Act of 1964, as amended. See note 903 supra.

monetary damages to the men who were laid off in violation of their collective bargaining agreement, while also following the requirements of the EEOC by maintaining employment of the requisite number of women.

By analogy, an employer caught between the INA and the NLRA would incur liability under both statutory schemes. This includes civil fines and criminal penalties now imposed by the INA as well as satisfaction of union and employee rights under the NLRA. Satisfaction of the unionized employees’ rights in \textit{W.R. Grace} came in the form of monetary damages rather than reinstatement to their jobs. Justice O'Connor, in \textit{Sure-Tan}, however, specifically barred a monetary award to the deported illegal alien employees. Therefore, the relief \textit{W.R. Grace} contemplated is unavailable to illegal aliens under the \textit{Sure-Tan} rationale. Since the IRCA makes it unlawful for an employer to continue the employment of an alien once he knows the alien to be illegally present in the United States,\footnote{Section 274A(a)(2) of the INA, as added by § 101 of the IRCA (codified at 8 U.S.C.S. § 1324(a)(2) (Law. Co-op. Supp. 1987)).} the only relief the \textit{Sure-Tan} opinion offered the illegal alien employee appears to have been abolished. The tiny foothold which the illegal alien had only recently obtained in the United States workforce has been eliminated by the IRCA.

This is an unfortunate development since the \textit{Sure-Tan} Court based its decision on a number of persuasive considerations. For example, the Court considered that unionizing illegal aliens would serve to protect American workers since the lower wage pool of illegal aliens is absorbed into the general wage pool. Since all employees must be paid the same, there is no incentive to try to beat the union by hiring illegal aliens.\footnote{467 U.S. at 893.} These considerations remain true despite passage of the IRCA. Lacking such incentive on the part of the employer, the illegal alien may therefore lose his inducement, to some extent, to come to the United States.\footnote{Id. at 893-94.} The same effect may now have been achieved by the IRCA, but at the risk of creating an underground subclass of illegal aliens in the United States who will fear the law more deeply than ever before and thereby be subjected to...
greater exploitation.\textsuperscript{910}

The \textit{Sure-Tan} Court conditioned the employer's necessary "offers of reinstatement on the employees' legal reentry"\textsuperscript{911} into the United States in order to avoid a conflict between the INA and the NLRA. Justice Brennan's concurrence took exception to the Court's remedy in an opinion that would have sent the illegal aliens in Mexico monetary damages in order to penalize the employer for his anti-union animus. The concurrence espoused a practical implementation of the majority's finely-crafted solution. Without Justice Brennan's insistence on a monetary award to the aliens, regardless of the aliens' absence from the United States, the employer has little incentive not to repeat union-busting activities. However, the Court considered that the one-time employees were "'unavailable' for work"\textsuperscript{912} by virtue of deportation and therefore ineligible for back pay during the time period when they were "not lawfully entitled to be present and employed in the United States."\textsuperscript{913} One rationale for an award of back pay is to make whole an individual who has been illegally discharged and is unable to find a new job. \textit{Sure-Tan} did not consider whether the alien employees were unsuccessful in their efforts to obtain employment in Mexico.

\subsection*{b. Employee Verification: Authorization and Identification}

The IRCA makes it unlawful to employ an individual without complying with certain paperwork requirements contained in section 274A(b) which establishes an employment verification system.\textsuperscript{914} If an employer refuses to comply with the verification system, he or she can be forced into compliance by an order\textsuperscript{915}

\begin{footnotesize}
\begin{enumerate}
\item For an extreme example of hostility which some foreign laborers have received, and the need to protect such foreigners under the aegis of the law, see Allee v. Medrano, 416 U.S. 802 (1974).
\item \textit{Sure-Tan}, 467 U.S. at 903.
\item Id.
\item Id.
\item Section 101 of the IRCA, 100 Stat. 3361 (adding a new \textsection{} 274A(b) to the INA (8 U.S.C.S. \textsection{} 1324a(b) (Law. Co-op. Supp. 1987))). This system provides the means by which an individual can establish that he or she is authorized to work in the United States, \textsection{} 274A(b)(1)(A),(B), and (C) (8 U.S.C.S. \textsection{} 1324a(b)(1)(A), (B), and (C) (Law. Co-op. Supp. 1987)), and the means by which the individual may establish his identity, \textsection{} 274A(b)(1)(A),(B), and (D) (8 U.S.C.S. \textsection{} 1324a(b)(1)(A), (B), and (D) (Law. Co-op. Supp. 1987)).
\item Section 274A(e)(4)(B) of the INA (8 U.S.C.S. \textsection{} 1324a(e)(4)(B) (Law. Co-op. Supp. 1987)).
\end{enumerate}
\end{footnotesize}
issued by an administrative law judge. The employment verification system provides that five types of documents can be used to establish an individual’s identity and authorization to work. These documents are: (1) a United States passport; (2) a certificate of United States citizenship; (3) a certificate of naturalization; (4) an unexpired foreign passport if properly endorsed by the Attorney General to authorize employment; or (5) a resident alien card or alien registration card which meets certain other requirements sufficient to identify the bearer of the card as authorized to work in the United States. Those native born citizens who do not possess these documents do not qualify under section 274A(b)(1)(B)’s documentary employment eligibility verification requirements. Under section 274A(b)(1)(A)(ii), these individuals must produce two documents to establish employment eligibility. First, under section 274A(b)(1)(C) they must produce one of three documents to establish work authorization—either (1) a social security card; (2) a birth certificate; or (3) other documentation which the Attorney General prescribes. Under section 274A(b)(1)(D), these people must also produce either a driver’s license or other document used for identification purposes by a state containing a photograph of the holder or other personal identification information which the Attorney General approves. It is not difficult to imagine the case of a native born citizen who possesses neither a United States passport nor a driver’s license who is thereby technically barred from employment in the United States. In the case of minors under 16 who do not have a driver’s license and who live in a state which issues no other type of identification documents, the Attorney General may intervene by regulations to provide for a system of identifying such individuals. Although the Act spe-
specifically provides that it is not to be read as authorizing a national identification card system,921 the message is clear that for purposes of identifying those individuals, including native born citizens, as authorized to work in the United States, if the states do not provide the system, the Attorney General will. The state driver's license or similar identification card must conform to the Attorney General's requirements.922 The identification requirements for minors also must conform to the Attorney General's specifications.923 Both the employer and the employee must swear under penalty of perjury on forms provided by the Attorney General that the employee is authorized to be employed in the United States.924

The Act provides indirectly for federal oversight as to the identity and work authorization of all people in the United States. Although the Act states that it does not purport to authorize a national identification card system, it does contemplate that in the future the President may recommend a “major change” in the employment verification system that would, following two years notice and congressional review, achieve precisely this result.925 A national identification card system would expand federal involvement into the lives of individuals in a way never before experienced by the states and citizenry. The IRCA additionally authorizes a study of the feasibility of a computerized telephonic employment eligibility system.926 The statute limits the uses to which personalized information collected in a nationwide employee verification system could legally be put.927 The inclusion of these limitations in the IRCA indicates already the potential for abuse which the system invites, including misuse of personal information by other “Government agencies, employers, and other persons” beyond what is required to “verify

921. Section 274A(c) of the INA, 100 Stat. 3363 (codified at 8 U.S.C.S. § 1324a(c) (Law. Co-op. Supp. 1987)).
923. Section 274A(b)(1)(D)(ii).
924. Section 274A(b)(1)(A), (b)(2).
NOTE

that an individual is not an unauthorized alien";928 violations of individual privacy;929 denial of employment eligibility by any of the parties involved, such as government officials or employers, for reasons "other than that the employee or prospective employee is an unauthorized alien";930 and use by law enforcement officials for purposes other than enforcement of the INA or various proscriptions concerning fraudulent use or procurement of identification documents.931 The basic issue, through this litany of prospective abuses, remains, as ever, the amount of individual freedom the average citizen is willing to sacrifice to facilitate achievement of immigration policies that are vague and unclear.

The IRCA allows for the termination of employer sanctions932 by 1990933 if the Comptroller General finds the system results in "a widespread pattern of discrimination . . . against citizens or nationals of the United States or against eligible workers seeking employment."934 The termination of employer sanctions would dispense with the need for a national identification card system. Through this indirect route, the path remains open to place United States citizens on the same legal footing they possessed before passage of the IRCA, and closer toward the goal expressed in the Supreme Court's general observation that "[it] requires no argument to show that the right to work for a living . . . is of the very essence of . . . personal freedom and opportunity."935

5. Federal Protection of Domestic Workers

In a case decided between De Canas and Sure-Tan, Puerto Rico brought suit as parens patriae on behalf of its residents against various east coast apple growers and related parties who

929. Section 274A(d)(2)(D), 100 Stat. 3364.
930. Section 274A(d)(2)(E).
931. Section 274A(d)(2)(F).
932. Section 274A(l) of the INA, as added by § 101(a) of the IRCA, 100 Stat. 3370 (8 U.S.C.S. § 1324a(l) (Law. Co-op. Supp. 1987)).
933. Section 274A(j) of the INA specifies "one year [after] three years after" enactment of the IRCA, which occurred in 1986 (8 U.S.C.S. § 1324a(j) (Law. Co-op. Supp. 1987)), as added by § 101(a) of the IRCA, 100 Stat. 3370.
934. Section 274A(l)(1)(A), as added by § 101 of the IRCA, 100 Stat. 3370.
refused to employ Puerto Rican workers when there was a shortage of help to pick apples and who hired Jamaican workers instead. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez,*936 the Court considered the Wagner-Peyser Act,937 which required employers to recruit nationwide, including Puerto Rico, before hiring aliens,938 in order to comply with the INA's allowance of visas for temporary workers from abroad.939 Under the INA, no alien may enter the United States with a temporary-worker visa unless the Secretary of Labor certifies that there is a shortage of United States citizens to do the job, and that the employment of the alien will not adversely affect domestic laborers.940 In this regard, the Jamaican workers were not legally eligible for the apple-picking jobs until the Puerto Rican workers were first employed.

Under the Wagner-Peyser Act, Puerto Rico is considered a "state"941 and had a "quasi-sovereign"942 interest in bringing suit. It thereby possessed the necessary interest required in or-

942. 458 U.S. at 602, 607.
order to bring a parens patriae action. The "quasi-sovereign" interest existed in Puerto Rico's concern over the "health and well-being—both physical and economic—of its residents in general," as well as its interest "in not being discriminately denied its rightful status within the federal system." Under Snapp, it is clear the labor protection offered United States citizens as well as residents of Puerto Rico will be enforced against a private employer who tries to circumvent the federal labor scheme by employing unauthorized foreign laborers.

A private employer may still possess considerable leeway in making decisions concerning the composition of his workforce. In Espinoza v. Farah Manufacturing Co., a lawfully admitted resident alien married to a United States citizen was refused employment by a private manufacturer on the basis of her noncitizenship. The company refused to employ aliens. Making a Title VII claim under the Civil Rights Act of 1964, the woman asserted she had been discriminated against on the proscribed basis of "national origin." According to Justice Marshall, the ban against discrimination on the basis of national origin does not bar distinctions based upon lack of United States citizenship. He equated national origin with ancestry, rather than with citizenship. He also referred to the then established federal practice of "discrimination against aliens by denying them the right to enter competitive examination for federal employment." This rationale, however, has conceivably evaporated since the decision in Hampton v. Mow Sun Wong, where the Court held that the Civil Service Commission could not discriminate on the basis of alienage in its hiring practices. Coupled

943. Id. at 607.
944. Id.
946. 414 U.S. at 87.
947. Id.
949. 414 U.S. at 88 n.2.
950. 414 U.S. at 89.
951. Id.
952. 426 U.S. 88 (1976), discussed in text accompanying note 1105 infra.
with the federal scheme as expressed in the Civil Rights Act which prohibits hiring practices that discriminate on the basis of national origin, the suggestion readily arises that permanent resident aliens are protected under the law from discriminatory practices of private employers.

The Court held, however, that Espinoza, the alien, had been permissibly denied employment because of her lack of citizenship rather than on the basis of her national origin. The Court observed that other employees at the plant, although citizens of the United States, were of Mexican ancestry, as was Espinoza. The Court stated that "nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." The Court did recognize, however, that aliens, as all individuals, are protected from illegal discrimination under the Civil Rights Act, such as discrimination based on race, color, religion, or sex. But, according to Justice Marshall, discrimination on the basis of citizenship is not illegal and is not equivalent to prohibited discrimination on the basis of national origin.

Justice Douglas's dissent relied upon Griffiths and Sugarman. These cases were decided upon the basis of state involvement with forbidden discrimination. Espinoza involved discrimination on the basis of alienage by a private employer. The Espinoza Court did not attempt to find state involvement in the private employer's discrimination. But Justice Douglas' point is well-taken that if states are not permitted to discriminate on the basis of citizenship, it is difficult to read a federal statute banning employment discrimination on the basis of national origin as not similarly extending protection to aliens. Justice Douglas also cited the Equal Employment Opportunity Commission's position that "discrimination on the basis of alienage always has the effect of discrimination on the basis of national origin." The majority of the Court, however, was unable to agree with this conclusion.

Espinoza has been legislatively overruled by passage of the

953. 414 U.S. at 93.
954. Id. at 95.
955. 413 U.S. 717 (1973), discussed in text accompanying note 984 infra.
956. 413 U.S. 634 (1973), discussed in text accompanying note 989 infra.
957. 414 U.S. at 97.
IRCA of 1986. Section 274B(a)(1)(A)\textsuperscript{958} prohibits discrimination with respect to hiring practices based upon national origin or citizenship status, unless the person receiving the discrimination is an illegal alien. An employer may, however, hire a citizen ahead of an alien if the two candidates are equally qualified.\textsuperscript{959} Congress appropriately included such provisions to assuage fears of many ethnic groups that their members, although citizens of the United States or otherwise lawfully present in the United States, would face difficulties finding employment under the new ban against employing unauthorized aliens because their members otherwise appeared to be foreigners. Indeed, the IRCA's provision allowing for termination of employer sanctions by 1990 is a prudent consideration which would eliminate these potential difficulties.\textsuperscript{960}

### B. State Discrimination Against Aliens

State discrimination against resident aliens has been upheld in numerous Supreme Court opinions. For example, state bans on ownership of real property by resident aliens ineligible to be naturalized have been enforced except when such prohibitions simultaneously discriminate against a citizen's ancestry.\textsuperscript{961}

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The legislative history states:

Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

To accomplish this objective, the bill makes it an “unfair immigration-related employment practice” to discriminate with respect to hiring, firing, recruitment, or referral for a fee based on national origin or citizenship status.


\textsuperscript{959} Section 274B(a)(4) of the INA, 100 Stat. 3375 (codified at 8 U.S.C.S. § 1324b(a)(4) (Law. Co-op. Supp. 1987)).

\textsuperscript{960} Section 274A(l) of the INA, added by § 101 of the IRCA, 100 Stat. 3370 (codified at 8 U.S.C.S. § 1324a(l) (Law. Co-op. Supp. 1987)).

