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A GENEROUSLY FLUCTUATING SCALE OF RIGHTS: RESIDENT ALIENS AND FIRST AMENDMENT FREE SPEECH PROTECTIONS*

Courtney Elizabeth Pellegrino

RESIDENT aliens are persons who lawfully and permanently reside in the United States, but are not United States citizens. This Comment examines the relationship of resident aliens to the free speech protections of the First Amendment through the jurisprudence of the Supreme Court. Since the conclusion of the nineteenth century, the Supreme Court has made various and contradictory pronouncements regarding this relationship. The result and its effect upon resident aliens' claims to First Amendment protections is elusive. Most Justices of the Supreme Court have agreed that resident aliens' speech activities are protected by the First Amendment in the same manner as citizens' activities. Most Supreme Court Justices have also agreed that in some contexts resident aliens' First Amendment protections are limited in ways that citizens' protections could not be limited.

The most important area in which these protections have been limited is when Congress enacts legislation directly curtailing permissible speech activities of resident aliens by providing for the deportation and denial of naturalization to resident aliens engaging in certain activities. The Supreme Court has shown extreme deference to Congress in this area by relying upon a conception of the nation state which is grounded in late nineteenth century international law and describes the power to expel any alien, at any time, for any reason, as unlimited. The Court has also employed a compact theory in order to deny resident aliens' Constitutional rights. Under this theory, only those who are citizens are parties to the Constitution and thus entitled to its protections. Alternating with the compact theory, the territoriality theory

* This title is drawn from two sources. The term “fluctuate” was used to refer to the diminished First Amendment protections available to resident aliens in the foreign affairs/immigration area. Michael Scaperlanda, The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive, United States v. Verdugo-Urquidez, 56 Mo. L. REV. 213, 238 (1991). The phrase “generous and ascending scale of rights” was used by Justice Jackson in Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) to describe the increasing claim to Constitutional protections which resident aliens have as they move toward citizenship. Id. “Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.” Id.
has also been proposed: that the Constitution applies to all persons within the territory of the United States. A third theory is that the Constitution applies to limit actions by the United States government in general, without regard to the location of affected individuals. Under the compact theory, resident aliens' entitlement to Constitutional protections increases as their connection to the United States increases. Resident aliens thus occupy a shifting middle ground between full Constitutional protection and complete denial of Constitutional protection. This middle ground is unstable, however, and matters of foreign policy and national security frequently intrude to decrease resident aliens' Constitutional protections. The deterioration of resident aliens' First Amendment Rights in the national security context is most graphically conveyed by the following statement made by former regional counsel for the United States Immigration and Naturalization Service (INS) in San Francisco to justify the deportation of resident aliens for speech activities in support of a suspected terrorist group: "Do we wait for these people to blow up the federal building?" 1

This Comment addresses the constitutional structure that allows the preclusion and limitation of First Amendment protection for resident aliens' speech activities in immigration proceedings. 2 The first part of this Comment analyzes the development of resident aliens' claims to Constitutional protections in the late nineteenth century. This section is not a comprehensive history 3 but is instead an examination of the development of theories justifying the expulsion of resident aliens. The discussion begins with several cases resulting from the Chinese Exclusion Act 4 and subsequent legislation of the 1880's. 5 These cases present attempts at the exclusion and restriction of aliens for international and domestic economic purposes. 6 The use of the category of "resident alien" to deport long term non-citizens for activities protected by the First Amendment will then be addressed. Foreign policy exclusions in the twentieth century have primarily had an ideological basis. Throughout this century, noncitizens have been subject to deportation or denial of naturalization due to political beliefs perceived to be contrary to

6. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 582-95 (1889). The United States and China began with an open immigration policy. Id. Economic pressures on the western coast of the United States intensified, however, because of the influx of immigrants. Id. Congress began to pass restrictive legislation in the 1880's to reduce the number of Chinese immigrants to the United States. Id.
United States policy. The McCarran-Walter Act of 1952\textsuperscript{7} represents the most memorable codification of provisions the entry and providing future deportation of noncitizens because of membership or affiliation with various political organizations, most notably the Communist Party.\textsuperscript{8}

The second part of this Comment examines the form that these concerns have taken during the 1980's. The focus is deportation and denial of naturalization because of membership in or affiliation with organizations suspected of involvement in terrorist activity. Exclusion for terrorist activity can be seen as an outgrowth of the much criticized ideological exclusions codified in the 1950's. The enactment of Section 901\textsuperscript{9} in 1987 extended First Amendment protections to all aliens within the United States.\textsuperscript{10} Section 901, however, contained important exceptions to constitutional protections: it did not apply to those suspected of terrorist activity, members of the PLO, and persons adverse to foreign policy.\textsuperscript{11} Additionally, Section 901 was amended in 1988 to apply only to non-immigrants.\textsuperscript{12} Thus, Congress withdrew the constitutional protections of Section 901 for immigrants, those wishing to enter and remain within the United States, while retaining these protections for those not wishing to remain, short term visitors and other non-immigrants.

The final section examines the foreign policy and terrorist exclusions as codified in the Immigration Act of 1990, passed on November 29, 1990 and effective October 1, 1991.\textsuperscript{13} The practical effect of this Act is unknown because of its recent passage. Thus, this discussion will be more speculative. Regulations implementing the Act are still being issued and much of the machinery of the McCarran-Walter Act must be dismantled. Particularly troublesome is the Visa Lookout System which contains over 300,000 names of persons, including resident aliens, considered to be excludable under the McCarran-Walter Act.\textsuperscript{14} Although legislation has been passed providing for the removal of names of persons who are no longer excludable under the 1990 Act,\textsuperscript{15} the deadline has been extended due to the enormity of the task of separating the excludable from the non-excludable.\textsuperscript{16} The recent use of the 1990 Act's terrorist provision to seek the deportation of two resident aliens\textsuperscript{17} demonstrates how its provisions can be employed in as broad a man-


\textsuperscript{8} Id. § 212(a)(28)(codified at 8 U.S.C. § 1182(a)(27)(1988)).


\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Id.