\textsuperscript{961} Oyama v. California, 332 U.S. 633 (1948)(unconstitutional discrimination exists where state statutory scheme presumes a conveyance of land to a minor citizen who is a child of a resident alien ineligible to be naturalized is for the purpose of evading a state law prohibiting land ownership by such aliens; the presumption impermissibly discrimi-
laws prohibiting leasing of farmland and indirect forms of control of land by aliens who failed to declare an intention to be naturalized or who were ineligible to be naturalized have been left undisturbed by Supreme Court opinions even though such aliens may have been residing permanently within the United States.962 States have freely exercised a power to discriminate between aliens who declared an intention to become citizens and those who did not.963 Recent federal legislation has stamped its imprimatur upon this distinction for the limited purposes of safeguarding certain lawfully present "intending citizens" from

962. See Terrace v. Thompson, 263 U.S. 197, 219 (1923) (land owner is not deprived of due process nor equal protection under the fourteenth amendment where United States citizens were forbidden by state law and state constitution from renting real property to Japanese resident aliens who had not declared an intention to naturalize upon penalty of such property escheating to the state; state may restrict land ownership to "citizens, and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws"); Porterfield v. Webb, 263 U.S. 225 (1923) (state may bar resident aliens ineligible to receive United States citizenship from leasing land and under this restriction, ineligible aliens do not have a claim for violation of equal protection under the fourteenth amendment even though aliens eligible to become United States citizens may rent land); Webb v. O'Brien, 263 U.S. 313 (1923) (since the Treaty between the United States and Japan of 1911, 37 Stat. 1504-1509, did not explicitly grant ineligible Japanese resident aliens the right to use or to have the benefit of land for sharecropping purposes, it was not a violation of the fourteenth amendment for a state to pass legislation expressly proscribing such activity); Frick v. Webb, 263 U.S. 326 (1923) (state statute may prohibit aliens who are ineligible to be naturalized from holding stock in a corporation which owns farmland).

963. For example, in Terrace v. Thompson, 263 U.S. 197, 218, it was stated: "Formerly in many States the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants." In the same opinion, the Court justified the basis for this discrimination:

The alien's formally declared bona fide intention to renounce forever all allegiance and fidelity to the sovereignty to which he has lately been a subject, and to become a citizen of the United States and permanently to reside therein markedly distinguishes him from an ineligible alien or an eligible alien who has not so declared.

Terrace, 263 U.S. 197, 219 (footnote omitted). See also Pope v. Williams, 193 U.S. 621 (1904) (state may require out-of-state individuals to declare intention to become citizens and residents of the state in order to vote).
discrimination in the work force based on national origin or lack of citizenship status.964

It was recognized early in the United States that aliens, at common law, could purchase land or take it by act of the grantor, although they could not receive land through descent nor by such other comparable operation of law. Under the common law, the alien could exercise complete dominion over such property subject to seizure by the sovereign state.965 The existence of an applicable treaty between the United States and the country of the alien's origin will supplant state legislation or common law, and has occasionally extended greater rights to the nonresident alien who has a claim to property in the United States.966 Such treaties usually have been directed toward establishment of reciprocal rights in the nationals of each contracting country. It is of relatively recent vintage that aliens have been recognized to possess a right sounding in the Constitution to exploit the natural resources found within the geographic boundaries of a particular state.967 Blanket provisions by the state proscribing


966. Hauenstein v. Lynham, 100 U.S. 483 (1879) (where a treaty so provides, an alien heir from one of the contracting countries can be granted the right to proceeds from the sale of real property located in the United States when it escheated to the state following the death of an owner whose only surviving heirs were aliens); Chirac v. Chirac, 15 U.S. (2 Wheat.) 124 (1817) (Marshall, C.J.) (the incapacity of aliens to receive land by descent can be removed by treaty). See also, Blythe v. Hinckley, 180 U.S. 333 (1901)(absent the existence of a treaty, a state could, through its own legislation, allow aliens to hold real property within its borders).

967. Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) (state statute prohibiting the issuance of commercial fishing license to aliens ineligible to receive United States citizenship violates fourteenth amendment's equal protection requirement); but see Patsone v. Pennsylvania, 232 U.S. 138 (1914) (Holmes, J.) (state statute prohibiting unnaturalized foreign born residents from hunting wild game within the state, and to that end, from possessing a shotgun or rifle, does not offend the fourteenth
employment of noncitizens by private employers have similarly foundered on constitutional shoals, although there are a significant number of exceptions to this rule.\textsuperscript{668} The existence of an applicable treaty will also extend limited rights to even nonresident enemy aliens who advance a claim to real property located within a state.\textsuperscript{669} More recently, similar protection has been provided to claims concerning personality despite the absence of an applicable treaty provision where to allow otherwise would simply invite too great an interference by a state in the regulation of foreign affairs.\textsuperscript{670}

A reverse of this trend toward expansion of alien rights in relation to the state can be noted concerning alien suffrage. According to one commentator, any claim to such a right appears to have been totally extinguished by 1928,\textsuperscript{671} but the right had been previously recognized in a surprisingly large number of states and territories.\textsuperscript{672} The reason behind giving aliens the

\textsuperscript{668} Truax v. Raich, 239 U.S. 33 (1915)(state may not require private employers to discriminate against noncitizen employees); Yick Wo v. Hopkins, 118 U.S. 356, 369(1886)(fourteenth amendment applies equally to both citizens and aliens in the United States); \textit{but see} Clarke v. Deckebach, 274 U.S. 392 (1927)(state, through a city ordinance, could prohibit a noncitizen from operating a pool hall); Heim v. McCall, 239 U.S. 175 (1915)(state could require by statute that only citizens of the United States could be employed on public works projects); Crane v. New York, 239 U.S. 195 (1915)(state may make violation of its prohibition against employing noncitizens on public projects a misdemeanor).

\textsuperscript{669} Clark v. Allen, 331 U.S. 503 (1947)(state resident's testamentary disposition directing acquisition of real property located within the state in favor of nonresident enemy aliens will be upheld at least to the extent that such property may be used to satisfy the claims of United States creditors, regardless of a state statutory scheme, where a federal treaty remains in force with the foreign country of which the aliens are nationals and residents).

\textsuperscript{670} Zschernig v. Miller, 389 U.S. 429, 434–35 (1968)(state regulation of descent and distribution of estates containing personality to nonresident aliens may not interfere with the effective exercise of the nation's foreign policy, even in the absence of a treaty, where such state regulation "has more than 'some incidental or indirect effect in foreign countries,' and [a] great potential for disruption or embarrassment"); \textit{but cf.} Clark v. Allen, 331 U.S. 503, 514–518 (1947)(absent a conflicting federal treaty arrangement, a state may regulate the descent and distribution of personality by citizens to nonresident aliens where the state regulation has only "some incidental or indirect effect in foreign countries").

\textsuperscript{671} \textit{See} Aylsworth, \textit{The Passing of Alien Suffrage}, 25 AM. POL. SCI. REV. 114 (1931).

\textsuperscript{672} In Minor v. Happerstett, 88 U.S. (21 Wall.) 162 (1874), Chief Justice Waite
vote, however, may have been less one of altruism than for deeper political purposes. With the exception of alien suffrage, marked inroads have recently been made significantly regulating state power to discriminate on the basis of alienage.

1. Legal Permanent Residents and the Repercussions of the Sugarman Exception

In *Graham v. Richardson*, the Court held that it is impermissible for a state to condition welfare benefits on possession of United States citizenship or residence in the United States for a specified number of years. The state's classification excluded legal permanent residents from public assistance. *Richardson* signalled the start of a line of cases restricting the power of

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noted that at least nine states allowed aliens, under appropriate circumstances, the right to vote:

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

*Id.* at 177. See *Ala. Const. of 1875*, art. VIII, § 1; *Ala. Const. of 1901*, art. VIII, § 177; *Minn. Const. of 1857*, art. 7 (Democratic and Republican documents); *Mo. Const. of 1865*, art. 2; *Tex. Const. of 1869*, art. 3, § 1. One commentator has pointed out that at one time "the laws and constitutions of at least twenty-two states and territories granted aliens the right to vote. This tendency reached its greatest extent about 1875." Aylsworth, *supra* note 971, at 114. According to the same article, "For the first time in over a hundred years, a national election was held in 1928 in which no alien in any state had the right to cast a vote for a candidate for any office—national, state, or local." *Id.* at 114.

973. For example, predictions that aliens coming from English or Northern European backgrounds would be anti-slavery and thereby join the Republican Party rather than the Democratic Party have been cited as one key consideration in extending the franchise to some types of aliens in Texas. See *Vernon's Ann. Tex. Const.* art. 6, § 2 (Interpretive Commentary).

974. Similarly, the states' ability to require citizenship for those holding high elected offices has been recognized for some time. Cf. Boyd v. Thayer, 143 U.S. 135, 161 (1892)(state may prescribe a federal citizenship requirement for individuals seeking office of governor or lieutenant governor).


976. *Id.* at 366, 376.
states to discriminate against legal permanent residents in the area of state employment and public benefits. The Court formulated language which reappeared through subsequent decisions that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." The state's desire to apply limited resources to its citizens, rather than to legal permanent residents, as part of supporting the public interest, was deemed an insufficient basis for the denial of benefits. The Court refused to frame the issue as one involving a constitutional right to interstate travel. Rather, the Court viewed the classification as "inherently suspect and . . . therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." To buttress its result, the Court added that aliens contributed to the welfare fund through payment of taxes and also are subject to military induction.

The Graham decision addressed the relationship of the state with legal permanent residents. The Court did not decide whether Congress could impose such restrictions under its "immigration and naturalization power," or whether a state could enforce similar restrictions against aliens who are not legal permanent residents.

In In re Griffiths, a Connecticut law prohibiting noncitizens from taking the state bar exam, and therefore from the practice of law, was held to violate the equal protection clause of the fourteenth amendment. The Court again applied strict scrutiny and required that the "State must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is 'necessary... to the accom-

977. Id. at 372 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).
978. 403 U.S. at 372. See the discussion of the "special public-interest doctrine" at note 977 infra.
979. Graham, 403 U.S. at 375.
980. Id. at 376.
981. Id.
982. Id.
plishment' of its purpose or the safeguarding of its interest." Although the Connecticut State Bar Examining Committee claimed there was a "link between citizenship and the powers and responsibilities of the lawyer," the Supreme Court disagreed. It stated that the functions of a lawyer do not "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." In a significant bit of dictum the Court added that "the status of holding a license to practice law [does not] place one so close to the core of political process as to make him a formulator of government policy."

The Court's hesitation to expand constitutional protection to resident aliens concerning occupations which were closely involved with the political process was more clearly announced in dicta in *Sugarman v. Dougall*, where a New York statute placing restrictions on the employment of aliens in the state civil service was struck down. The scheme barred state employment unless the applicant was a citizen of the United States. The Court initially framed the issue in terms which later resurfaced in some of the more recent opinions on this subject. The Court decided that "[t]he New York scheme . . . is indiscriminate." It did not bar "some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis." The "competitive class" positions included

985. 413 U.S. 721-22 (footnotes omitted).
986. Id. at 724.
987. Id.
988. Id. at 729 (footnote omitted).
991. For example, the overinclusive-underinclusive evaluation mentioned in *Sugarman*, 413 U.S. at 642, reappeared in such cases as Cabell v. Chavez-Salido, 454 U.S. 432 (1982) and Bernal v. Fainter, 467 U.S. 216 (1984), discussed in text accompanying notes 1039-63 infra. The Court in *Sugarman* observed that the state's asserted justification proves both too much and too little. . . . [T]he State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose.
992. 413 U.S. at 639.
993. Id.
those “all the way from the menial to the policy making.” In line with Graham and Griffiths, the Court applied strict judicial scrutiny and held that the statutory scheme violated the equal protection clause of the fourteenth amendment. The statutory scheme failed, despite the state’s proper concern in defining its political community because the legislative means the state had chosen were not sufficiently narrowly tailored to achieve the state’s otherwise substantial purpose.

In dictum, the Court created an exception to the seemingly broad protection proffered legal permanent residents which has since become known as the Sugarman exception. The state has power to refuse employment on the basis of noncitizenship for positions “that go to the heart of representative government.” In later decisions, after complaint that the Sugarman exception had started to swallow the Sugarman rule, the Court reemphasized Sugarman for its discussion of closely tailoring the classification for a permissible state objective.

Following Sugarman, the Court affirmed a district court decision concerning a citizenship requirement for jury membership in Perkins v. Smith. A Maryland statute, as well as a federal

994. Id. at 640.
995. The Court used the phrase “close scrutiny,” 413 U.S. 642, and followed a strict scrutiny analysis.
996. 413 U.S. at 646.
997. Id. at 643. The Court rejected a call to apply the “special-public-interest doctrine” in which state grants categorized as privileges, rather than as rights, can be made contingent upon the recipient’s citizenship. 413 U.S. at 643–45. By doing so, the Court refused to apply the reasoning behind such cases as Heim v. McCall, 239 U.S. 175 (1915); and Crane v. New York, 239 U.S. 195 (1915), described briefly supra at note 968. In describing the special-public-interest doctrine, the Court noted that the doctrine’s purpose was basically one of economics where the state restricts the allocation of limited resources for the benefit of its own members. 413 U.S. 643–44. One recent opinion has adverted to this doctrine in somewhat of a more favorable light. See Cabell v. Chavez-Salido, 454 U.S. 432 (1982), at text accompanying note 1039 infra.
998. 413 U.S. at 647. The Court stated:
And this power and responsibility of the State applies, not only to the qualification of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

Id.
provision, excluded noncitizens from jury duty. The district court utilized the Sugarman exception in upholding the statutory scheme and in supporting the government’s position that “jury service is a unique responsibility going to the heart of representative government and as such should be entrusted only to citizens.” It stated that “the jury is one of the institutions at the heart of our system of government.” By applying the Sugarman exception, the Graham position that aliens form a suspect class as a “discrete and insular minority” for whom strict scrutiny is appropriate is silently overruled. Strict scrutiny is avoided in place of mere rationality review. Although aliens may remain a suspect class, there is no need for a determination of whether a compelling state interest may justify the classification. The basis for strict scrutiny disappears by applying the Sugarman exception.

In Examining Board of Engineers v. Flores de Otero, “Puerto Rico’s restriction, by statute, of licenses for civil engineers to United States citizens” was held unconstitutional. The suit was brought by two legal permanent residents. The Court explained “that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.” The Court did not specifically decide which of the two amendments is applicable to Puerto Rico which had virtually banned “the private practice of civil engineering by aliens.” The Court relied upon Graham and Griffiths and applied strict judicial scrutiny to Puerto Rico’s

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1003. Id. at 137.
1004. In Sugarman, 413 U.S. at 648, the Court stated “our scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives.”
1006. Id. at 575.
1007. Id. at 600.
1008. Id. at 601. The Court did not decide whether Puerto Rico should be treated like a state under the fourteenth amendment or whether it should be directly governed under the fifth amendment as a creature of the federal government.
statutory discrimination against aliens. The Court phrased its strict scrutiny analysis in familiar terms by announcing that "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn." Since the statute in Flores de Otero was unable to withstand this scrutiny, the licensing scheme was held to be unconstitutional.

In Nyquist v. Mauclet, the Court held the equal protection clause of the fourteenth amendment was violated under a statutory scheme where New York State barred resident aliens from receiving some higher education benefits. The state assistance included Regents college scholarships, tuition assistance, and guaranteed student loans which were indirectly financed by the federal government. State law required the applicants to be either a United States citizen, or to have applied for such citizenship, or if not qualified to obtain such citizenship at the time of applying for the education benefits, to have submitted a statement to the state expressing an intention to apply for citizenship when eligible, or to be a refugee paroled into the country by the United States Attorney General. Two legal permanent residents, neither of whom intended to become a United States citizen, brought suit. The Court followed Graham in considering that "classifications based on alienage 'are inherently suspect and are therefore subject to strict scrutiny whether or not a fundamental right is impaired.' " In the Court's own language it applied a "stringent examination."