\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Ybarra, supra note 1, at A4.
ner as the exclusionary provisions of McCarren-Walter Act were.\textsuperscript{18} These individuals were first charged under the McCarren-Walter Act's ideological provisions. Although Section 901 was enacted soon after deportation proceedings were begun, its protection was unavailable to them because they were charged with membership in a terrorist organization.\textsuperscript{19} When the McCarren-Walter Act provisions were struck down as unconstitutional by a federal district court, new charges were brought under the 1990 Act charging the individuals with providing material support to a terrorist organization.

I. \textbf{THE DISTINCTION BETWEEN CITIZENS AND NON-CITIZENS IN THE DENIAL OF CONSTITUTIONAL PROTECTIONS}

A. \textit{Exclusivity of Congressional Control Over Immigration}

Congressional authority over immigration is implied from Article I, section 8, clause 4 of the Constitution, which provides that Congress should "establish an uniform Rule of Naturalization . . . ."\textsuperscript{20} The Supreme Court has described Congress' implied power of exclusion as based on "ancient principles of the international law of nation-states . . . ."\textsuperscript{21} This power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government . . . ."\textsuperscript{22}

The Supreme Court has held that Congress' exercise of power over immigration through the implementation of policies excluding and providing con-


\textsuperscript{19} American-Arab Anti-Discrimination Comm., 714 F. Supp. at 1064.


\textsuperscript{21} Kleindienst v. Mandel, 408 U.S. 753, 765 (1972). Kleindienst involved a First Amendment challenge by the United States citizens to the Attorney General's refusal to waive the denial of a temporary visa to Mandel, a nonresident alien, on the basis of advocacy of communism. The Court held that First Amendment interests would not be balanced against the Executive's exercise of Congress' plenary power to exclude aliens as long as this power was exercised "on the basis of a facially legitimate and bona fide reason . . . ." Id. at 770. At least one commentator has interpreted this decision as offering a lowered standard of First Amendment protection for citizens as well as aliens. Scaperlanda, supra note *, at 239 n.144.

\textsuperscript{22} Id. at 765 (citing Chae Chan Ping, 130 U.S. at 609; Fong Yue Ting, 149 U.S. at 698. Recent developments in the international customary law of migration suggest that the right of the nation state to exclude or expel aliens is not absolute. Timothy R. Hager, Recognizing the Judicial and Arbitral Rights of Aliens to Review Consular Refusals of "E" Visas, 66 TUL. L.R. 203, 222-24 (1991). "According to customary international law, a state may legitimately exclude aliens only if, 'individually or collectively, they pose a danger to its public safety, security, welfare or essential institutions of the state.'" Id. at 222-23 (quoting James A. R. Nafziger, A Commentary on American legal Scholarship Concerning the Admission of Migrants, 17 U. Mich. J.L. Ref. 165, 166 (1984)). States may also "have a qualified duty to admit aliens." Id. at 222-23 (citing SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 762 (1981). States' rights to admit and exclude aliens are also affected by international agreements. Id. at 223-24. For a general discussion of this topic, see id. at 222-24 and cited authorities.
ditions for the entry of aliens is a political question and thus not subject to
tjudicial review. The Court has also interpreted the formulation and en-
forcement of policies regarding the entry and continued presence of aliens
within the United States as the exclusive province of Congress, subject only
to the procedural protections of due process.

B. Expulsionary Legislation and Deportation Applied to Resident Aliens in
the Late Nineteenth Century

United States policy toward aliens wishing to enter the country was open
with little or no restriction placed upon immigration until the latter part of
the nineteenth century. For example, in 1868, the United States adopted
provisions to its treaty with China that provided for free emigration between
the two countries. The primary motive for this treaty was commercial; it
provided that the citizens of each country would be allowed the rights of the
citizens of the other. The treaty recognized "the inherent and inalienable
right of man to change his home and allegiance. . . ." It also recited the
"mutual advantage of the free migration and emigration of their citizens and
subjects respectively from one country to the other for purposes of curiosity,
of trade, or as permanent residents." A supplement to the treaty in 1880
provided that the citizens of each country would receive all the rights and
privileges of citizens when within the other's country. California received
the bulk of the Chinese immigrants who arrived to participate in the gold

The conditions of entry for every alien, the particular classes of aliens that shall
be refused entry altogether, the basis for determining such classification, the right
to terminate hospitality to aliens, the grounds on which such determination shall
be based, have been recognized as matters solely for the responsibility of Con-
gress and wholly outside the power of this court to control.

Id. (quoting Harisiades, 342 U.S. 580, 596-97 (1952)). "Congress alone has the constitutional
authority to prescribe rules for naturalization, and the courts' task is to assure compliance
. . . ." Fedorenko, 449 U.S. at 506.

25. Only two laws restricting immigration were passed prior to 1875. The first was the
Alien and Sedition Act of 1798 and an 1862 Act prohibiting the importation of Chinese slave
labor. Tilner, supra note 3, at 14. (citing Aliens' Act of 1798, ch. 8, 1 Stat. 570; Act of
February 19, 1862, ch. 27, 12 Stat. 240. See Kleindienst, 408 U.S. at 761; Harisiades v.
Shaughnessy, 342 U.S. 580, 588 n.15 (1952); Fong Yue Ting, 149 U.S. at 715, 746-50; Chae
Chan Ping v. United States, 130 U.S. 581, 582-95 (1889).
26. See Chae Chan Ping, 130 U.S. at 592-93 for a discussion of additional articles adopted
to the treaty between the United States and China.

27. Id. at 592.
28. Id.
29. Id.
30. Treaty Between the United States and China Concerning Immigration, November 17,
Initially, the U.S. Government felt this immigration to be beneficial. Increasing numbers of immigrants, however, placed economic pressures upon the western coast of the United States as the immigrants with citizens competed for employment. Under political pressure from the states, Congress passed legislation in 1884 regulating the presence of Chinese laborers in the United States. In 1891, Congress provided for limitations on the entry of new Chinese laborers and for deportation of unlawfully present aliens within one year of their entry.