Justice Rehnquist's dissent in Mauclet was later adopted, in part, by Justice Powell in Ambach v. Norwick. Justice Rehnquist maintained in Mauclet that the aliens were not a discrete and insular minority because the statute provided they could be

1009. 429 U.S. at 602.
1010. Id. at 605.
1012. Id. at 3-4. The statute at issue was N.Y. EDUC. LAW § 661(3) (McKinney Supp. 1978).
1013. 432 U.S. 8 n.9.
1014. 432 U.S. at 7.
1015. 441 U.S. 68 (1979), discussed infra at text accompanying note 1026.
eligible for the education benefits if each alien declared “his intention to become a citizen as soon as possible.” Since each individual’s membership in the minority class could terminate, Justice Rehnquist argued that strict judicial scrutiny was not necessary. The majority rejected this argument by noting that the fact that aliens were being coerced under state power to change their status did not alter the fact that discrimination based upon alienage had occurred. Additionally, the classification on the basis of noncitizenship is one founded on what could be an immutable trait for many legal permanent residents. Not all resident aliens eventually become eligible to apply for citizenship. Not all such aliens can make a declaration of intent to apply for such citizenship, possibly out of fear of losing their first citizenship to some other country. For example, aliens may refuse to make a declaration of intent to become United States citizens because under section 337(a) of the INA they can be required to renounce any foreign citizenship. Justice Blackmun warned that the state’s effort to expand the exception in Sugarman to allow the state a justification for discrimination on the basis of noncitizenship in order to encourage aliens to become citizens and members of the state’s political community is a reading of the Sugarman exception that “would swallow the rule.”

In Foley v. Connelie, a legal permanent resident was denied a position as a New York State Trooper. The Court upheld the restriction. Foley, the alien, was barred from taking a competitive exam for the position. The Court applied rationality re-
view and explained that "[t]he State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification." The Court based application of this standard upon the exception developed in *Sugarman*. The Court described the analysis required to determine whether the position is one going to the heart of representative government as an examination of "each position in question to determine whether it involves discretionary decisionmaking or execution of policy, which substantially affects members of the political community." The basis for including police officers on the list of occupations that may be filled in a discriminatory manner is that the "police function is . . . one of the basic functions of government" possessing "an almost infinite variety of discretionary powers." The Court indicated that in applying the *Sugarman* exception, mere rationality review was utilized: "In the enforcement and exception of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position."

In *Ambach v. Norwich*, the Court held New York State "may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but

1021. Id. at 296.
1022. Id. at 296 (footnote omitted).
1023. Id. at 297.
1024. Id. (footnote omitted).
1025. Id. at 300. Justice Marshall's dissent voiced concern that the *Sugarman* exception had swallowed the general rule. He stated that police officers only enforce the law; they do not legislate. 435 U.S. 302-07. According to Justice Stevens' dissent, the majority opinion in *Foley*, in which an alien could be denied employment as a State Trooper, was difficult to harmonize with *Griffith*, where aliens were allowed to practice law. 435 U.S. at 308-312.
who refuse to seek naturalization." The statute was similar to the one in *Mauclet* which was found to be unconstitutional. Under the statute, the noncitizen had to show "an intention to apply for citizenship." The statute in *Mauclet* had provided similarly, although the result in *Ambach* was to the opposite effect. The Court envisioned teaching in the public school system as a "governmental function." According to the Court, public school teachers perform a task going "to the heart of representative government." They are invested with a high "degree of responsibility and discretion" in performing that governmental function. The standard the Court used was one of rationality review. That a government function was involved was decisive in *Ambach*; not that the alien could make a declaration of intention to naturalize. However, the Court's reliance upon the fact that the aliens in *Ambach* could declare an intention to naturalize, but had refused to do so as a valid justification for the state's discrimination, is contrary to the Court's rejection of this distinction in *Mauclet*. An explanation lies in the fact that *Ambach* utilized the *Sugarman* exception, however warranted, and thus employed mere rationality review. In *Mauclet*, the Court applied strict scrutiny.

In his dissent, Justice Blackmun stated "[i]t seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French, or, indeed, an English woman may not teach the grammar of the English language." He contended the re-
result was irreconcilable with Griffiths.

As a result of this line of decisions, an important unanswered question remained: which facts would trigger application of the Sugarman exception with its accompanying standard of mere rationality review, and which factual circumstances would avoid a suggestion that a function going to the heart of representative government is present, thereby triggering strict scrutiny? As these earlier cases indicate, the Court proceeded on a case-by-case basis without clearly defining the applicable decisional parameters, perhaps because the required distinction which the Court had desired to make was vague and elusive.

In Cabell v. Chavez-Salido,1039 the Court upheld a California statute which required state probation officers and deputy probation officers to be United States citizens. The Court re-embraced the "public/private"1040 distinction which had been disparaged in Graham and other recent cases.1041 Justice White's view of the older "public/private" distinction was that a state could discriminate between citizens and aliens concerning allocation of public benefits and public resources. A state, however, was not permitted to discriminate between the two classes when intervening in the private sector, such as by requiring discrimi-

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1040. 454 U.S. at 437.

1041. Graham, 403 U.S. at 374. In Graham, the Court referred to a "special public-interest doctrine." In Cabell, Justice White equated his "public/private" doctrine with the "special public-interest doctrine." Cabell, 454 U.S. at 437. See also Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948).
nation in the realm of private employment.\textsuperscript{1042} Although Justice White agreed that the “public/private” distinction had fallen into disuse,\textsuperscript{1043} his delineation of a political function and an economic function of state government, which in turn either allowed or disallowed, respectively, the state relative leeway in discriminating on the basis of alienage closely paralleled the former “public/private” distinction.\textsuperscript{1044} The “public” component of the older distinction is the analogue of the present “political” element. The “private” component of the older decisions is reflected in the current “economic” component described in Justice White’s dichotomy.

In Cabell, the emphasis upon Sugarman was slightly different than in previous cases. Sugarman recognized and applied traditional equal protection analysis in which the statutory restriction was examined to determine whether the classification was either under- or overinclusive when analyzed in light of an otherwise legitimate or substantial state interest or purpose.\textsuperscript{1046} In Cabell, the Court employed this analysis to determine whether the statutory restriction was designed to achieve a political or economic goal. The Court stated that “[f]irst, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends.”\textsuperscript{1046}

The hunt for a legitimate political end was a variation from the language of prior equal protection cases where the Court looked for a legitimate state purpose or interest. Perhaps in the context of legal permanent residents and the fourteenth amendment, “legitimate political ends” are the equivalent of those “functions that go to the heart of representative government” as the dictum in Sugarman suggested.\textsuperscript{1047} This would constitute a shift away from prior equal protection analysis since the meaning and the scope of the phrase quoted from the Sugarman deci-
sion is far from clearly established. Under this analysis, however, a statute that was not "sufficiently tailored" to "substantial[ly] fit" some legitimate political end would be categorized as a statute regulating economic aspects of an alien's life. Analysis then proceeds to consider whether the economic regulation was permissible under the strict scrutiny analysis of Graham. If, however, the statute passed the first test and was properly tailored toward some legitimate political end, a second inquiry followed which invoked the Sugarman exception under a standard of rationality review.

The Court indicated in Cabell that it would defer to state legislative judgments as to what positions are "important sovereign functions of the political community" that go to the heart of representative government. The Court cited factors which placed a probation officer in the position of performing a function that goes to the heart of representative government. Probation officers in California exercised broad discretionary coercive powers over a limited number of probationers, including the responsibility to see to it that all terms of probation were met. The officers had the power to arrest as well as to release some detained individuals, and also had a wide range of contacts with local communities in the course of their work.

This enumeration left open to a large extent how the Court will rule in future cases under modified fact patterns. In upholding the California statute under the Sugarman exception, the Court utilized the standard "lower level of scrutiny" which has now become part of the Sugarman analysis. Once again, a dissenting voice complained that Sugarman's exception had swallowed Sugarman's rule.

In Bernal v. Fainter, a Texas statute forbidding aliens from becoming notaries public was struck down. The position did not go to the heart of representative government and the

1048. 454 U.S. at 442.
1049. Id.
1050. 454 U.S. at 445.
1051. 454 U.S. at 445-46.
1052. Id. at 444.
1053. Id. at 458 (Blackmun, J.).
Sugarman exception did not apply. The Court invoked strict scrutiny, as originally announced in Graham. Although the statute was determined not to be overinclusive since it limited only a narrow class of individuals from becoming notaries, it failed to pass constitutional muster because it did not further "a compelling state interest by the least restrictive means practically available." The state had other options at its disposal, such as testing all individuals for their knowledge of relevant state law, to eliminate those individuals unfit to be notaries, rather than a blanket prohibition against an entire class of individuals.

In Bernal v. Fainter, the Supreme Court attempted to define further which positions go to the heart of representative government and which may exclude legal permanent residents. In referring to the two-part test in Cabell, the Court emphasized "that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate." The Court determined the statute forbidding aliens from being notaries was not overinclusive because "it applies narrowly to only one category of persons: those wishing to obtain appointments as notaries." The Court did not decide whether the statute was underinclusive, although it suggested it might be, since the person who supervised licensing of notaries public was not required to be a citizen of the United States. The Court found the prohibition failed the second prong of the Cabell test, which essentially meant the Sugarman exception did not otherwise save the prohibited discrimination. The position's responsibilities did not go to the heart of representative government; rather they were "essentially clerical and ministerial." The Court stated that the "political function exception is properly applied [where the position is] invested either with policy-making responsibility or broad discretion in the execution of public policy that requires

1055. Id. at 222.
1056. Id. at 227.
1057. Id. at 222 n.7.
1058. Id. at 222.
1059. Id. at 222-23.
1060. Id. at 225.
the routine exercise of authority over individuals."\textsuperscript{1061} Neither the responsibility nor the discretion was invested in the notary public position.

As a result of \textit{Bernal v. Fainter}, the relative balance between the separate components of the Court's equal protection analysis was restored to the condition in which it rested following the \textit{Graham} decision and its immediate progeny. This analysis emphasizes that resident aliens are indeed members of a "'discrete and insular' minority" and that as a general rule, state legislation discriminating against them must be subjected to strict judicial scrutiny. The \textit{Bernal} decision took the emphasis off the \textit{Sugarman} exception and thereby reduced the applicability of mere rationality review. As reiterated in \textit{Bernal}, the purpose of the \textit{Sugarman} exception was to allow the states to exclude from those positions that "are so closely bound up with the formulation and implementation of self-government [those] persons outside the political community . . . who have not become part of the process of democratic self-determination."\textsuperscript{1062} As viewed in the \textit{Sugarman} decision itself, this was to be a limited exception infrequently utilized. \textit{Bernal} returned the jurisprudence on this subject to this original viewpoint. The problem of defining when to apply the \textit{Sugarman} exception still remains rather difficult. In light of the one-time accepted existence of alien suffrage in a number of states,\textsuperscript{1063} it is by no means clear that the \textit{Sugarman} exception cannot be further limited.

2. State Discrimination Against Temporary Visitors and Illegal Aliens

The class of aliens who are not legal permanent residents includes nonimmigrants as defined by the Immigration and Nationality Act (INA).\textsuperscript{1064} These people, who constitute a heterogeneous class of individuals, are typically in the United States on a temporary visa. Additionally, the Immigration Reform and Control Act (IRCA) of 1986 created a new class of aliens called tem-

\textsuperscript{1061} \textit{Id.} at 226.
\textsuperscript{1062} \textit{Id.} at 221.
\textsuperscript{1063} \textit{See} notes 971-74 and accompanying text \textit{supra}.
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porary legal residents.\textsuperscript{1065} A further category of aliens consists of those illegally in the United States. The period of stay during which visa-holders may remain in the United States can be quite prolonged. Many visa holders receive their visas as nonimmigrants under the authority of section 101(a)(15) of the INA.\textsuperscript{1066} That section currently defines nineteen different classes of temporary visas.\textsuperscript{1067} There are also visas available under other provisions of the INA\textsuperscript{1068} or under other statutes or treaties, such as visas for some participants in NATO.\textsuperscript{1069} The rights to which these aliens are entitled, under federal and state law, have occasionally been the subject of litigation in the Supreme Court. Several cases decided by the Burger Court examined these issues, frequently borrowing concepts from decisions concerning the rights of aliens who are in the United State permanently or who occupy legal statuses far different than the nonimmigrants before the Court.

\textit{a. Representatives of Foreign Governments and Education Benefits}

In \textit{Elkins v. Moreno},\textsuperscript{1070} suit was brought on behalf of aliens who were financially dependent on relatives named in visas is-

\begin{enumerate}
  \item \textsuperscript{1067} The most recent additions have come in § 312(b) of the IRCA, 100 Stat. 3435, which created a temporary visa for parents and children of special immigrants, and for children of parents of special immigrants under a new § 101(a)(15)(N) (8 U.S.C.S. § 1101(a)(15)(N) (Law. Co-op. Supp. 1987)) where the term "special immigrant" is defined to include certain officers or employees of international organizations. Section 101(a)(27)(I) of the INA, \textit{added by} § 312(a) of the IRCA, 100 Stat. 3434 (codified at 8 U.S.C.S. § 1101(a)(27)(I) (Law. Co-op. Supp. 1987)).
  \item \textsuperscript{1069} See 5 U.S.T. 877, 1094–1100; 4 U.S.T. 1794, 1796 (representatives and members of NATO); 22 U.S.C. § 2691 (1982) (nonimmigrant visas for aliens who are members of proscribed organizations in compliance with the Helsinki Final Act).
  \item \textsuperscript{1070} 435 U.S. 647 (1978) (Brennan, J.) (Rehnquist J., dissenting, joined by Burger, C.J.). \textit{See generally}, Wildes & Grunblatt, \textit{Domicile for Immigration and Federal Gift and Estate Tax Purposes—is a Harmonious Rule Possible?}, 21 San Diego L. Rev. 113
sued under section 101(a)(15)(G)(iv) of the INA as immediate family members of a representative of a foreign government that is a member of an international organization meeting in the United States (G-4 visas). The University of Maryland had denied these aliens within the State of Maryland "in-state" status for tuition purposes. The aliens claimed violation of various provisions of the due process and equal protection clauses of the fourteenth amendment and the supremacy clause. The policy of the University of Maryland was to grant in-state status to United States citizens and legal permanent residents who complied with certain requirements relating to a minimum period of domicile within the state. The supremacy clause issue, and arguments based upon state taxation concerns, were raised but were not decided. The controlling issue was phrased by the majority in terms of whether G-4 visa holders "can form the intent necessary to allow them to become domiciliaries of Maryland." According to the Court, the university did not discriminate on the basis of nonimmigrant status, or noncitizen status, but entirely upon a nondomiciliary basis.

The Court decided that under federal law a G-4 visa holder can become a Maryland domiciliary. It then sent the case to the Court of Appeals of Maryland to decide, on the basis of that state's law, whether such aliens could become domiciled within Maryland. According to the Court "Congress did not require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a certain date." Under other visa provisions for other classes of nonimmigrants, Congress had specifically required that nonimmigrant aliens have an intention "not to abandon a foreign residence, or by implication . . . an

(1983).


1072. 435 U.S. at 650.

1073. Domicile was defined, according to university policy, as "a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland." 435 U.S. at 651. The policy also considered 8 additional factors, one of which was whether the student or a person on whom the student was dependent, paid Maryland income tax, including "taxable income earned outside the State." Id at 651.

1074. 435 U.S. at 658.

1075. Id. at 664.
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intent not to seek domicile in the United States.”1076 These aliens could not become domiciled within the United States without an adjustment of status under section 245(a) of the INA.1077 The Court stated Congress did not place a similar prohibition against G-4 aliens from possessing the intent to take up domicile within the United States. These aliens could develop the “subjective intent to stay indefinitely in the United States.”1078 The Court then sent the question to the Maryland Court to learn whether G-4 aliens were barred by operation of state law from becoming domiciliaries within Maryland.1079

In Toll v. Moreno,1080 the Court recognized that the Maryland Court of Appeals answered in the negative to the certified question sent from the Supreme Court as a result of Elkins v. Moreno.1081 Therefore, G-4 aliens were not incapable, according to the Maryland court, from becoming domiciliaries within the state. In the meantime, the Board of Regents in Maryland clarified its policy position by indicating that nonimmigrants who could become domiciled within Maryland were still ineligible for favorable “in-state” tuition status. The Supreme Court remanded to the district court for consideration of the problem in


1078. 435 U.S. at 666.
1079. Id. at 668–69.
1080. 441 U.S. 458 (1979) (per curiam).
1081. The certified question was

Are persons residing in Maryland who hold or are named in a visa under 8 U.S.C. § 1101(a)(15)(G)(iv)(1976 ed.), or who are financially dependent upon a person holding or named in such visa, incapable as a matter of state law of becoming domiciliaries of Maryland?