C. Judicial Review of Congress' Measures to Restrict the Presence and Expel Non-Citizens: The Birth of the Citizen Resident Alien Distinction

Judicial review of Congressional enactments expelling resident aliens from the United States began with Chae Chan Ping v. United States. Chae Chan Ping was a Chinese laborer and lived in San Francisco from 1875 through 1887. In 1887 he left the United States. Upon his return later that year he was unable to reenter the United States although he had received a certificate entitling him to return under the Restriction Act of 1882. Chae Chan Ping was refused entry because, in his absence, Congress had passed an act abrogating the certificate. Chae Chan Ping challenged the law as conflicting with the treaty between the United States and China and as a deprivation of a vested right. The new registration in effect, provided for the expulsion of Chinese laborers, as it did not permit them to leave the United States and

31. Id. at 594.
32. Id. at 592-93.
33. Id. at 595. The Court explained
   "[it] seemed impossible for them to assimilate to our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.

Id.
35. See Harisiades, 342 U.S. at 588 n.15; Fong Yue Ting, 149 U.S. at 715-23.
36. Act of March 3, 1891, ch. 551, § 10, 26 Stat. 1084, 1086 (1891); see Harisiades, 342 U.S. at 588 n.15.
37. Chae Chan Ping, 130 U.S. at 602. Section 13 of the Chinese Exclusion Act was passed on September 13, 1888. Ch. 1015, § 13, 25 Stat. 476 (repealed 1943). Section 13 provided:
   "that any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States . . . and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.

Id.
Justice Story's opinion for the majority found that Chae Chan Ping had not acquired any right to reenter the United States. Justice Story emphasized the United States' power as sovereign to exclude aliens at will. According to Justice Story, the power to exclude inhered in sovereignty and was necessary to ensure the safety and security of the nation. The opinion asserted that the power to expel aliens was also derived from the sovereignty of the nation and could be used at any time to expel dangerous persons from its territories.

In *Fong Yue Ting*, the validity of the Registration Act of May 5, 1892 was challenged. Section 6 of the Registration Act required all Chinese laborers lawfully within the United States to apply within one year to the district collector of internal revenue for a certificate of residence. Noncompliance with the registration requirement caused a Chinese laborer to be deemed to be unlawfully within the United States and therefore subject to arrest and deportation. Three plaintiffs challenged the Act as a violation of the Fifth Amendment guarantee of due process of law and therefore unconstitutional. The Supreme Court upheld Section 6 as a valid exercise of the absolute sovereign right to exclude or expel aliens and stated that this right may be exercised solely through executive officials. The court stated that:

> Every sovereign nation has the power, as inherent in sovereignty, and essential to self preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government. . . .

The majority held that there was no limitation on the government's power to expel or exclude aliens who had not progressed towards citizenship or become naturalized. Because the Court held that Congress had an absolute right to expel aliens, Congress also had the right to regulate their presence by passing the Registration Act. Justice Story recognized that, while within the territory of the United States, aliens with the intention of permanent residence are entitled to the protection of the nation's laws. The Court made a distinction, however, at the point at which Congress' power,

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40. *See Chae Chan Ping*, 130 U.S. at 599-600.
41. *Id.* at 609.
42. *Id.* at 603-04.
43. *Id.* at 606.
44. *Id.* at 607.
47. *Id.*
48. *Id.*; *Fong Yue Ting*, 149 U.S. at 727.
49. *Fong Yue Ting*, 149 U.S. at 713.
50. *Id.* at 705.
51. *Id.* at 707.
52. *Id.* at 714.
53. *Id.* at 724.
in the interest of the nation's welfare, is employed to expel them.\textsuperscript{54} Aliens could not call upon the laws to protect them from Congress' authority to expel.\textsuperscript{55} Under the majority opinion in \textit{Fong Yue Ting}, an alien enjoys the protection of the laws of the United States only when remaining within the United States with the permission of the sovereign.\textsuperscript{56}

In a strong dissent, Justice Brewer asserted that the plaintiffs were lawful permanent residents of the United States and so were entitled to the protections of the Constitution.\textsuperscript{57} Thus, the Registration Act violated their constitutional rights to liberty and due process.\textsuperscript{58} Justice Brewer argued that resident aliens, "those who have become domiciled in a country, are entitled to a more distinct and larger measure of protection than those who are simply passing through."\textsuperscript{59} Justice Brewer rejected the majority's assertion that the sovereignty of the nation granted Congress the absolute authority to expel aliens unencumbered by the Constitution and pointed to the Tenth Amendment's retention of powers in the states or the people.\textsuperscript{60} The concept of a sovereign and unlimited power is one which Justice Brewer found to be dangerously indefinite.\textsuperscript{61} Although Justice Brewer admitted the power of the nation to exclude, he found no power to banish resident aliens.\textsuperscript{62} He also interpreted the Bill of Rights as applying to all persons within the United States, noting that the word citizen is not used within them.\textsuperscript{63}

Justice Field wrote a separate dissent focusing upon the entry of the Chinese laborers with the consent of the United States under treaties with China.\textsuperscript{64} Justice Field made a distinction between those aliens who are foreigners and those who have been allowed to enter and establish domicile.\textsuperscript{65} He argued that deportation of resident aliens had only been permitted for commission of crime or as an act of war.\textsuperscript{66} Justice Field compared the Alien Registration Act to the Aliens Act of 1798,\textsuperscript{67} which allowed the President to expel aliens believed to be dangerous. The Aliens Act had been criticized as bestowing an undelegated power upon the President and violating the balance of the Constitution.\textsuperscript{68} Justice Field leveled the same criticisms at the Alien Registration Act because it bestowed a power not expressly delegated to Congress.\textsuperscript{69} Additionally, Justice Brewer asserted that:

\begin{quote}
It does not follow, because aliens are not parties to the Constitution, as
\end{quote}
citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.\textsuperscript{70}

Justices Brewer and Field thus saw a distinction between resident aliens and nonresident aliens with regard to Constitutional protections that the majority did not accept.

In\textit{ Wong Wing},\textsuperscript{71} an alien challenged Section Four of the Registration Act as an infliction of an infamous punishment without affording the Fifth Amendment right of indictment and Sixth Amendment right to jury trial for infamous crimes. Section Four provided 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 not exceeding one year, and thereafter removed from the United States . . ."\textsuperscript{72} Although holding that a trial be held in order to subject an unlawful alien to punishment, Justice Shiras' majority opinion stated that

\[n\]o limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose races or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein.\textsuperscript{73}

\textit{Wong Wing} signaled a slightly expanded role for the Courts in immigration policy and enforcement. This power of review, however, was limited to ensuring the provision of basic procedural due process when a punishment is imposed for unlawful entry or presence within the United States.\textsuperscript{74} Congress' unbounded and exclusive power to expel resident aliens was thus firmly established.

D. Limitations on Resident Aliens' First Amendment Rights in the 20th Century

Aliens, both resident and nonresident, have been excluded or deported from the United States on the basis of political belief and affiliation at least since 1903 when the first legislation excluding anarchists was passed.\textsuperscript{75} The McCarren-Walter Act\textsuperscript{76} codified deportation and exclusion for membership in, affiliation with, or the advocacy of the goals of subversive organizations.\textsuperscript{77}

\textsuperscript{70} Id. at 749.
\textsuperscript{71} Wong Wing v. United States, 163 U.S. 228, 233-34 (1896).
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 237.
\textsuperscript{74} Id. at 237-38.
\textsuperscript{75} Tilner, supra note 3, at 30. The Act of March 3, 1903, provided for the exclusion of alien anarchists and aliens opposed to organized government. Ch. 1012, 23 Stat. 1213 (1903); see Tilner, supra note 3, at 36-32 (describing the origins and passage of the Act).
\textsuperscript{77} 8 U.S.C. § 1251 (a)(6) (1988) (prior to 1990 amendment). Deportable aliens include:
It also provided for the exclusion of those who advocated communism or the overthrow of the United States government through force and violence.\textsuperscript{78}

An early First Amendment case involving the revocation of the citizenship of a naturalized resident alien expressed the conflict between Congress' power to establish conditions for the grant and revocation of naturalization and First Amendment protection of free thought and speech.\textsuperscript{79} The United States Government sought Schneiderman's denaturalization because he had not revealed his membership in the Communist Party at the time of his naturalization. The naturalization laws in 1927, the time of Schneiderman's naturalization, did not expressly disqualify Communist Party members, although they generally excluded individuals and members of organizations that did not believe in organized government.\textsuperscript{80} The Government argued that because Schneiderman had been a member of the Communist party at the time of his naturalization he did not satisfy the requirement that he up-

\textsuperscript{78} See Schneiderman v. United States, 320 U.S. 118, 131-32 (1943).

\textsuperscript{79} The Constitution authorizes Congress "to establish an uniform Rule of Naturalization" (Art. I, 8, cl. 4), and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit . . . . But because of our firmly rooted tradition of freedom of belief, we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes.

hold the Constitution and the order of the United States. The government argued that the Communist Party to which he belonged advocated radical changes in government through force and violence.

Justice Murphy, writing for the Supreme Court, rejected the claim that Schneiderman was not attached to the Constitution simply because of his Communist Party membership by noting that a distinction must be made between the views of the party and the views of Schneiderman as an individual. The goals and beliefs of the party to which Schneiderman belonged could not be imputed to him without proof of Schneiderman's individual belief in these principles. Membership alone was insufficient.

The Court emphasized the central position that the free exchange of a diversity of beliefs occupies in the Constitution. This exchange includes proposals for the reform of the United States government and even for the alteration of the Constitution. Attachment to the Constitution did not, therefore, require uncritical allegiance. Schneiderman did not distinguish between citizens and resident aliens in the context of First Amendment protections except to favor a construction of the statute that allowed "novitiates" as well as citizens full freedoms of belief. Schneiderman implied that all persons within the territory of the United States were entitled to the protection of the First Amendment. This opinion has been largely ignored in later jurisprudence although it was the basis for dicta in full protection of non-citizens speech activities.

Bridges v. Wixon has been cited by the Supreme Court as establishing the extension of First Amendment protections to resident aliens. The deci-

82. Id. at 136.
83. Id. at 136, 146. The Court stated that [u]nder our traditions beliefs are personal and not a matter of mere association, and ... men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. ... Th[e] principles and views [of the Communist Party] are not generally accepted—in fact they are distasteful to most of us—and they call for considerable change in our present form of government and society. But we do not think the government has carried its burden of proving by evidence which does not leave the issue in doubt that petitioner was not in fact attached to the principles of the Constitution and well disposed to the good order and happiness of the United States when he was naturalized in 1927.
84. Id. at 136.
85. Id. at 136, 146.
86. Id. at 137. "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for generations to come. Instead they wrote Article V and the First Amendment, guaranteeing freedom of thought, soon followed." Id.
87. Id. at 157-58.
88. Id. at 158.
89. 326 U.S. 135 (1945).
sion in *Bridges*, however, does not directly support this conclusion. Rather, the *Bridges* majority, like the Schneiderman court, avoided the direct constitutional question by basing its decision on a narrow reading of the deportation statute.91

Bridges legally entered the United States in 1920 from Australia.92 In 1938, the United States Government brought deportation proceedings against him on the grounds of Communist Party membership and affiliation. Under the deportation statute in force at the time,93 past membership or affiliation was not a sufficient ground for deportation94 and there was a lack of evidence of Bridges’ membership at the time of deportation or entry, so the proceeding failed.95 Congress then amended the deportation statute96 to make deportable any alien who had been a member of or affiliated with an organization such as the Communist Party “at the time of entering the United States, or . . . at any time thereafter.”97 Following this amendment, the INS again brought deportation proceedings against Bridges. This time, evidence of Bridges’ affiliation with the Communist Party and the Marine Workers Industrial Union (considered to be affiliated with the Communist Party) since arriving in the United States, was found to be sufficient for deportation.98 Bridges challenged his deportation on First Amendment grounds, but the majority opinion in *Bridges* did not reach these claims.99 Instead, the Court required that, in order to deport Bridges for affiliation with the Communist Party, the INS prove that Bridges’ activities were related to furthering the purposes of the Communist Party and not merely that he cooperated with the Party to achieve lawful goals.100 Because the INS had not shown this, the Court held that Bridges could not be deported under the statute.101