441 U.S. at 459–60 (footnote omitted).
light of the Board of Regents’ new explanation and the prior holdings related to the case.

When the case subsequently returned to the Supreme Court, the Court was squarely confronted with the issue whether the supremacy clause was violated by Maryland’s refusal to grant in-state status to nonimmigrant aliens domiciled within the state. In *Toll v. Moreno*, the Court decided there was such a violation. The Court considered whether there was an encroachment by the state “upon Congress’ prerogatives with respect to the regulation of immigration.” The Court recognized a conflict between the state and congressional power to regulate commerce with foreign nations as well as with the broad congressional authority over foreign affairs. The Court distinguished *De Canas v. Bica* on the basis that Congress had intended to allow the states to regulate employment of illegal aliens to the extent consistent with federal law. Unlike the California statutory scheme in *De Canas*, Maryland’s refusal to allow G-4 visa holders to become state domiciliaries was contrary to congressional intent:

In light of Congress’ explicit decision not to bar G-4 aliens from acquiring domicile, the State’s decision to deny “in-state” status to G-4 aliens, solely on account of the G-4 alien’s federal immigration status, surely amounts to an ancillary “burden not contemplated by Congress” in admitting these aliens to the United States.

Other factors which directed the Court’s decision included the fact that the federal policy to encourage international organizations to locate within the United States was frustrated by the university’s policy. Since the federal government expressly re-

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1083. Id. at 9, referring to the supremacy clause, U.S. Const. art. VI, cl. 2, and Congress’ authority to regulate immigration under art. I, § 8, cl. 4.
1084. U.S. Const. art. I, § 8, cl. 3 (regulation of commerce with foreign nations).
1085. 424 U.S. 351 (1976), discussed in text accompanying note 852 supra.
1086. 458 U.S. at 13 n.18. See also *De Canas*, 424 U.S. at 361.
1087. 458 U.S. at 14.
lieved the G-4 aliens from taxation, the State of Maryland could not go about indirectly recouping such loss by charging higher tuition to the children of such aliens.

b. Illegal Aliens and Education Benefits

In Plyler v. Doe, the State of Texas’ denial to “undocumented school-age children . . . free public education that it provide[d] to children who [were] citizens of the United States or legally admitted aliens” was struck down by the Court as a

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1089. 457 U.S. at 205.
violation of the equal protection clause of the fourteenth amendment. The alien children were determined to be persons within the state’s jurisdiction, who, under the language of the fourteenth amendment, were entitled to equal protection of the laws. The Court rejected the argument that “undocumented aliens, because of their immigration status, are not ‘persons within the jurisdiction’ of the State of Texas, and that they therefore have no right to the equal protection of Texas law.”\(^{1090}\) The Court stated that to permit a state to interpret the “within its jurisdiction” phrase of the fourteenth amendment to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. The objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.\(^{1091}\)

Since the Court had already indicated that a state may follow the federal government’s lead, as in \textit{De Canas v. Bica},\(^{1092}\) the Court was required to consider whether federal disapproval of the presence of illegal alien children within the country permitted Texas’ prohibition against their presence in the state school system. The Court recognized that illegal aliens do not constitute a suspect class\(^{1093}\) and that education is not a fundamental right.\(^{1094}\) But the Court determined that the classification did not “operate harmoniously within the federal program”\(^{1095}\) be-

\(^{1090}\). \textit{Id.} at 210–16.
\(^{1091}\). \textit{Id.} at 213. The equal protection clause in the fourteenth amendment reads: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”
\(^{1092}\). 424 U.S. 351 (1976), discussed in text accompanying note 852 \textit{supra}.
\(^{1093}\). 457 U.S. at 219 n.19, & 223.
\(^{1095}\). 457 U.S. at 226.
cause any particular illegal alien child might be eligible for a number of different forms of relief from deportation.\textsuperscript{1096} During their residence in the United States as illegal aliens, according to the Court, they were in fact "enjoying an inchoate federal permission to remain."\textsuperscript{1097} Once the Court determined the fourteenth amendment applied, the equal protection arguments struck down the Texas prohibition.\textsuperscript{1098}

\textit{Plyler} held that the denial of free public education to illegal alien children was not shown to further any "substantial state interest."\textsuperscript{1099} Thus, the statute could "hardly be considered rational."\textsuperscript{1100} The statute failed to pass a mere rationality level of review. It operated to inflict permanent damages on children as the Court explained that "[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life."\textsuperscript{1101} Many of these illegal aliens remain per-

\footnotesize{1096. See, e.g., 8 U.S.C. \textsection 1251 (1982), as \textit{amended} Act of Nov. 10, 1986, Pub. L. No. 99-639, \textsection 2(b), 100 Stat. 3541; 1252 (1982 & Supp. II 1984); 1253(h) (1982); 1254 (1982), as \textit{amended} Act of Nov. 6, 1986, Pub. L. No. 99-603, \textsection 315(b), 100 Stat. 3439, for examples of various types of relief to deportation. 1097. \textit{Plyler}, 457 U.S. at 226. 1098. A Texas statute conceivably affecting much the same group of people as in \textit{Plyler} was subsequently upheld by the Court in \textit{Martinez v. Bynum}, 461 U.S. 321 (1983) (Powell, J.) (Brennan, J. concurring)(Marshall, J. dissenting). Texas had a residency requirement for minor children who wished "to attend public free schools while living apart from their parents or guardians." \textit{Id.} at 322. The student bringing the challenge was born in the United States and was a United States citizen, although his parents were Mexican citizens living in Mexico. The student fit the category of a child born in the United States to parents who were illegal aliens and who were later deported. The Court upheld the residency requirement. Since the alien had no parent or guardian in the state, he was denied a free public education. The law obviously affected a similar group of individuals as was targeted by the statute in \textit{Plyler}. This time, the classification passed constitutional muster. This problem was foreseen in Justice Powell's concurrence in \textit{Plyler}, where he stated: The classes certified in these cases included all undocumented school-age children of Mexican origin residing in a school district . . . or the State. Even so, it is clear that neither class was thought to include mature Mexican minors who were solely responsible for violating the immigration laws. . . . A different case would be presented in the unlikely event that a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition. \textit{Plyler}, 457 U.S. at 240 n.5 (citation omitted). 1099. \textit{Id.} at 230. 1100. \textit{Id.} at 224. 1101. \textit{Id.} at 222.
manently in the United States and become citizens.\textsuperscript{1102} The statute unfairly punished illegal alien minors for the act of their parents in bringing them to the United States which was an activity over which the children had no control.\textsuperscript{1103} The state provided no satisfactory reasons to support these constitutional deficiencies.\textsuperscript{1104}

\textbf{C. Federal Discrimination Against Legal Permanent Residents: Employment, Medicare, and Illegitimacy}

In \textit{Hampton v. Mow Sun Wong},\textsuperscript{1105} the Civil Service Commission and other federal agencies denied legal permanent residents employment in many available government positions. The Court stated that \textit{Sugarman}\textsuperscript{1106} and \textit{Griffiths}\textsuperscript{1107} did not apply "because the Fourteenth Amendment's restrictions on state power are not directly applicable to the Federal Government and because Congress and the President have broad power over immigration and naturalization which the States do not possess."\textsuperscript{1108} The Court prohibited the discrimination by reasoning that the authority of the Commission to impose the discrimination was not the same as the authority of Congress or the President to make the same decision. The decision to hire only citizens was not made at the congressional or presidential level but only by the Civil Service Commission.\textsuperscript{1109} The Court assumed "without deciding, that the Congress and the President have the constitutional power to impose the requirement that the Committee has adopted."\textsuperscript{1110} But the Commission, unlike the President or Congress, had "no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or con-

\begin{itemize}
  \item \textsuperscript{1102} Id. at 222 n.20.
  \item \textsuperscript{1103} Id. at 219–20.
  \item \textsuperscript{1104} Id. at 228–30.
  \item \textsuperscript{1106} 413 U.S. 634 (1973). \textit{See text accompanying note 989 supra.}
  \item \textsuperscript{1107} 413 U.S. 717 (1973). \textit{See text accompanying note 984 supra.}
  \item \textsuperscript{1108} 426 U.S. at 95 (footnotes omitted).
  \item \textsuperscript{1109} 426 U.S. 105–14.
  \item \textsuperscript{1110} Id. at 114.
\end{itemize}
ditions of entry, or for naturalization policies.\footnote{1111} Additionally, the administrative burden to decide which positions in the Civil Service Commission were sensitive and therefore properly reserved for citizens was not such an onerous task as to justify the blanket proscriptions that were used.\footnote{1112} The Court repeated a much older finding that the right to work for a living is an "interest in liberty."\footnote{1113} Deprivation of a discrete class's interest in that liberty, when that class is not entitled to vote, must be done according to some due process standards within the fifth amendment.\footnote{1114}

In the same year that it decided Hampton, the Court decided Mathews v. Diaz,\footnote{1115} which upheld a federal Medicare provision denying benefits to aliens over 65 years of age who had not been legal permanent residents in the United States for five years or more. The Court reasoned this did not amount to a deprivation of liberty without due process of law. According to the Court, congressional discrimination between the numerous categories of aliens was constitutionally permissible when the statutory distinctions were not "wholly irrational."\footnote{1116} It was "reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."\footnote{1117} The Court announced this result despite its concession that "unnecessary hardship is incurred by persons just short of qualifying."\footnote{1118} The circumstances of the case were unlike those involving the welfare benefits in Graham v. Richardson\footnote{1119} because federal, rather than state benefits, were involved.

The distinction between the results achieved in Hampton and Mathews is superficially explained by the decision-making level in the federal government responsible for the discriminatory plans. In Hampton, the prohibited decision to discriminate had been made by the Civil Service Commission. In Mathews,
Congress itself authorized discrimination against the legal permanent residents who desired to receive Medicare benefits. In an extension of the rationale behind *Mathews*, Congress, in the IRCA, placed numerous restrictions on the availability of federal benefits to aliens in a host of immigration statuses.\footnote{1120} Whether there remain any boundaries to the congressional power to limit federal benefits to aliens cannot be considered completely settled, since many of the benefits Congress has denied to different categories of aliens affect the lives of such people in ways conceivably far different than in *Mathews* and may one day raise issues of fundamental fairness and questions of legislative rationality which were not presented in the *Mathews* decision.

The Court has also upheld a federal statutory scheme that discriminated against some aliens on the basis of illegitimacy, although state laws discriminating on the basis of illegitimacy have been struck down as a violation of equal protection.\footnote{1121} In *Fiallo v. Bell*,\footnote{1122} the Court upheld provisions of the INA which

\footnote{1120. See, e.g., § 121(a) of the IRCA of 1986, Pub. L. No. 99-603, 100 Stat. 3384 (affecting AFDC, Medicaid, unemployment compensation, and the food stamp program). Section 245A to the INA, as added by § 201(a) of the IRCA, 100 Stat. 3394 (codified at 8 U.S.C.S. § 1255a (Law. Co-op. Supp. 1987)) created a new category of legal temporary resident aliens who had already established a continuous unlawful residence since January 1, 1982. Section 245A(h)(1)(A)(i) provides that the new legal temporary residents will be barred for five years from eligibility for “any program of financial assistance furnished under Federal law (whether through grant, loan, guarantee, or otherwise) on the basis of financial need.” Such aliens are also barred from “medical assistance under a State plan approved under title XIX of the Social Security Act” and from “assistance under the Food Stamp Act of 1977.” Section 245A(h)(1)(A)(ii), (iii). These are particularly harsh consequences for people who work and pay federal taxes. A citizen who has just joined the workforce and has begun to pay taxes does not receive similar discrimination. The IRCA allows some exceptions for aged, blind, or disabled aliens, as well as restricted emergency benefits for pregnant women. Section 245A(h)(3). The general restrictions are directed against some of the most helpless and defenseless individuals in society. It is constitutionally absurd to assert that under the guise of general immigration powers Congress and the majoritarian process may ride roughshod over an obviously “discrete and insular minority.” United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

1121. See *Trimble v. Gordon*, 430 U.S. 762 (1977) where a state law permitting intestate succession to illegitimate children only from their mothers and not from their fathers was held to deny equal protection. This decision was decided the same day as *Fiallo v. Bell*, 430 U.S. 787 (1977). According to Nowak, Rotunda, & Young, the different results are explained by the expansive federal power over immigration and naturalization. J. NOWAK, R. ROTUNDA & N. YOUNG, CONSTITUTIONAL LAW 649 (3rd ed. 1986).

discriminated against the relationship between an illegitimate child and its natural father while according favorable immigration status to the relationship between an illegitimate child and its natural mother.\textsuperscript{1123} At the time of the Fiallo decision, under the INA, requests for immigrant visas by children or parents of United States citizens, or children or parents of legal permanent residents, were facilitated to the extent that the Act's labor certification requirements were dispensed with,\textsuperscript{1124} and when a United States citizen was involved, the numerical quota restrictions were also lifted.\textsuperscript{1125} A parent could invoke these provisions in order to obtain an immigrant visa for a child or conversely, the child could do so on behalf of the parent. When Fiallo was decided, the INA excluded an illegitimate child and its unwed father from obtaining the immigration benefit while simultaneously according the benefit when the parties involved were an illegitimate child and its unwed mother. In deciding that the discrimination was constitutionally permissible, the Court adhered to considerations of federal sovereignty\textsuperscript{1126} as well as the federal immigration powers in order to defer to Congress' explicit legislation. Justice Marshall, in his dissent, further expounded upon the ideas he introduced in his dissenting opinion in Kleindeinst v. Mandel.\textsuperscript{1127} His dissent was vindicated by the

\textsuperscript{1123} The statutory provisions under scrutiny were § § 101(b)(1)(D), (b)(2) of the INA of 1952, 66 Stat. 171, as amended, Act of Sept. 11, 1957, Pub. L. No. 85-316, § 2, 71 Stat. 639 (codified at 8 U.S.C. § § 1101(b)(1)(D), (b)(2) (amended 1986)). Section 101(b)(1) provided that "[t]he term 'child' means an unmarried person under twenty-one years of age who is—. . . (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother." Section 101(b)(2) provided that "[t]he terms 'parent', 'father', or 'mother' mean a parent, father or mother only where the relationship exists by virtue of any of the circumstances set forth in (1) above." Following Fiallo, Congress amended § 101(b)(1)(D) on the INA. See note 1128 infra.


\textsuperscript{1126} But see, note 394 supra and accompanying text.

\textsuperscript{1127} 408 U.S. 753 (1972). In Fiallo, Justice Marshall looked at the discriminatory effect which the statute produced on those already within the United States as citizens or legal permanent residents. In Mandel, 408 U.S. 753 (1972), discussed at text accompanying note 329 supra, Justice Marshall expressed a concern for infringement upon the
passage of section 315 of the IRCA which amended the INA to terminate the discrimination against fathers of illegitimate children.\textsuperscript{1128}

\section*{VIII. Aliens and Claims of Estoppel Against the United States}

Estoppel has not proven to be a successful defense when raised by aliens in deportation proceedings or other actions by the INS. In Dunn \textit{v. INS},\textsuperscript{1129} certiorari was denied with respect to a request to review an alien’s unsuccessful claim that the INS was barred from initiating a deportation proceeding. The dissent explained the factual background of the case. The alien was a legal permanent resident who temporarily left the United States to avoid the Vietnam draft.\textsuperscript{1130} When he returned, he was imprisoned because legal permanent residents were obligated by first amendment rights of United States citizens to hear and speak with Mandel, whom the United States refused to allow to enter. In his dissent in \textit{Fiallo}, Justice Marshall argued that the distinction based upon some type of illegitimacy, but not others, denied equal protection of the laws to United States citizens:

> It is irrelevant that aliens have no constitutional rights to immigrate and that Americans have no constitutional right to compel the admission of their families. The essential fact here is that Congress did choose to extend such privileges to American citizens but then denied them to a small class of citizens.