Justice Douglas’ majority opinion in *Bridges v. Wixon* grounded resident

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94. *Bridges*, 326 U.S. at 137 (citing Kessler v. Strecker, 307 U.S. 22 (1939)).
95. *Id.*
97. *Id.*
98. *Bridges*, 326 U.S. at 139. The inspector assigned to conduct hearings and make a recommendation found sufficient evidence. *Id.* The Board of Immigration Appeals, however, did not find sufficient evidence that Bridges had been affiliated with either organization after his entry into the United States. *Id.* at 139-40. The Attorney General reviewed the Board’s decision and recommended deportation. *Id.* at 140. Bridges then voluntarily entered the custody of immigration officials and petitioned for habeas corpus to the District Court for the Northern District of California. *Id.* The District Court denied the petition. *Id.* (citing *Ex parte Bridges*, 49 F. Supp. 292, 307 (N.D. Cal. 1943)). The Ninth Circuit Court of Appeals affirmed. *Id.* (citing *Bridges v. Wixon*, 144 F.2d 927, 944 (9th Cir. 1944)).
100. *Id.* at 142-43.
101. *Id.* at 145.
aliens' First Amendment rights in a narrow reading of the legislative intent of Congress:

It is clear that Congress desired to have the country rid of those aliens who embraced the political faith of force and violence. But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence.\textsuperscript{102}

Implied in this reading is a recognition of Congress' power to provide for the deportation of resident aliens for activities normally protected by the First Amendment. Continuing congressional efforts to deport Harry Bridges belied the constitutional motives attributed to Congress by Justice Douglas.\textsuperscript{103} The House of Representatives pursued efforts to deport Bridges to the extent that a special bill directing the Attorney General to deport Bridges "notwithstanding any other provision of law"\textsuperscript{104} was introduced and passed by the House but defeated by the Senate.\textsuperscript{105}

In a glancing reference to the application of First Amendment protections to permanent resident aliens, the Court cited an earlier case involving Bridges for the proposition that "[f]reedom of speech and of press is accorded aliens residing in this country."\textsuperscript{106} The case to which Justice Douglas cited involved a challenge to contempt proceedings instituted against Bridges' for editorials criticizing ongoing judicial proceedings written in his position as union leader.\textsuperscript{107} Although the Court found that these writings were protected by the First Amendment, the opinion had not addressed in any way Bridges' status as a resident alien or the application of First Amendment protections to resident aliens.\textsuperscript{108} Bridges' freedoms of speech and of the press as a resident alien were protected without discussion or challenge.\textsuperscript{109}

In contrast to the majority opinion, Justice Murphy's concurrence strongly and unequivocally found Bridges' First Amendment protections to lie in the Constitution itself, rather than in precedent or Congressional intent.\textsuperscript{110} Although Justice Murphy acknowledged that Congress' power to
exclude aliens is based in the "inherent sovereignty of the United States," he made a distinction between aliens seeking admission for the first time and aliens who have lawfully entered and reside within the United States. For Justice Murphy, those aliens who lawfully reside within the United States "become invested with the rights guaranteed by the Constitution to all people within our borders." Justice Murphy noted that the First, Fifth, and Fourteenth Amendments do not distinguish between citizens and resident aliens, and concluded that Congress' plenary power to deport resident aliens was limited by the protections contained in these Amendments. Justice Murphy's literal use of the terms used within the Constitution is the second reading of this kind within the jurisprudence of resident aliens entitlement to First Amendment protections. As in Justices Brewer and Field's dissents, this textual reading is employed to argue for the extension of First Amendment rights. This methodology will resurface in later Supreme Court opinions.

The majority opinion in Bridges v. Wixon, particularly when compared to Justice Murphy's concurring opinion, clearly does not provide a firm grounding of resident aliens' First Amendment protections in the Constitution itself. Instead, the Court relied upon a skewed reading of Congressional intent that ignored the motives for the enactment of the amendments under which Bridges' deportation proceedings were instituted.

Deportation was initially used as a way of enforcing exclusionary restrictions. In the late Nineteenth Century new laws widened the reach of the deportation statutes beyond unlawful Chinese laborers to reach lawful residents of various classes including prostitutes, anarchists, members of subversive organizations, and advocates of the forceful and violent overthrow of the United States government. Deportation of resident aliens, those lawfully within the United States, was subject to time restrictions of commonly 3-5 years after entry. These time limits, as well as restrictions as to when a prohibited act or status had occurred, were abolished in the Alien Registration Act of 1940.
Harisiades v. Shaughnessy,122 decided in 1952, presented a challenge to the Alien Registration Act,123 which allowed the deportation of resident aliens for Communist Party membership occurring after an alien was lawfully admitted to the United States.124 Three resident aliens challenged the statute claiming that it violated the Fifth Amendment by depriving them of liberty without due process of law and violated their First Amendment freedoms of free speech and assembly. The aliens also attacked the statute as an impermissible ex post facto law. Each of the deportees had lived in the United States as legal permanent residents for more than thirty years.

Justice Jackson’s opinion for the majority drew a rigid distinction between citizens and resident aliens, asserting that the two did not have equal standing before the law.125 Aliens were entitled to the protections of "a large measure" of equal economic opportunity, personal liberty, the Fifth and Sixth Amendments, and the Just Compensation Clause.126 Aliens, however, could not be elected to various public offices, could not vote, could be subjected to travel restrictions which would not apply to citizens, and had the burden of proving their right to remain within the United States if arrested for illegal entry.127 If a resident alien's country was at war with the United States, the resident alien was subject to expulsion, internment, and seizure or confiscation of property.128 The power to deport resident aliens, however, was not dependent upon a state of war; it could be exercised in the case of both foreign and domestic dangers.129 Deportation could thus be used to promote both foreign affairs and national security.130 The use of deportation to expel longtime resident aliens was justified by the "precarious tenure"131 under which the resident alien resided within the United States.132


123. See supra notes 3, 105.
124. See Harisiades, 342 U.S. at 581.
125. Id. at 586. "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." Id. (footnotes omitted).
126. Id. at 586 n.9.
127. Id. at 586 n.10.
128. Id. at 587.
129. Id. The Court stated: "it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use." Id.
130. Id. at 588-89.
131. Id. at 587.
132. Id.

So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic re-
Court found resident aliens' presence within the United States to be "a matter of permission and tolerance" rather than a vested right. Justice Jackson rooted the right to expel long-time resident aliens through deportation in the power of the nation-state under international law. Justice Jackson characterized deportation as "a weapon of defense and reprisal" resulting from the nation-state's interactions with other nation-states. The Court viewed the Alien Registration Act as a proper exercise of the power of the state and, because it was "vitaliy and intricately interwoven" with matters of the preservation of the government, foreign relations, and war, outside of the purview of the judiciary. The Court then declined to consider whether a Communist Party conspiracy existed that justified the deportation statute, as this was a purely political question involving national security.