430 U.S. at 807. Additionally, Justice Marshall continued his inquiry into the asserted justification or authorization of the discrimination on the alleged basis of national self-defense or security. He stated that “Congress deliberately chose, for reasons unrelated to foreign policy concerns or threats to national security, to deny those rights to a class of citizens traditionally subject to discrimination.” \textit{Id.} at 808. According to Justice Marshall

> The class of citizens denied the special privilege of reunification in this country is defined on the basis of two traditionally disfavored classifications—gender and legitimacy. Fathers cannot obtain preferred status for their illegitimate children; mothers can. Conversely, every child except the illegitimate—legitimate, legitimated, step-, adopted—can obtain preferred status for his or her alien father. The Court has little tolerance for either form of discrimination.

\textit{Id.} at 809. This approach by Justice Marshall is a logical extension of the position he formulated in \textit{Mandel}.

\textsuperscript{1128} Section 315 of the IRCA, 100 Stat. 3439, \textit{amended} § 101(b)(1)(D) of the INA of 1952, to allow that within the definition of the term “child” shall be included “an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.”

\textsuperscript{1129} 419 U.S. 919 (1974) (Stewart, J., dissenting from the denial of \textit{cert.}, joined by Douglas, J.).

\textsuperscript{1130} \textit{Id.} at 920.
NOTE

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statute to be eligible to serve in the armed forces. After he completed his prison sentence, the INS brought a deportation proceeding against him on the theory that when he fled the United States, he lost his status as a legal permanent resident. If the petitioner were no longer a legal permanent resident when he left the United States, then he would no longer have been covered by the statute requiring the imprisonment of legal-permanent-resident draft evaders. Since the petitioner served his term in prison under a statute directed against legal permanent residents, he claimed the INS was barred, in fundamental fairness, from advancing the argument that he was no longer a legal permanent resident and no longer entitled to remain in the United States. The denial of certiorari, in effect, accepted the INS argument. The dissenting opinion explained that the government had successfully “prosecuted petitioner for breaching an induction order premised on his status as a permanent resident” and was barred from deporting him on a claim that he had, by the same trip to Canada, lost his legal permanent residence status. Justice Stewart’s dissent concluded that “the judgment before us is grossly unjust. The Service has noted that petitioner has a ‘penchant for botching up his life.’ Perhaps so, but the Government’s botching up of this case has served to complete the wreckage.”

In INS v. Hibi, an alien petitioned for naturalization “even though the deadline fixed by Congress for the filing . . . had expired more than 20 years earlier.” The alien was born in the Philippines and fought for the United States Army during World War II. A federal statute explicitly allowed for the filing of a petition for naturalization by December 31, 1946 for those aliens who had served in the United States Armed Forces.

1132. 419 U.S. at 921.
1133. Id. at 924.
1135. 414 U.S. at 5.
The alien did not file until 1967, after entering the United States. The alien claimed the government was barred from denying his petition because it had failed "to advise him, during the time he was eligible, of his right to apply for naturalization." During the statutory eligibility period there had briefly been a United States vice-consul in the Philippines to conduct naturalizations. The Philippine Government, however, feared Filipino men would leave the Islands and arranged for the vice-consul's removal from the territory. According to the dissent, in complying with the request by the Philippine Government to stop naturalizations, the executive branch of the United States deliberately frustrated the congressional purpose behind the statute. Nonetheless, the Court held the United States Government was not estopped from denying the alien's petition for naturalization. It stated:

We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.

In *INS v. Miranda,* a citizen of the Philippines was married to a United States citizen in 1976. His wife petitioned for him to receive an immigrant visa as an "immediate relative" of a United States citizen. The husband petitioned for an adjustment of status to that of a legal permanent resident under section 245(a) of the INA. The INS failed to take action on the request for eighteen months, by which time the marriage had broken up, and the wife had withdrawn her request. The alien claimed an estoppel had arisen from the "unreasonable delay" of

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1137. 414 U.S. at 7–8.
1138. Id. at 10–11.
1139. Id. at 8–9.
1141. Section 201(b) of the INA, 66 Stat. 175 (current version at 8 U.S.C. § 1151(b) (1982)).
the INS\footnote{1143} and that there was "affirmative misconduct"\footnote{1144} by the INS which caused him "irrevocable harm.\footnote{1145} The Court disagreed and held that the eighteen month delay was not "unwarranted."\footnote{1146} The claim of estoppel raised by the alien was therefore denied.

In \textit{United States v. Mendoza},\footnote{1147} the Court reconsidered the statutes at issue in \textit{Hibi}.\footnote{1148} A Filipino national desired to be naturalized thirty-two years after the application deadline had passed. He claimed the government's withdrawal of a United States naturalization officer from the Islands during the 1940s denied him due process of law. In a prior proceeding involving different aliens, a federal court decided this claim against the government.\footnote{1149} The alien argued that the United States was barred by collateral estoppel from relitigating the same due process issue. The Court held, however, that the "United States may not be collaterally estopped on an issue . . . adjudicated against it in an earlier lawsuit brought by a different party."\footnote{1150} The Court decided that nonmutual offensive collateral estoppel does not apply against the United States in its efforts to enforce the immigration laws.\footnote{1151}

In a case similar to \textit{Dunn}, but decided several years earlier, the Court refused to allow the United States to renege upon an understanding it had reached with a legal permanent resident

\footnote{1143.} 459 U.S. at 16 (quoting from the record of the case).
\footnote{1144.} 459 U.S. at 16 (quoting from the record of the case).
\footnote{1145.} 459 U.S. at 16.
\footnote{1146.} \textit{Id.} at 18 (footnote omitted).
\footnote{1148.} \textit{See supra} note 1136, and 464 U.S. 154 n.1.
\footnote{1149.} \textit{In re} Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D.Cal. 1975).
\footnote{1150.} 464 U.S. at 155.
\footnote{1151.} \textit{Id.} at 158. \textit{See Parklane Hosiery Co. v. Shore}, 439 U.S. 322 (1979) (involving private litigants). The Court defined the terminology it used:

Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party.

\footnote{1144.} 464 U.S. at 159 n.4 (quoting \textit{Parklane Hosiery}, 439 U.S. at 326 n.4). \textit{See note} 1309 \textit{infra} for cases addressing res judicata in the context of immigration law.
who was petitioning for naturalization. In *Astrup v. INS*, the petitioner was a legal permanent resident from Denmark who had signed an agreement in 1950 with the United States "to give up his right to become an American citizen" in exchange for which the United States gave up its right to draft him into the armed forces. In 1951, Congress repealed the 1948 statutory authority for this agreement and made legal permanent residents ineligible to receive an exemption from military service. This provision was related to the provision under scrutiny in *Dunn*. Following the change in law, the Selective Service drafted the petitioner in violation of the 1950 agreement. He was rejected from the service, however, when he was found medically unfit to serve. The petitioner then applied for naturalization. The Court decided that section 315 of the Act was applicable. It provides that to be ineligible for citizenship an alien must first apply for an exemption from military service and, secondly, must in fact be relieved or discharged from serving. Since the petitioner's exemption in *Astrup* was only temporary, the Court reasoned that insufficient grounds were furnished to prevent naturalization. The Court thus held the United States to its word and repeated a statement by Justice Black in a different case, that "Great nations, like great men, should keep their word."

**IX. Citizenship**

Methods of acquiring and loosing citizenship raise fundamental issues over who is a member of the national political community. Easily obtained expulsions from group membership threaten the security of each individual's citizenship and discourage full participation in the democratic form of government.

**A. Citizenship of Those Born Abroad**

There are two fundamental ways in which citizenship is passed through the generations. Common law recognized the

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1153. Id. at 510.
passing of citizenship at birth to those infants born within the geographic boundaries of the country.\footnote{1157} This is known as the principle of \textit{jus soli}.\footnote{1158} From the earliest times, however, special provision was made for children born to citizens while in a foreign country. The passing of citizenship was said to be through blood, or descent and is known as the principle of \textit{jus sanguini}.\footnote{1159} Problems often arose concerning rights of inheritance. For example, in 1350, during the reign of Edward the Third, a statute was passed allowing children born abroad to English parents the same rights of inheritance other English subjects enjoyed.\footnote{1160} In 1676, the English Parliament passed a statute to aid in the naturalization of the King's subjects who were born in foreign countries.\footnote{1161} Other British statutes addressed similar issues.\footnote{1162}

\footnote{1157. See \textit{e.g.}, \textit{Minor v. Happersett}, 88 U.S. (21 Wall.) 162, 167–78 (1874).}
\footnote{1158. See \textit{United States v. Wong Kim Ark}, 169 U.S. 649, 667 (1898).}
\footnote{1159. \textit{Id.} Reportedly, the rule in ancient Rome was one of \textit{jus sanguini}, "where the citizenship of the child followed that of the parent." \textit{Id.} at 666. Similarly, in France, the "Code of Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, \textit{jus soli}, the rule of descent or blood, \textit{jus sanguini}, as the leading principle." \textit{United States v. Wong Kim Ark}, 169 U.S. 649, 667.}
\footnote{1160. An Act touching such as be born beyond the Seas, 25 Edw. 3 (1350) (Stat. 2) provided:}
\footnote{1161. An Act for the Naturalizing of Children of his Majesty's English subjects born in foreign countries during the late Troubles, 29 Car. 2, ch. 6 (1676).}
\footnote{1162. An Act for naturalizing Foreign Protestants, 7 Anne, ch. 5, § 3 (1708) prescribed that "the Children of all natural-born Subjects born out of the Ligeance of her Majesty, her Heirs and Successors, shall be deemed, adjudged and taken to be natural-born Subjects of this Kingdom, to all Intents, Constructions, and Purposes whatsoever." \textit{See also}, An Act to explain a Clause in an Act made in the seventh Year of the Reign of her late Majesty Queen Anne (\textit{for naturalizing foreign Protestants}) which relates to the Children of the natural-born Subjects of the Crown of England, or of Great Britain, 4 Geo. 2, ch. 21 (1731):}

\begin{quote}
And that all Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages, to have and bear the Inheritance within the same Ligeance, as the other Inheritors aforesaid in Time to come; so always that the Mothers of such Children do pass the Sea by the Ligeance and Wills of their Husbands.
\end{quote}

\begin{quote}
That all Children born out of the Ligeance of the Crown of England, or of Great Britain, or which shall hereafter be born out of such Ligeance, whose Fathers were or shall be natural-born Subjects of the Crown of England, or of Great Britain, at the Time of the Birth of such Children respectively, shall and may . . . be adjudged and taken to be, and all such Children are hereby declared to be natural-born Subjects of the Crown of Great Britain, to all Intents, Construc-
Under the principle of *jus soli*, the children of English subjects born abroad also obtained citizenship of the foreign country in which they were born. The problem of dual nationality thus arose, with its conflicting demands of allegiance to two sovereigns. Nonetheless, the British statutes remained quite generous in granting citizenship to foreign-born grandchildren of natural born subjects. This did not extend so far as to grant English citizenship to great grandchildren of natural-born English subjects. The obligation to provide these great grandchildren with the protection of the British Crown was too great, in light of competing demands other countries placed on them, and the significantly attenuated nature of their ties to England.

In the United States, statutes have provided for the granting of citizenship to children born abroad to United States citizens. During the period of 1802 to 1854, however, the statutes did not allow for *jus sanguini.* In the language of the Supreme Court, "'naturalization by descent' was not a common-law concept but was dependent, instead, upon statutory enactment." One state court indicated that absent any federal or state court decisions or statutes, the question of citizenship to those born abroad to a United States citizen must be decided on the basis of English common law as it existed prior to the passage of any English statutes on the subject, which directed the court's inquiry back to the year 1350.

Under the common law tradition, a child born abroad to an alien father and a citizen mother was barred from inheriting the

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1163. See discussion in text accompanying note 1232–1303 infra.
1164. 13 Geo. 3, ch. 21 (1773).
1168. Ludlam v. Ludlam, 26 N.Y. 356, 360–62 (1863), referring to 25 Edw. 3. See note 1160, supra. In addressing the question of inheritance, the court decided that a child born in Peru was a United States citizen since his father was a United States citizen. To avoid the problem of conflicting allegiance and conflicting requirements of sovereign protection, the court stated that once such a child comes of age, he must elect which citizenship he will take permanently. Id. at 371, 377.
mother's citizenship. 1169 The United States adopted the rule 1170 until modern times. 1171 In Montana v. Kennedy, 1172 this prohibited a woman from passing her citizenship to her child born while she was abroad, despite the fact that within one year of the child's birth he and his mother returned to the United States and he resided there continuously for fifty-five years. 1173 The Supreme Court upheld the rule despite noting the "apparent harshness" 1174 of requiring the deportation of a fifty-five-year-old man who had resided in the United States since infancy. 1175

Theoretically, there is no difference between citizenship obtained by the native born and citizenship obtained by those who are naturalized. 1176 Naturalized citizens receive the protection of due process under the fifth amendment. 1177 Thus, for example, Congress may not provide in a statute that a naturalized citizen who returns to and lives in her native country for three years will lose her United States citizenship while a native born United States citizen may reside in such foreign country indefinitely without suffering a loss of citizenship. 1178

In Rogers v. Bellei, 1179 however, the Supreme Court indicated that citizenship obtained under the doctrine of jus

1169. Collingwood and Pace, 86 Eng. Rpts. 262, 268 (K.B. 1726) ("[I]t is without question that, if an English woman go beyond the seas, and marry an alien, and have issue beyond the seas, the issue are aliens . . . .").


1171. Act of May 24, 1934, ch. 344, 48 Stat. 797, amending Rev. Stat. § 1993. The petitioner in Montana was born in 1906 in Italy. 366 U.S. at 309. According to the Court, this amendment was prospective only. Id. at 312.


1173. Id. at 309.

1174. Id.

1175. Id. at 310.


1177. Id. at 168–69.

1178. Id. The statute under scrutiny in Schneider was § 352 (a)(1) of the INA of 1952, 66 Stat. 163, 269, repealed by Act of Oct. 10, 1978, Pub. L. No. 95–432, § 2, 92 Stat. 1046. But cf. the British Nationality Act of 1948, 11 & 12 Geo. 6, ch. 56, § 20(3), which subjects a naturalized citizen to expatriation for grounds not applicable to natural-born citizens although such grounds are not related to the actual naturalization process. The section makes disloyal acts or speech a basis for denaturalization (§ 20(3)(a)) and also provides that within a five-year period following naturalization imprisonment for a term of not less than twelve months will result in loss of citizenship (§ 20(3)(c)).

sanguini is of a different status and may be treated differently than citizenship obtained under the doctrine of *jus soli*. In *Bel-
lei* the Court interpreted the first sentence of the fourteenth amendment as an application of the principle of *jus soli* since it grants citizenship to individuals who are either born or natural-
ized in the United States who are also subject to its jurisidic-
tion.\textsuperscript{1180} In *Bellei*, the individual who was denied citizenship was born abroad to a United States citizen mother and an alien fa-
thер,\textsuperscript{1181} and stood ready to take United States citizenship under the principle of *jus sanguini*. His claim failed because he had not complied with a statutory residency requirement. A chal-
lenge to the constitutionality of the requirement of section 301(b) of the INA,\textsuperscript{1182} on fifth amendment due process and four-
teenth amendment grounds, was rejected by the Court. Although subsequently modified, the statute, as applied in *Bellei*, required a “post-age-14 and pre-age-28 residential requirement”\textsuperscript{1183} of any national and citizen of the United States who was born aboard by one United States parent and one alien parent. In

\begin{itemize}
\item \textsuperscript{1180} Id. at 830.
\item \textsuperscript{1181} Id. at 817.
\item \textsuperscript{1182} 66 Stat. 163, 236, \textit{repealed by} Act of Oct. 27, 1972, Pub. L. No. 92-584, § 1, 86 Stat. 1289. That section provided:
\begin{quote}
(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to the age of attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: \textit{Provided}, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.
\end{quote}
\begin{quote}
SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:
\begin{quote}
(7) a person born outside the geographic limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: \textit{Provided}, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.
\end{quote}
\end{quote}
\item \textsuperscript{1183} 401 U.S. at 817.
\end{itemize}
Bellei, the deprivation of citizenship was upheld.

Bellei involved an alien father, a citizen of Italy, who was never a United States citizen. He married the plaintiff's mother in Philadelphia in 1939. She was 24, a United States citizen, and had fulfilled a requirement of ten-year physical presence in the United States by residing more than five of those years while over the age of fourteen within the United States. According to the terms of the statute then in force, she was therefore eligible to pass her United States citizenship to a child born abroad.\footnote{1184} After the married couple moved to Italy, the plaintiff was born in 1939, and thereby attained Italian citizenship at birth under Italian law. At birth, plaintiff also obtained United States citizenship under existing United States law.\footnote{1185} Later, the plaintiff failed to comply with the provisions of section 301(b) of the INA by not beginning a period of residence in the United States prior to his twenty-third birthday that would permit him to reside physically in the United States for a continuous period of five years prior to his 28th birthday.\footnote{1186}

In denying citizenship, the Court circumscribed the effect of two earlier decisions rendered by the Warren Court.\footnote{1187} The Court reasoned that under the fourteenth amendment, Bellei was neither born nor naturalized in the United States, nor had he been subject to its jurisdiction.\footnote{1188} In short, Bellei was not "a Fourteenth-Amendment-first-sentence citizen."\footnote{1189} The Court accepted this as a distinguishing factor from the rules an-

\footnote{1184. As required by § 301(a) of the 1952 Act, 66 Stat. 235–36. See supra note 1182.}
\footnote{1185. Act of May 24, 1934, § 1, 48 Stat. 797, amending REV. STAT. § 1993 (2d ed. 1878).}
\footnote{1186. Notably, when Bellei, the plaintiff, was twenty years of age he registered in Italy, under the United States Selective Service requirements. He was "asked to report for induction in the District of Columbia" after his twenty-third birthday when, technically, he had already lost his United States citizenship. 401 U.S. at 819. His induction was deferred since he was a NATO employee in Europe. In early 1964, however, Selective Service informed him he was no longer obligated to the United States military because he had previously lost his United States citizenship.}
\footnote{1187. Afroyim v. Rusk, 387 U.S. 253 (1967) (involuntary expatriation of a naturalized citizen prohibited, although the citizen participated in a foreign election); Schneider v. Rusk, 377 U.S. 163 (1964). According to Justice Blackmun, these cases were based upon fourteenth amendment citizenship. Bellei, 401 U.S. at 835.}
\footnote{1188. The first sentence of § 1 of the fourteenth amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."}
\footnote{1189. 401 U.S. at 827.}
nounced in earlier cases involving loss of citizenship. According to Justice Blackmun in *Afroyim v. Rusk*,\(^{1190}\) where citizenship was maintained, the individual "was naturalized in the United States"\(^{1191}\) and, in *Schneider v. Rusk*,\(^{1192}\) the alien's "citizenship was derivative by her presence here and by her mother's naturalization here."\(^{1193}\)

Since the fourteenth amendment did not apply to Bellei, Justice Blackmun turned to the applicable statutory provision enacted by Congress under its power to "establish an uniform rule of Naturalization."\(^{1194}\) The Court reasoned that since Congress could withhold citizenship from someone in Bellei's position until he resided in the United States a specified period, Congress could also grant citizenship to one born abroad pursuant to the imposition of a subsequent condition of residency for a specified period within the United States. Bellei's claim to citizenship was "wholly, and only, statutory."\(^{1195}\) Therefore, the statute could constitutionally provide for denial of the claim.

Justice Black's dissent made clear the irreconcilability of the decision with prior cases. In *Afroyim*, for example, the Court granted fourteenth amendment protection to citizenship against any statutory deprival unless the citizen voluntarily relinquished such citizenship. The Constitution does not provide for different categories of citizenship. Once citizenship is obtained, it cannot be differentiated from the citizenship others possess. In *Bellei*, the plaintiff had "neither renounced his American citizenship nor voluntarily assented to any governmental act terminating it."\(^{1196}\) Justice Black would have held that section 301(b) of the INA was in conflict with the result obtained in *Afroyim* because the statute did not consider the citizen's intent to relinquish his citizenship. Additionally, *Schneider* rejected the "concept of a hierarchy of citizenship" that allows for the citizenship of some individuals to be less secure than the citizenship of others.\(^{1197}\) The fourteenth amendment does not protect "the citizenship of

\(^{1190}\) 387 U.S. 253 (1967).
\(^{1191}\) 401 U.S. at 827.
\(^{1192}\) 377 U.S. 163 (1964).
\(^{1193}\) 401 U.S. at 827.
\(^{1194}\) U.S. CONST. art. I, § 8, cl. 4, quoted at 401 U.S. at 829.
\(^{1195}\) 401 U.S. at 833.
\(^{1196}\) *Id.* at 838.
\(^{1197}\) *Id.* at 839.
some Americans and not others."\textsuperscript{1198}

According to Justice Black's dissent, Bellei was naturalized into the United States by the statute granting him citizenship at birth. He was thereby naturalized in the United States under the language of the fourteenth amendment.\textsuperscript{1199} Anyone who obtained citizenship under a statute which Congress passed pursuant to its power to establish a "uniform rule of Naturalization" is a "naturalized" citizen for purposes of the fourteenth amendment. The rule from \textit{Schneider v. Rusk} is that there should be no difference between the status of citizenship stemming from the manner in which that citizenship has been obtained. The word "in" appearing in the first sentence of the fourteenth amendment, Justice Black pointed out, means "into": All persons naturalized \textit{into} the United States are citizens of the United States.\textsuperscript{1200} Justice Black relied upon \textit{Afroyim} for the proposition that "every American citizen has Fourteenth Amendment citizenship."\textsuperscript{1201}

The Court's decision in \textit{Bellei} is not completely compatible\textsuperscript{1202} with \textit{Schneider v. Rusk}.\textsuperscript{1203} In \textit{Schneider}, the Court held that the fifth amendment's guarantee of due process prohibited unequal treatment between native born citizens and those citizens who obtained their citizenship through naturalization. The statute under scrutiny,\textsuperscript{1204} which was held unconstitutional, revoked the citizenship of a naturalized citizen who resided in the

\textsuperscript{1198} Id.
\textsuperscript{1199} Id. at 839-40. Justice Black explained that Bellei was "constitutionally speaking, 'naturalized in the United States.'" 401 U.S. at 839 (quoting U.S. CONST. amend. XIV, § 1). Justice Black presented a practical definition of "naturalization." According to this definition, "naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization." Id. at 841.

\textsuperscript{1200} Id. at 843.
\textsuperscript{1201} Id. at 843-44.
\textsuperscript{1202} Justice Brennan's dissent placed the \textit{Bellei} decision into perspective vis-à-vis the Warren Court decisions when he stated that "I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again . . . the Court's opinion makes evident that its holding is contrary to earlier decisions." 401 U.S. at 845.
\textsuperscript{1203} 377 U.S. 163 (1964).
country "of which she was formerly a national"\textsuperscript{1205} for a period of three years or more, but it did not similarly provide for citizenship revocation of native-born citizens from the United States who resided in other countries for similar extended periods. The Court forbade a statutory distinction based upon the method of acquiring citizenship.\textsuperscript{1206}

The majority in \textit{Bellei} distinguished \textit{Schneider} and \textit{Afroyim} on the basis that those two earlier decisions involved naturalization of individuals who had spent some time within the United States. The result in \textit{Afroyim}, however, permitted denaturalization only where the United States citizen intends to relinquish it. The Court stated in \textit{Afroyim} that "neither the Fourteenth Amendment nor any other provision of the Constitution expressly grants Congress the power to take away that citizenship once it has been acquired."\textsuperscript{1207} Therefore, the citizen must intend to relinquish such citizenship. Further, the element of intent cannot be invoked in some denaturalizations, while not considered in other denaturalizations, since so doing violates the holding in \textit{Schneider} that no distinction may be made favoring one subclass of citizens over another.

\textbf{B. Expatriation of Those Born Within the United States}

Birth within the United States is not necessarily a guarantee of citizenship.\textsuperscript{1208} But it is now beyond cavil that, absent certain restrictions,\textsuperscript{1209} an individual born in the United States is a United States citizen.\textsuperscript{1210} The Civil Rights Act of 1866 reaffirmed the principle of \textit{jus soli} within the United States.\textsuperscript{1211} Ratification

\textsuperscript{1205} \textit{Bellei}, 401 U.S. at 821.
\textsuperscript{1206} Indeed, the language of \textit{Schneider} provides: "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." \textit{Schneider}, 377 U.S. at 165.
\textsuperscript{1207} \textit{Afroyim}, 387 U.S. at 254-55.
\textsuperscript{1208} See, \textit{e.g.}, Quock Ting v. United States, 140 U.S. 417 (1891)(evidence that a child was born in the United States may lack credibility and he may be denied entry into the United States).
\textsuperscript{1209} \textit{E.g.}, children of ambassadors, or of enemy aliens, particularly those of an occupying force. United States v. Wong Kim Ark, 169 U.S. 649, 657-58, 674-75, 682 (1898).
\textsuperscript{1211} Act of Apr. 9, 1886, ch. 31, § 1, 14 Stat. 27, provided that "all persons born in the United States and not subject to any foreign power . . . are hereby declared to be
of the fourteenth amendment on July 28, 1868, ensured that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."\textsuperscript{1212} This rule was interpreted in \textit{United States v. Wong Kim Ark}\textsuperscript{1213} to guarantee citizenship to any child born within the geographic boundaries of the United States unless the parents of such child were either diplomats of a foreign country or serving in some official capacity for a foreign government.\textsuperscript{1214}

In \textit{Wong Kim Ark}, an individual of Chinese ancestry born in San Francisco\textsuperscript{1215} was denied permission to return to the United States following a trip to China.\textsuperscript{1216} His claim to United States citizenship was upheld by the Supreme Court over the restrictions of the Chinese Exclusion Acts,\textsuperscript{1217} which were designed to prohibit certain individuals of the Chinese race\textsuperscript{1218} as well as Chinese laborers\textsuperscript{1219} from entering the country. The Supreme Court suggested limitations on the congressional power to regulate naturalization when it stated that "[t]he power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."\textsuperscript{1220} Controversy on this point continues although it may be conceded that the modern rule supports a contrary conclusion.\textsuperscript{1221}

Throughout history, there have been numerous instances in which the courts have upheld legislation designed to strip individuals of their citizenship, regardless whether such citizenship belonged to the native born\textsuperscript{1222} or the duly naturalized.\textsuperscript{1223}

\begin{footnotesize}
\begin{itemize}
  \item U.S. Const. amend. XIV, § 1, proposed June 16, 1866 by the House and Senate "to the legislatures of the several States," 14 Stat. 358, and ratified July 28, 1868, 15 Stat. 708–11.
  \item 169 U.S. 649 (1898).
  \item Id. at 653.
  \item Id. at 652.
  \item Id. at 653.
  \item The Chinese Exclusion Acts appear at note 17 supra.
  \item See, e.g., Act of May 6, 1882, ch. 126, 22 Stat. 58, and other statutes cited in note 17 supra.
  \item Wong Kim Ark, 169 U.S. at 703.
  \item See, e.g., cases cited at notes 1224–1353 infra.
  \item See, e.g., discussion at text accompanying notes 1224 and 1229 infra.
  \item See, e.g., discussion at text accompanying notes 1304–53 infra.
\end{itemize}
\end{footnotesize}
In *MacKenzie v. Hare*,\(^{1224}\) for example, the Court upheld a statute which suspended, during marriage, the citizenship of a native born woman who married a foreigner yet who remained within the United States. Under the statute at the time,\(^{1225}\) upon termination of the marriage, the woman could resume her United States citizenship by continuing to reside within the United States. The unconvincing rationale behind this decision was that the expatriation occurred voluntarily as indicated by the free undertaking of marriage.\(^{1226}\) In recent times, Congress has provided for restrictions on expatriation so that a citizen cannot be expatriated while within the United States.\(^{1227}\) A naturalized citizen, however, may be denaturalized while within the United States following a court proceeding which determines that the original grant of naturalization was improperly conferred.\(^{1228}\)

In *Savorgan v. United States*,\(^{1229}\) the Court held that a native born citizen who obtained Italian citizenship in order to marry her Italian husband in 1940, and who lived in Italy and Germany from 1941 to 1945, had lost her United States citizenship as Congress required by statute.\(^{1230}\) The Court identified voluntary intent as a required component for expatriation measured according to an objective basis through the ordinary meaning of the woman's overt acts in taking Italian citizenship and an oath of allegiance to Italy. Although the oath the woman signed renouncing her United States citizenship was in a language she could not understand,\(^{1231}\) the Court considered the ordinary meaning of her acts and did not condition expatriation

1224. 239 U.S. 299 (1915).
1226. Mackenzie v. Hare, 239 U.S. at 310–12.
1228. See the cases discussed *supra* at text accompanying notes 1304–53 *infra*. See 8 U.S.C. § 1451(a) (1982) (judicial revocation of naturalization by setting aside order admitting person to citizenship).
1230. The Nationality Act of 1940, ch. 876, § 401(a), (b), 54 Stat. 1168–69.
upon an analysis of her undisclosed intentions.

C. Dual Nationality

The restrictions on citizenship to those born abroad seek in large part to avoid the problems accompanying dual nationality. In *Perkins v. Elg*, the Court defined dual nationality as that condition in which "two States make equal claim to the allegiance of an individual at the same time." It is generally regarded as a disfavored status because of the conflicts that can arise when two states make competing claims over the same individual, or when the dual national turns to one state for protection from the other. Despite statutory allowances granting citizenship to those born abroad, nations may seek to protect their interests by curtailing this method of obtaining citizenship. In the United States, children born abroad to American citizens who themselves obtained United States citizenship through descent and not from presence in the United States, would not be considered fourteenth amendment first-sentence citizens. Such children's claim to citizenship thereby rests more heavily upon the statutory largesse of Congress’ constitutionally authorized naturalization power.

For example, based upon statutory interpretation, the Supreme Court held in *Weedin v. Chin Bow*, that a United States citizen father must have resided in the United States before the birth abroad of his child in order for that child to obtain United States citizenship. In *Chin Bow*, the individual laying the claim to United States citizenship was born in China. His grandfather was born in the United States and thereby possessed United States citizenship. Chin Bow's father was born in China and took his United States citizenship from Chin Bow's grandfather. Chin Bow's father did not visit the United States

1232. 307 U.S. 325, 344 (1939), (quoting DEP'T OF STATE, COMPILATION OF CERTAIN DEPARTMENTAL CIRCULARS, 118, 121, 122 (1925) (containing instructions to diplomatic and consular officers)). The Court has also defined dual nationality to be the "exercise [of] rights of nationality in two countries [while] subject to the responsibilities of both." *Kawakita v. United States*, 343 U.S. 717, 723 (1952).

1233. See text accompanying notes 1157–1207 *supra*.

1234. See text accompanying note 1189 *supra*.

1235. 274 U.S. 657 (1927).
until after Chin Bow's birth,\textsuperscript{1236} and according to statute,\textsuperscript{1237} the succession of citizenship was curtailed as to Chin Bow. The latent anomaly in such a scheme was that a father could be abroad and have alien children, but later travel to the United States and have citizen children. Nevertheless, the Court rejected Chin Bow's argument that his father's residence at any time in the United States entitled Chin Bow to citizenship. Part of the Court's rationale lay in the proposition that the father's residence requirement would have to be fulfilled prior to the transmission of citizenship. Since the transmission occurs at the birth of the child, rather than upon the death of the ancestor,\textsuperscript{1238} Chin Bow's claim failed. By curtailing Chin Bow's claim to citizenship, the Court eliminated the potential problem of dual nationality.