The Court addressed the deportees' First Amendment challenge in a somewhat cryptic rejection based upon a distinction between advocating change through electoral processes and advocating change by force or violence. The First Amendment provided protection for the advocacy of Communism through voting but not through "methodical but prudent incitement to violence." This was a somewhat ironic statement after Justice Jackson's listing of rights that resident aliens did not have, including the right to vote. Because a resident alien remained unable to vote, however, by having chosen not to seek naturalization, the denial of any First Amendment protection was logical. Justice Jackson distinguished between "admonishment against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.

Id. at 585.
133. Id. at 586-87.
134. Id. at 586.
135. Id. at 587-88.
136. Id. at 587.
137. Id. at 587-88. "[I]n strict law, a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home state of the expelled alien does not constitute an illegal, but only a very unfriendly act." Id. at 588 n.14 (citations omitted) (quoting LASSA OPPENHEIM, 1 INTERNATIONAL LAW 499 (3rd ed. 1920)).
138. Id. at 588.
139. Id. at 588-90.
140. Id. at 590.
141. Id. at 592.
142. Id. But see Gitlow v. People of New York, 268 U.S. 652, 673 (1925) (Holmes & Brandeis, J.J., dissenting) ("Every idea is an incitement.").
143. Harisiades, 342 U.S. at 586 n.10.
144. See id. at 592.

Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence.

Id. (footnote omitted).
vocacy of political methods"\textsuperscript{145} and "incitement to violence"\textsuperscript{146} in order to employ the clear and present danger test articulated in \textit{Dennis v. United States}.\textsuperscript{147}

The \textit{Harisiades} majority found that the deportees' membership in the Communist Party satisfied this test.\textsuperscript{148} The Court concluded that the statute did not unlawfully infringe upon the exercise of First Amendment rights.\textsuperscript{149} Justice Jackson's limitation of protected speech to advocacy of change through electoral processes thus resulted in extremely limited First Amendment protections for resident aliens.\textsuperscript{150}

Justice Jackson's brief and conclusory discussion of the First Amendment challenge in \textit{Harisiades} must be read against \textit{Dennis}, decided one year earlier, in order to gain its full significance. \textit{Dennis} presented a First and Fifth Amendment challenge to the Smith Act,\textsuperscript{151} which made it illegal "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence."\textsuperscript{152} The defendants in \textit{Dennis}, United States citizens, were charged with a conspiracy to violate the Act. A

\begin{footnotes}
\footnote{\textsuperscript{145} Id.} \footnote{\textsuperscript{146} Id.} \footnote{\textsuperscript{147} Id. at 592 (citing \textit{Dennis v. United States}, 341 U.S. 494, 513 (1951)). True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. . . . [T]he test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable. [citing \textit{Dennis v. United States}, 341 U.S. 494 (1951)]. We think the First Amendment does not prevent the deportation of these aliens. \textit{Dennis}, 341 U.S. at 508 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950)). This test requires that there be a clear and present danger that the activities under the circumstances will result in a substantive evil that Congress has the authority to prevent. \textit{Id.} \footnote{\textsuperscript{148} \textit{Harisiades}, 342 U.S. at 591-92. The majority's opinion does not explicitly state its reasoning. Instead, after accepting the lower court's finding that the Communist Party advocated the overthrow of the government during the defendants' membership, the Court conflated the actions of individuals associated with the Communist Party with the activities of the organization as a whole. \textit{Id.} at 581-84. \textit{But cf. Bridges}, 326 U.S. at 143-44 (affiliation requires proof of act or acts showing furtherance of the organization's purposes; cooperation in lawful goals is insufficient).} \footnote{\textsuperscript{149} \textit{Harisiades}, 342 U.S. at 592.} \footnote{\textsuperscript{150} \textit{See id.} The Court's decision did not address the associational rights of the deportees. The court took the plaintiffs' membership in a group advocating the violent overthrow of the government as a finding of the lower court and so did not reach the question of whether the Act require individual advocacy of the overthrow of government through force and violence. \textit{Id.} at 591-92. \textit{See Bridges}, 326 U.S. at 143-44 for a discussion of the statutory requirements of membership and affiliation.} \footnote{\textsuperscript{151} Ch. 439, § 2 54 Stat. 670, 671 (1940) (current version codified at 18 U.S.C. 2385 (1988) (prior to amendment by 62 Stat. 808 (1948))).} \footnote{\textsuperscript{152} \textit{Dennis}, 341 U.S. at 517 (construing Smith Act, ch. 439, § 2(a)(3), 54 Stat. 670, 671 (1940) (prior to amendment by 62 Stat. 808, (1948)) (Frankfurter, J., concurring in the judgment of the plurality).}
\end{footnotes}
plurality of the Court upheld the constitutionality of the Act against the defendants’ First and Fifth Amendment challenges.\textsuperscript{153}

The \textit{Dennis} defendants argued that the Smith Act violated their First Amendment rights because their activities had not presented a substantial enough danger to warrant application of the statute under the clear and present danger standard. They claimed that the statute's application to their activities could only be justified if "an immediate danger of obvious magnitude to the very existence of our present scheme of society"\textsuperscript{154} had been created by those activities. The Court rejected this argument on the basis that the First Amendment does not protect activities that cause a clear and present danger that the harm sought to be prevented will occur.\textsuperscript{155} The clear and present danger standard as applied in the criminal context in \textit{Dennis} differs greatly when applied in the deportation context. Because deportation is not considered to be a criminal proceeding, the alien does not have the constitutional protections applicable to criminal proceedings.\textsuperscript{156} Additionally, the Court’s plurality opinion in \textit{Dennis} stressed the requirement of proof of an individual’s intent to overthrow the government through force and violence.\textsuperscript{157} Proof of intent was missing from the \textit{Harisiades} decision: it was implied from active membership in an organization which advocated the overthrow of government through force and violence.\textsuperscript{158}

Justice Frankfurter’s concurrence in \textit{Harisiades} echoed the majority assertion that resident aliens remained in their host country at the discretion of that country and did not gain any constitutionally protectible interest in remaining.\textsuperscript{159} This was due to:

a world order based on politically sovereign States . . . . [in which] a national State implies a special relationship of one body of people, i.e., citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State in which they are not citizens has been a matter of political determination by each State.\textsuperscript{160}

\textsuperscript{153} \textit{Id.} 341 U.S. at 516-17.
\textsuperscript{154} \textit{Id.} at 518-19.
\textsuperscript{155} \textit{Id.} at 534. “The First Amendment ‘cannot have been, and obviously was not, intended to give immunity for every possible use of language!’ \textit{Id.} (quoting Robertson v. Baldwin, 165 U.S. 275, 281 (1897)).