In appropriate circumstances, the Court will tolerate the existence of a condition which looks tellingly to be one of dual nationality.\textsuperscript{1239} The Court has allowed persons to have dual nationality while leaving the details for Congress and the lower courts to resolve. The Court has been reluctant to prohibit dual nationality when the individual is a native born United States citizen,\textsuperscript{1240} or when there are other compelling reasons to continue United States citizenship.\textsuperscript{1241} 

\textit{Perkins v. Elg,}\textsuperscript{1242} for example, concerned Marie Elg who was born in the United States in 1907 to emigrants from Sweden. From 1911 to 1929, she resided in

\textsuperscript{1236} Chin Bow, 274 U.S. at 658.
\textsuperscript{1237} Rev. Stat. § 1993 (2d ed. 1878), which provided:

\begin{quote}
All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.
\end{quote}

This provision embodied the Act of Feb. 10, 1855, ch. 71, 10 Stat. 604, which reenacted provisions that had been repealed by the Act of Apr. 14, 1802, § 5, 2 Stat. 153. See note 1165, supra.

\textsuperscript{1238} Chin Bow, 274 U.S. at 675.
\textsuperscript{1239} See, e.g., United States v. Gay, 264 U.S. 353 (1924) (the presumption that a naturalized citizen relinquishes his citizenship by returning to and living in his native country for over two years does not apply where the individual was rendering services for the United States Navy).
\textsuperscript{1241} See, e.g., Kawakita v. United States, 343 U.S. 717 (1952), discussed \textit{infra} at text accompanying note 1250 \textit{infra}.
\textsuperscript{1242} 307 U.S. 325 (1939).
Sweden. In 1929 she was admitted to the United States on a United States passport as a United States citizen. Subsequently, the Department of Labor threatened her with deportation from time to time, and the Secretary of State refused to issue her another passport. The Court held that a child born in the United States who is taken, during his or her minority, to the country of his parents' origin and whose parents resume their allegiance to the foreign country, does not therefore lose his or her "citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties." Absent a suitable treaty or statute to alter this result, a person may have a dual nationality until reaching "adult years," at which time an election needs to be made.

The Court extended this ruling in Mandoli v. Acheson to allow a native born United States citizen to maintain his citizenship despite his foreign residence in Italy, his parents' native country, many years after attaining his majority. The Court decided that although the individual in Perkins v. Elg returned to the United States promptly upon reaching her majority, the Elg Court ruling did not apply to factual circumstances where the individual claiming citizenship had resided outside the United States for a longer period of time. The Court in Mandoli v. Acheson expressed reluctance to remove citizenship absent a clear statutory mandate to do so, and described the immigration officials' view of the law as "harsh and technical."

The Court relaxed its intolerance of dual nationality most strikingly in Kawakita v. United States, where, notwithstanding the preceding case law restrictions on dual nationality, it held that a native born United States citizen of Japanese parents who lived in Japan during the Second World War had not committed acts amounting to expatriation despite his se-

1243. Id. at 327.
1244. Id. at 328.
1245. Id. at 329 (footnote omitted).
1246. Id. at 345.
1247. 344 U.S. 133, 134 (1952) (Jackson, J.).
1248. Id. at 139.
1249. Id. at 138.
1250. 343 U.S. 717 (1952) (Douglas, J.).
1251. Id. at 720–21.
verely abusive treatment\textsuperscript{1252} of United States prisoners of war during the Second World War. Thus, in punishment for his cruelties the Court was able to find him guilty of treason, which would not have been the case had the Court determined such acts resulted in expatriation, since a citizen owes an enforceable allegiance to his country which a nonresident alien does not.\textsuperscript{1253} A citizen's breach of such allegiance can result in a determination of treason under article III, section 3 of the Constitution.\textsuperscript{1254} Nonetheless, the Court attempted to limit its toleration by stating dual nationality "could not exist if the assertion of rights or assumption of liabilities of one [citizenship] were deemed inconsistent with the maintenance of the other."\textsuperscript{1255} It is difficult to imagine a scenario where an inconsistency could be more pronounced than under the facts in \textit{Kawakita}.

Six years after deciding that a citizen had not expatriated himself by aiding the Japanese in World War II, the Court determined in \textit{Perez v. Brownell}\textsuperscript{1256} that a native born United States citizen had expatriated himself by voting in a presidential election in Mexico. Statutes specifically provided for expatriation as a result of such activities.\textsuperscript{1257} The Court found Congress has the power to regulate voting by a United States citizen in a foreign country under its power to deal with foreign affairs.\textsuperscript{1258} In distinction with \textit{Kawakita}, where the United States has an
interest in seeing a treasonous actor remain eligible for prosecution upon returning home, the nation also has an interest in cutting ties with a citizen who votes in foreign elections in order to avoid embarrassment in the conduct of United States foreign affairs.\textsuperscript{1259} In \textit{Perez}, the Court also announced that Congress’ power to terminate citizenship did not depend upon that citizen’s assent.\textsuperscript{1260} This contradicted earlier statements made by the Court that expatriation is a voluntary renouncement of citizenship.\textsuperscript{1261} The Court has since modified its position on the issue of assent in expatriation cases.\textsuperscript{1262}

Chief Justice Warren’s dissent in \textit{Perez v. Brownell} was instrumental in leading to the overruling of that decision, although the Court has not completely embraced his expansive view. He reasoned that since the government exists only by the consent of the governed, the government cannot subsequently exclude individuals from the group from which the government received its existence and legitimacy.\textsuperscript{1263} Under the former Chief Justice’s concept of the relationship between the individual citizens and the government, “the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government.”\textsuperscript{1264} Individual citizenship is subject to the powers of a single branch of government to an even lesser extent.\textsuperscript{1265} Chief Justice Warren would have flatly prohibited the government from removing the citizenship of either the native born or the lawfully naturalized.\textsuperscript{1266}

\textsuperscript{1259} \textit{Id.}, 356 U.S. at 60–61. For example, many naturalized United States citizens participated in the Saar Plebiscite in January 1935 to determine sovereignty over that territory. \textit{Id.} at 54.

\textsuperscript{1260} \textit{Id.} at 61.

\textsuperscript{1261} \textit{See, e.g.}, Perkins v. Elg, 307 U.S. 325, 334 (1939) (“Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.”). Conversely, a post–Civil War statute recognized the right of all citizens freely to expatriate themselves without consent of the sovereign. \textit{Rev. Stat.} § 1999 (2d ed. 1878); Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223, 223–24.

\textsuperscript{1262} \textit{See, e.g.}, Afroyim v. Rusk, 387 U.S. 253 (1967); Vance v. Terrazas, 444 U.S. 252 (1980).

\textsuperscript{1263} \textit{Perez}, 356 U.S. at 64.

\textsuperscript{1264} \textit{Id.} at 65.

\textsuperscript{1265} \textit{See, e.g.}, Justice Black’s concurrence in \textit{Nishikawa v. Dulles}, 356 U.S. 129, 138 (1958) (Black, J. concurring) (citizenship is a constitutional birthright which may not be involuntarily removed: “What the Constitution has conferred neither the Congress, nor the Executive, nor the Judiciary, nor all three in concert, may strip away.”).

\textsuperscript{1266} \textit{Perez}, 356 U.S. at 66, 77. Chief Justice Warren explained:
On the same day in which the Court decided Perez, it rendered two other expatriation decisions which went the other way. In a plurality opinion authored by Chief Justice Warren, the Court in Trop v. Dulles returned to the position that relinquishment of citizenship must be voluntarily accomplished either through express language or a combination of language and conduct demonstrating a renunciation of citizenship. In Trop, a native born American was held not to have lost his citizenship and not to have become a stateless person despite his conviction for desertion from the United States armed forces in French Morocco during wartime following an absence of less than one day. Unlike circumstances where a United States citizen votes in a foreign election, in the case of a brief desertion, the United States citizen does not have the opportunity to involve himself with a foreign state or to show allegiance to another state. The Trop Court also considered that since the military authorities had already provided a penalty for desertion, denaturalization as a further punishment violated the eighth amendment’s ban against cruel and unusual punishment.

In a third expatriation decision rendered on the same day as

My conclusions are as follows. The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this priceless right is immune from the exercise of governmental powers. If the Government determines that certain conduct by United States citizens should be prohibited because of anticipated injurious consequences to the conduct of foreign affairs or to some other legitimate governmental interest, it may within the limits of the Constitution proscribe such activity and assess appropriate punishment. But every exercise of governmental power must find its source in the Constitution. The power to denationalize is not within the letter or the spirit of the powers with which our Government was endowed. The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country. The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship. The record in this case does not disclose any of the circumstances under which this petitioner voted. We know only the bare fact that he cast a ballot. The basic right of American citizenship has been too dearly won to be so lightly lost.

1269. Id. at 92.
1270. Id. at 87-88.
1271. Id. at 101.
the two just described, the Court determined in *Nishikawa v. Dulles*,\(^{1272}\) that the government must meet a clear, convincing, and unequivocal standard\(^{1273}\) to establish that a native born United States citizen, who was also a citizen of Japan and who served in the Japanese Army during the Second World War, had by his actions voluntarily renounced his United States citizenship. The dispute focused on whether the United States citizen freely joined the Japanese Army or was involuntarily drafted into it with no alternative.\(^{1274}\) The Court applied the rule of an earlier case that the clear, convincing and unequivocal evidentiary standard also applies in expatriation proceedings.\(^{1275}\)

Other safeguards apply in an expatriation proceeding as well. In *Kennedy v. Mendoza-Martinez*,\(^{1276}\) the statutorily required expatriation of native born United States citizens who left the United States to evade military service was held an unconstitutional punishment since expatriation occurred automatically without the procedural safeguards of the fifth and sixth amendments. According to the Court in *Mendoza-Martinez*, deprivation of citizenship is a punishment which "cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses."\(^{1277}\)

In *Afroyim v. Rusk*,\(^{1278}\) the Court resolved doubt on the issue of the necessary state of mind that a citizen must have while committing an expatriating act in order for the expatriation to become effective. The Court held that a citizen must voluntarily renounce citizenship, and that the citizen's assent to expatriation is required.\(^{1279}\) The basis of the Court's decision lay in its analysis that "[i]n our country the people are sovereign and the Government cannot sever its relationship to the people by tak-

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\(^{1273}\) 356 U.S. at 133. For a discussion how this standard developed and applies in denaturalization proceedings, see the discussion *infra* accompanying notes 1304–53. The burden was placed on the government. See *Vance v. Terrazas*, 444 U.S. 252 (1980).

\(^{1274}\) *Id.* at 134–35. See also *Acheson v. Okimura*, 342 U.S. 899 (1952); *Acheson v. Murata*, 342 U.S. 900 (1952).

\(^{1275}\) *Id.* at 133. See *Gonzales v. Landon*, 350 U.S. 920 (1955).


\(^{1277}\) *Id.* at 167.

\(^{1278}\) 387 U.S. 253 (1967).

\(^{1279}\) *Id.* at 257.
ing away their citizenship."\textsuperscript{1280} Referring to the natural and inherent right of all people to expatriation,\textsuperscript{1281} the Court recognized that the government cannot control or confer such right.\textsuperscript{1282} In\textit{Afroyim}, a Polish national who became a naturalized United States citizen later voted in an election for the Knesset in Israel. In determining that he had not lost his United States citizenship, the Court overruled\textit{Perez v. Brownell}.\textsuperscript{1283} \textit{Afroyim} held that the statute requiring expatriation for voting in a foreign election\textsuperscript{1284} was unconstitutional since the citizen had not assented to expatriation nor voluntarily renounced his citizenship. A subsequent opinion by the United States Attorney General took the position that the \textit{Afroyim} principles reached several other sections of the 1952 Act.\textsuperscript{1285}

In\textit{Vance v. Terrazas},\textsuperscript{1286} the Supreme Court described in greater detail the application of the "voluntary relinquishment" standard. In this case, a native born United States citizen who also bore Mexican nationality was charged with loss of United States nationality because he allegedly swore an oath of allegiance to Mexico in violation of statute\textsuperscript{1287} and renounced his United States citizenship. Based on the preceding cases where much more egregious acts were held not to expatriate United States citizens bearing dual nationality,\textsuperscript{1288} the taking of an oath to a foreign country perhaps does not seem as inconsistent with the continued possession of United States citizenship, especially when one considers that the individual involved was also a citizen of Mexico at the time he took the oath.\textsuperscript{1289} In\textit{Terrazas}, how-

\textsuperscript{1280} \textit{Id.}
\textsuperscript{1281} See statutes in note 1261 supra.
\textsuperscript{1282} \textit{Afroyim}, 387 U.S. at 265 n.20.
\textsuperscript{1283} 356 U.S. 44 (1958); discussed at text accompanying note 1256 supra.
\textsuperscript{1285} 42 Op. Att'y Gen. 397 (1969) (all of the provisions concerning expatriation in § 349(a) of the INA require a determination of voluntary relinquishment of United States citizenship).
\textsuperscript{1286} 444 U.S. 252 (1980).
\textsuperscript{1288} See, \textit{e.g.}, Kawakita v. United States, 343 U.S. 717 (1952), discussed at text accompanying notes 1250–55 supra.
\textsuperscript{1289} \textit{Terrazas}, 444 U.S. at 255.
ever, the Court upheld the deprivation of citizenship.

Although the denaturalization cases require compliance with a clear, unequivocal, and convincing evidentiary standard, the standard utilized in the expatriation proceeding of a native born citizen in *Terrazas* was the lower preponderance of the evidence standard as prescribed by statute. An anomaly thereby results in that the evidentiary standard used to expatriate a native born citizen is less rigorous than the standard used to denaturalize one who originally was an alien to the United States.

In *Vance v. Terrazas*, the statute in question required the government to prove by a preponderance of the evidence that an expatriating act, such as swearing an oath of allegiance to a foreign government, occurred. Any person who committed such an act is presumed to have acted voluntarily, but can rebut the presumption with a showing, by a preponderance of the evidence, that the act was not committed voluntarily. The Court

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1290. See cases discussed at text following note 1304 infra.

> (c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

When Chaunt v. United States, 364 U.S. 350 (denaturalization) was decided in 1960, and adhered to the clear, unequivocal and continuing evidence standard, this amendment dealing with the distinct issue of expatriations was not yet law and the lesser evidentiary standard could not be applied to the Chaunt decision. Following the amendment however, Fedorenko v. United States, a denaturalization proceeding indicated the clear, unequivocal, and convincing evidentiary standard was still in force. See text accompanying notes 1316–53 infra.

held, in line with earlier cases such as *Afroyim v. Rusk*, that the government must prove an intent to surrender United States citizenship. Further, the Court decided that Congress possessed the constitutional authorization to legislate the standard of proof to be utilized in expatriation proceedings as well as the authorization to legislate into existence the described statutory presumptions. *Terrazas* requires that loss of citizenship may occur only through a voluntary act of expatriation coupled with an assent to be expatriated. Assent means an intention on the part of the citizen to surrender his citizenship which can be either expressly stated or inferred from proven conduct.

The presumption that the expatriating act was voluntarily committed follows once the expatriating act is proven to have occurred. The intent, however, to relinquish citizenship cannot be presumed. Rather, the government must establish such intent by a preponderance of the evidence. Unlike *Terrazas*, in *Nishikawa*, the government had to prove the expatriating act was performed voluntarily. In *Terrazas*, the statute provided for a presumption of voluntariness. In *Nishikawa*, the government had to prove its case on the basis of the clear, convincing, and unequivocal evidentiary standard, but following a statutory amendment the Court in *Terrazas* was able to apply a preponderance of the evidence standard, finding no constitutional bar to Congress' implementation of the lesser standard.