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.


\textsuperscript{156} \textit{See} Fong Yue Ting v. United States, 149 U.S. 698, 749 (1893).
\textsuperscript{157} \textit{Dennis}, 341 U.S. at 499-500. “The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” \textit{Id.} at 499. (emphasis removed). The Court explained that an explicit Congressional indication that the crime should not require intent to be proved as an element would be required in the statute. \textit{Id.}

\textsuperscript{158} \textit{Harisiades}, 342 U.S. at 581-84.
\textsuperscript{159} \textit{Id.} at 596 (Frankfurter, J., concurring).
\textsuperscript{160} \textit{Id.}
For Justice Frankfurter, as well as the majority in *Harisiades*, immigration law was purely a political matter under the power of the political branch and therefore outside of the concern of the judiciary.\(^\text{161}\) All immigration policy was exclusively within the authority of Congress, including the decision to terminate aliens' long-term residence within the United States.\(^\text{162}\) Although Justice Frankfurter did see a role for the judiciary in the enforcement of the rules which Congress imposed upon immigration officials and the maintenance of procedural due process,\(^\text{163}\) policy decisions defining aliens who were permitted to establish or continue residence in the United States were immune from review.\(^\text{164}\)

In a strong dissent from the *Harisiades* majority, Justice Douglas, joined by Justice Black, rejected the majority's formulation of exclusive and unlimited Congressional power over immigration.\(^\text{165}\) They referred to past Supreme Court decisions which held that resident aliens enjoyed constitutional protections\(^\text{166}\) and asserted that the right to liberty necessarily included the right to be free from arbitrary expulsion.\(^\text{167}\) The dissent did not address the defendants' First Amendment argument. Instead, Justice Douglas based his rejection of absolute Congressional power over immigration on the express constitutional right to life and liberty which preempted Congress' implied power of deportation.\(^\text{168}\) Because Congress' power to deport resident aliens was implied from the grant of power to "establish an uniform Rule of Naturalization,"\(^\text{169}\) the express guarantees contained within the Fifth Amendment, encompassing all persons, should have prevailed.\(^\text{170}\)

The dissent did, however, locate an exception to these express guarantees where Congress was acting to preserve the safety and security of the nation.\(^\text{171}\) If an alien's actions were shown to be dangerous to the security and safety of the nation, the dissent would allow the alien's deportation regard-

\(^\text{161. Id. at 596-97.}\)
\(^\text{162. Id.}\)
\(^\text{163. Id. at 597. Justice Frankfurter cited Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920), for judicial review of the administration of immigration laws in compliance with Congressional mandates, and Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922), for due process's demand that certain procedures be observed. Id.}\)
\(^\text{164. Harisiades, 342 U.S. at 597 (Frankfurter, J., concurring). "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress." Id.}\)
\(^\text{165. Id. at 599-600 (Douglas & Black, J.J., dissenting).}\)
\(^\text{166. Id. at 598-99. The dissent cited Toras Takashi v. Fish and Game Comm'n, 334 U.S. 410, 420-21 (1948) (right of non-citizen to fish in state waters); Bridges v. California, 314 U.S. 252, 270 (1941) (protections of First Amendment); Truax v. Raich, 239 U.S. 33, 42 (1915) (right of non-citizen to employment); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (entitlement to protections of Fifth and Sixth Amendments); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (entitlement to writ of habeas corpus); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (equal economic opportunity under state law). For a discussion of aliens' protections under the Bill of Rights, see Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1311-33 (1982).}\)
\(^\text{167. Harisiades, 342 U.S. at 600 (Douglas & Black, J.J., dissenting).}\)
\(^\text{168. Id. at 599.}\)
\(^\text{169. Id. (citing U.S. Const. art. I, § 8, cl. 4).}\)
\(^\text{170. Id. (citing U.S. Const. art. I, § 8, cl. 4; U.S. Const. amend. V).}\)
\(^\text{171. Id. at 599-601.}\)
less of the length of residence. Ultimately, the dissent's disagreement with the majority in Harisiades lay not in the nature of the standard to be employed but merely in the degree and methods of proof of danger necessary. Both accepted that the clear and present danger standard could allow the deportation of long-term resident aliens on the basis of expressive activities implicating the First Amendment.

II. FOREIGN POLICY AND TERRORISM: NEW LIMITATIONS ON RESIDENT ALIENS' FIRST AMENDMENT PROTECTIONS

A. First Amendment Protections Extended and then Contracted for Resident Aliens

Section 901 of the Foreign Relations Authorization Act of 1987 was proposed as a temporary revision of the McCarran-Walter Act in order to rid the immigration laws of provisions excluding immigrants for their political beliefs. Aliens would continue to be deported and denied naturaliza-

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172. Id.
173. Id.
177. Cole, supra note 2, at 22. Section 901 of the Foreign Relations Authorization Act provided:

PROHIBITION ON EXCLUSION OR DEPORTATION OF ALIENS ON CERTAIN GROUNDS

(a) IN GENERAL—Notwithstanding any other provision of law, no non-immigrant alien may be denied a visa or excluded from admission into the United States, or subject to deportation because of any past, current or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.

(b) CONSTRUCTION REGARDING EXCLUDABLE ALIENS.