D. Denaturalization

Citizenship may be revoked by the federal courts when it has been procured on the basis of false evidence. When a

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1295. Discussed at text accompanying note 1278 supra.
1296. This accounts for the difference in standards utilized in *Terrazas*, 444 U.S. at 264-70, and in *Nishikawa*, 356 U.S. 129 (1957).
1298. *Id* at 268.
1299. *Id*.
1301. *Id*. at 133-38.
1304. Johannessen v. United States, 225 U.S. 227 (1912) (admitted perjury of two witnesses at an initial naturalization hearing who testified falsely that the individual seeking naturalization had resided within the United States for a statutorily prescribed five-year period prior to naturalization); Schwinn v. United States, 311 U.S. 616 (1940),
statute passed by Congress so provides, a naturalized citizen living permanently abroad may lose his citizenship under the theory that such a naturalized individual indicates a lack of intent to become a permanent citizen of the United States.\textsuperscript{1306} A judge's mistake during the naturalization proceeding concerning either an interpretation of law or facts may also result in the naturalized citizen subsequently losing his citizenship.\textsuperscript{1306} An alien's failure to comply with technicalities in a naturalization proceeding can later result in denaturalization.\textsuperscript{1307} Naturalized citizenship may be revoked even where the alien's inability to comply with technical statutory requirements during the naturalization proceeding results from the delay of an agency of the United States Government.\textsuperscript{1308}

The doctrine of res judicata does not bar the United States from raising the same objections against an individual's citizenship in a denaturalization proceeding which the United States unsuccessfully advanced at an earlier naturalization proceeding.

\textsuperscript{1305} Luria v. United States, 231 U.S. 9 (1913) (since denaturalization is an equitable remedy, rather than one at law, the seventh amendment's requirement of a trial by jury does not apply, and a naturalized citizen, who moved to South Africa, joined the South African Medical Association and served in the Boer War, was properly denaturalized); see also Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601 (paragraph second).

\textsuperscript{1306} United States v. Ginsburg, 243 U.S. 472 (1917).

\textsuperscript{1307} United States v. Ness, 245 U.S. 319 (1917) (Brandeis, J.). In Ness, the alien had failed to file in his naturalization proceeding a certificate stating the date, place and manner of his arrival into the United States as required by the Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596, 597 (paragraph second). An alien who entered the United States unobserved could evade a physical examination, payment of the "alien head tax," as well as registration of entry into the country. Ness, 245 U.S. at 321. See also, Polites v. United States, 364 U.S. 426 (1960) (acts committed before naturalization can be the basis for later revocation of citizenship).

\textsuperscript{1308} Maney v. United States, 278 U.S. 17 (1928) (Holmes, J.). In this case, the alien filed a petition for naturalization on November 13, 1923, but the Department of Labor did not issue a certificate indicating the date, place, and manner of the alien's arrival into the United States, as was required under the Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596, 597 (paragraph second), until November 24, 1923, and did not mail the certificate to the naturalization court until December 3. The Supreme Court construed the statute to require a filing of the document simultaneously with the original petition of naturalization.
of that individual. To offset this advantage, the burden which the government bears to obtain an order of denaturalization is made heavy enough to afford the naturalized citizen some protections. The burden of proof rests on the government to demonstrate by clear, unequivocal, and convincing evidence that citizenship was not conferred according to exacting legal standards.

1309. United States v. Ness, 245 U.S. 319 (1917) (Brandeis, J.); Johannesen v. United States, 225 U.S. 227, 238 (res judicata does not apply when the government did not appear in the original naturalization proceeding); Knauer v. United States, 328 U.S. 654, 671 (1946) (the decision to accept an alien's oath foreclosing allegiance to his or her home country is not res judicata because no evidence is heard at the naturalization proceeding to establish the truthfulness or falsity of such an oath; fraud in the oath is not an issue adjudicated in the naturalization proceeding); see also Pearson v. Williams, 202 U.S. 281 (1906) (Holmes, J.) (board inquiries concerning an alien's right to land in the United States are not res judicata in a later deportation proceeding); Lewis v. Frick, 233 U.S. 291, 301-02 (1914) (a verdict and judgment from a federal district court acquitting an indicted alien of charges of importing a woman into the United States for immoral purposes is not res judicata and is not binding upon the executive branch's administrative proceeding when there is a subsequent deportation hearing against the same alien on the same charges).


1311. Id. at 125. In Schneiderman, the government failed to show by clear, unequivocal, and convincing evidence that the naturalized citizen had not been attached to the principles of the Constitution at the time of the naturalization. Id. at 142.


The clear, unequivocal, and convincing standard of proof is not utilized in naturalization proceedings where the burden is on the alien to show his eligibility for citizenship. Berenyi v. INS, 385 U.S. 630, 637 (1967).


The Schneiderman decision is also notable for the position Justice Murphy took regarding those who are ideologically opposed to the majority view of people in the United States, as well as for the concern which the opinion expressed to avoid trampling fundamental American values with broadly construed immigration statutes. Schneiderman involved a member of the Communist Party who refused to relinquish his United States citizenship. Justice Murphy started the Court's opinion with the caveat that "[w]e brought this case here . . . because of its importance and its possible relation to freedom of thought." 320 U.S. at 119. The Justice also stated that "[t]he constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come." Id. at 137 (footnote omitted). He announced a standard that immigra-
In the denaturalization context, the Court is reluctant to re-examine issues going to the beliefs held by an individual in an earlier naturalization proceeding, because of difficulties in proof. Sufficient proof to clear the high hurdle to warrant denaturalization may be had where objective indicia establish that the naturalized citizen falsely foreswore allegiance to his or her prior sovereign during the naturalization proceeding.

Histori-
cally, the standard of proof required under a denaturalization proceeding has generally applied to expatriation procedures as well, but Congress has, in modern times, established differing evidentiary standards.\textsuperscript{1318}

In a naturalization proceeding, it is possible an alien will not disclose all of the facts which are requested concerning his background and beliefs. The issue may then arise whether the failure to disclose should later result in denaturalization. In \textit{Chaunt v. United States},\textsuperscript{1318} the Court attempted to answer this question, but the results were not altogether satisfying. Currently, an alien affiliated with, or a member of, the Communist Party of the United States is ineligible to be naturalized.\textsuperscript{1317} In \textit{Chaunt}, however, the alien had been naturalized in 1940,\textsuperscript{1318} prior to the passage of the explicit statutory prohibition against communists in 1952. Nonetheless, an oath was required at the time of Chaunt’s naturalization in which he had to swear to support the Constitution\textsuperscript{1318} and he was also required to have “behaved as a man of good moral character, attached to the principles of the Constitution of the United States”\textsuperscript{1320} for some time prior to naturalization. Membership in the Communist Party was a bar to meeting these requirements.\textsuperscript{1321}

At his naturalization proceeding, Chaunt admitted membership in the International Workers’ Order (IWO), a group “said to be controlled by the Communist Party.”\textsuperscript{1322} Chaunt failed to

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A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of society, possessing all rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. . . . He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

\textsuperscript{1315} Gonzales v. Landon, 350 U.S. 920 (1955), \textit{rev’d} 215 F.2d 955 (9th Cir. 1954).
\textsuperscript{1316} 364 U.S. 350 (1960).
\textsuperscript{1318} \textit{Chaunt}, 364 U.S. at 350.
\textsuperscript{1320} \textit{Id.} at 598 (paragraph fourth).
\textsuperscript{1321} \textit{See, e.g., Chaunt v. United States}, 270 F.2d 179 (9th Cir. 1959), \textit{rev’d on other grounds}, 364 U.S. 350 (1960).
\textsuperscript{1322} \textit{Chaunt}, 364 U.S. at 355.
disclose, however, that he had been arrested three times for minor offenses which could have connected him with the Communist Party.\textsuperscript{1323}

Following his naturalization, the government sought to revoke Chaunt's citizenship, contending that knowledge of Chaunt's arrests would have sparked an investigation of his background which might have tied him to the Communist Party.\textsuperscript{1324} The Supreme Court refused to revoke Chaunt's citizenship because the government's knowledge of his IWO membership alone could have spurred the government to conduct the same investigation into Chaunt's background.\textsuperscript{1325}

The precise holding in Chaunt is that an alien's failure to disclose some information requested of him in his naturalization proceeding will not later be sufficient grounds for denaturalization when the government was alerted to other facts that could have led it down a similar path of investigation into the alien's background. Chaunt, however, is less remembered for its holding than for its broad dicta which clouded an area of law that had previously been quite clear.\textsuperscript{1326}

In dicta, the Court indicated that had Chaunt not admitted his membership in the IWO, the result of the case might have been different.\textsuperscript{1327} There would then conceivably have been a wall of silence completely blocking the government from investigating Chaunt's background. In the proper instance, the Court stated, a naturalized citizen may be subject to denaturalization where facts are not disclosed in the original naturalization proceeding which "might have been useful in an investigation possibly leading to the discovery of facts warranting denial of citizenship,"\textsuperscript{1328} provided that no other disclosures were made by the

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  \item \textsuperscript{1323} Id. at 354. The arrests were for activities involving distribution of handbills, public demonstrations, and breach of the peace. Id. at 352.
  \item \textsuperscript{1324} Id. at 354.
  \item \textsuperscript{1325} Id. at 355.
  \item \textsuperscript{1326} See cases cited at note 1311 supra.
  \item \textsuperscript{1327} Chaunt, 364 U.S. at 355.
  \item \textsuperscript{1328} Id. The quoted passage appears in the context of the Court's conclusion: We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Chaunt, 364 U.S. at 355. Under the facts presented in Chaunt the first prong did not
alien that could have led the government down a similar line of inquiry.\textsuperscript{1329} Chaunt was saved because he had admitted his membership in the IWO.

Application of the \textit{Chaunt} dicta is by no means straightforward. In a denaturalization proceeding the burden remains on the government to prove its case in a clear, unequivocal, and convincing fashion.\textsuperscript{1330} In practical terms, what the government must prove to satisfy this high evidentiary standard is unclear. Two possibilities suggest themselves: (1) either the government must prove that if a fact had been disclosed in a naturalization proceeding the government would have conducted an investigation without proving what the results of such an investigation would have been; or, (2) the government, under a more stringent interpretation of \textit{Chaunt}, would have to prove in a clear, unequivocal, and convincing fashion not only that it would have conducted an investigation into the alien's background, but also what the results of such an investigation would have been. When a number of years has passed between the naturalization and denaturalization proceeding, the rule adopted from the \textit{Chaunt} dicta could be decisive on the issue of whether the naturalized citizen will be denaturalized. The first interpretation of \textit{Chaunt} places naturalized citizens at greater peril of losing their citizenship than the second interpretation, because merely requiring the government to prove it would have conducted an investigation indirectly results in shifting the burden onto the citizen to establish that his omission was harmless and not worthy of warranting denaturalization. After the passage of years, any evidentiary support the citizen might possessed could have long vanished. Conversely, if the second interpretation of \textit{Chaunt} is adopted, the government is confronted with the difficulty of proving what the result of a hypothetical investigation would have been. In the interests of security of citizenship and of placing naturalized citizenship on the same par as citizenship obtained by the native born, the second interpretation of \textit{Chaunt} is more appropriate. It remains the law however, that the willful

\textsuperscript{1329} Id. at 355.
\textsuperscript{1330} See note 1311 \textit{supra}. 
concealment of a material fact in a naturalization proceeding will subsequently be a basis for denaturalization.1331

In Fedorenko v. United States1332 the Supreme Court bypassed an opportunity to clarify Chaunt by refusing to apply its analysis in the context of fraud on an initial visa application. In Fedorenko, the petitioner, a naturalized citizen of the United States, failed to disclose in his initial visa to enter the country “that he had served during the Second World War as an armed guard at the Nazi concentration camp at Treblinka, Poland.”1333 When he applied for naturalization some twenty years after settling in the United States, he again did not disclose his “wartime service as a concentration camp armed guard.”1334 He lived in the United States approximately ten years as a citizen.

Fedorenko’s original entry into the United States was covered by a special provision of the Displaced Persons Act (DPA)1335 which Congress passed “to enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas.”1336 As a former concentration camp guard, however, Fedorenko was specifically excluded from the benefits of the Act.1337 He was able to enter the United States by misrepresent-

1331. Costello v. United States, 365 U.S. 265 (1961) (alien, who applied for naturalization during Prohibition, failed to disclose his principal occupation was bootlegging; since such occupation was in flagrant violation of the eighteenth amendment, the alien could not have been held to be attached to the principles of the United States Constitution). Unlike Chaunt, in Costello, there was concrete evidence of facts (bootlegging) which if known at the naturalization proceeding, would have warranted denial of naturalization. Costello is an example of hardship that can result from loss of citizenship where the individual involved had lived 65 years in the United States and had arrived in the country when he was three years of age.


1333. Id. at 493.

1334. Id. at 497.


1336. 449 U.S. at 495.

1337. The Displaced Persons Act excluded from the scope of its benefits

1. War Criminals, quislings and traitors.

2. Any other person who can be shown:

   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

From Part II of Annex I of the Constitution of the International Refugee Organization,
ing his wartime activities. Under section 340(a) of the INA of 1952, revocation of Fedorenko's citizenship was required if such citizenship was "illegally procured or ... procured by concealment of a material fact or by willful misrepresentation." The Court noted that Fedorenko was not questioned nor required to disclose information about his service as a concentration camp guard in his naturalization proceeding. Such information, however, would have been required under the DPA when Fedorenko first applied to enter the United States. Consistent with the results in Rogers v. Bellei, Congress could specify the terms under which to grant citizenship. The Court also supported application of the "clear, unequivocal and convincing" evidentiary standard in denaturalization proceedings. This is unlike the standard used in Vance v. Terrazas, but the difference can be explained by the existence of an applicable statute in Terrazas.

Persons who will not be the concern of the Organization, 62 Stat. 3051-52 (footnote omitted). The DPA excluded the types of individuals enumerated above from eligibility for benefits bestowed upon "refugees or displaced persons." See § 2(b) of the DPA, 62 Stat. 1009.

1339. Id., quoted in 449 U.S. at 493.
1340. 449 U.S. at 497 n.9.
1342. 449 U.S. at 505. See the discussion of Schneiderman v. United States, 320 U.S. at 125, and related cases, starting at text accompanying note 1304 supra.
In terms of Chaunt v. United States, the issue in Fedorenko would naturally have presented itself as whether the government would be required under the clear, unequivocal, and convincing standard to show that it would have conducted an investigation into Fedorenko's background had it known of his wartime activities, or whether the government, under the same standard, would be required to prove what the results of such a hypothetical investigation would have been. Explanations were offered in an attempt to extenuate Fedorenko's wartime activities—such as his contention that he did not act voluntarily. The Court sidestepped the potential problem of determining the factual basis for events that had occurred almost forty years earlier by confining Chaunt to instances where false statements are made in an application for citizenship. Fedorenko had made false statements in his initial visa application. Without determining whether Chaunt applied to material misrepresentations made in a visa application, the Court in Fedorenko decided that, under the DPA, false statements at the time of the initial visa application rendered the applicant ineligible for a visa. From this determination, resolution of Fedorenko's status was straightforward. At the time of his subsequent application for citizenship, the naturalization statute required an applicant to have been lawfully admitted to the United States for permanent residence. Fedorenko was not legally in the United States since his initial visa was invalid and his failure to comply with the literal provisions for naturalization rendered his natu-
ralization ineffective. By thus confining the application of Chaunt, the Court circumscribed the effects of a decision which might otherwise spread significant evidentiary problems in all denaturalization proceedings.

An unresolved issue in Fedorenko is the scope of the holding, and whether every alien who obtains citizenship following an illegal entry is in jeopardy of losing his citizenship. Fedorenko, however, was deported to the Soviet Union, sentenced to death, and reportedly executed for his war crimes.\textsuperscript{1352} There is a likelihood that the Supreme Court will soon shed light on these issues and, in particular, clarify the controversy over the appropriate interpretation of Chaunt since the Court has recently granted certiorari in Kungys v. United States\textsuperscript{1353} to a third circuit opinion which squarely addresses the problems posed by Chaunt.

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