Notwithstanding this subsection, nothing in subsection (a) shall be construed as applying to an alien who is described in section 212(a)(33) of the Immigration and Nationality Act (relating to those who assisted in the Nazi persecutions), to an alien described in the last sentence of section 101(a)(42) of such Act (relating to those assisting in other persecutions) who is seeking the benefits of section 207, 208,
tion due to their political beliefs and activities, however, because aliens who had engaged in terrorist activity, who were members of the Palestine Liberation Organization, or whose entry was adverse to foreign policy, were not included in the protection of the section.\footnote{178} Section 901 extended initially to all aliens, however, in 1988 it was amended to apply only to non-immigrant aliens.\footnote{179} As a result, the amended Section 901 offered no constitutional protection to resident aliens, who were classified as immigrant aliens rather than as non-immigrant aliens.\footnote{180}

In RaFeedie v. Immigration & Naturalization Service,\footnote{181} the INS attempted to summarily exclude a resident alien returning to the United States after a short trip abroad because of suspected terrorist contact by the resident alien while absent from the United States. The court employed the distinction between resident and nonresident aliens with regard to the extent of constitutional protections afforded to reject the use of a summary procedure in this case.\footnote{182} The D.C. Circuit Court explained that, when a resident alien gains admission to the United States and begins to develop significant personal and legal ties, the resident alien develops a liberty interest in remaining in the United States which is "substantial enough to command the protection of due process before he may be excluded or deported . . . ."\footnote{183}

\footnote{243(b)(1), or 245A of such Act (relating to admission as a refugee, asylum, withholding of deportation, and legalization), or to an alien who is described in section 21(c) of the State Department Basic Authorities Act of 1956 (members of the Palestine Liberation Organization (PLO)). In paragraph (2), the term "terrorist activity" means the organizing, abetting or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities.}


\footnote{178. Id. § 901(b)(3).}

\footnote{179. Pub. L. No. 100-204 § 901, 101 Stat. 1331, 1399-1440 (1987) (amended 1988) (repealed 1990). The Immigration and Nationality Act classifies aliens in three general categories: illegal aliens, lawfully admitted non-immigrant aliens and lawfully admitted immigrant aliens. Mathews v. Diaz, 426 U.S. 67, 79 n.13 (1976) (citing 8 U.S.C. § 1101) (1970)). Non-immigrants are defined to include: officials and employees of foreign governments and certain international organizations; aliens visiting temporarily for business or pleasure; aliens in transit through this country; alien crewmen serving on a vessel or aircraft; aliens entering pursuant to a treaty of commerce and navigation to carry on trade or an enterprise in which they have invested; aliens entering to study in this country; certain aliens coming temporarily to perform services or labor to serve as trainees; alien representatives of the foreign press and other information media; certain aliens coming temporarily to participate in a program in their field of study or specialization; aliens engaged to be married to citizens; and certain alien employees entering temporarily to continue to render services to the same employers.}


\footnote{180. See Cole, supra note 2, at 22.}

\footnote{181. 880 F.2d 506 (1989).}

\footnote{182. Id. Cf United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (constitutional rights of an illegal alien voluntarily in the U.S. differ from those of an alien not in the country voluntarily).}

\footnote{183. RaFeedie, 880 F.2d at 522. The court noted that permanent resident aliens are re-}
These substantive due process protections can be lost under Congressional naturalization statutes, however, by anything but a brief absence from the United States. This case reveals a growing movement to extend constitutional protections to resident aliens in the interest of fairness.

B. Deportation for Engaging In Terrorist Activity

In American-Arab Anti-Discrimination Committee v. Meese, the District Court of the Central District of California held that the protections of the First Amendment applied to aliens within the United States in the context of deportation proceedings.

Eight individual plaintiffs and ten organizational plaintiffs brought suit against the INS to challenge the constitutionality of the ideological exclusion provisions of the McCarren-Walter Act and Section 901 of the Foreign Relations Authorization Act of 1987. This case squarely presented the question of the extent to which resident aliens are entitled to the protections of the First Amendment, because two of the individuals, Hamide and Shehadeh, were resident aliens. The INS had arrested and detained eight aliens in January 1987 because of alleged membership in the Popular Front for the Liberation of Palestine (PFLP), a splinter group of the Palestine Liberation Organization. The INS claimed that, as members of a group promoting world communism, the detainees were subject to deportation under the McCarren-Walter Act. This activity would have been protected if committed by a United States citizen.
Although none of those threatened with deportation had been accused of any crime and there was no evidence of involvement in terrorist activity as defined by section 901, the INS sought denial of bail on the basis that the detainees were a threat to national security because of their involvement in terrorist activity. Additionally, the INS refused to reveal in open court evidence linking the detainees to the PFLP, which it claimed to have collected through wiretapping.\footnote{Citing national security, the INS sought a closed session in which to introduce this evidence.} Judge Roy Daniels refused to hear the evidence in a closed session, and the detainees were released.\footnote{The INS dropped the McCarren-Walter Act charges against all eight aliens on April 23, 1987. The Government then brought charges for technical, non-ideological violations of the Immigration and Nationality Act against six of the individuals, and new McCarren-Walter charges against Hamide and Shehadeh for “being members of or affiliating with an organization that advocates or teaches the unlawful damage, injury or destruction of property.”} In April of 1987 Hamide and Shehadeh challenged the constitutionality of the McCarren-Walter provisions. The District Court dismissed the suit because Hamide and Shehadeh had not exhausted their administrative remedies and a direct appeal to the Ninth Circuit Court of

\footnote{William H. Webster, to be Director of Central Intelligence, 100th Cong., 1st Sess. 94, 95 (1987) (statement of William H. Webster).}

\footnote{See Ybarra, supra note 1, at A1, A4. An INS Agent lived in the apartment next to Khader Hamide for eight months prior to his arrest. Id. at A1. The INS admitted to tapping the phone calls of the defendants and their lawyers, but would not reveal whether this activity continued as of Nov. 1, 1991. Id. at A4. The Government disclosed that video and audio surveillance had been conducted in December of 1988 and that the Government on February 19, 1989 submitted a petition seeking a declaration of the legality of the surveillance to the Federal District Court. United States v. Hamide, 914 F.2d 1147, 1149 (9th Cir. 1990). This was pursuant to § 1806(f) of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1811 (1988) which provides that the Government must generally obtain a court order before conducting foreign intelligence surveillance within the United States. Id. “The judge must make specific findings that the application for surveillance is proper, and that probable cause exists to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power.” Hamide, 914 F.2d at 1149 n.1 (quoting 50 U.S.C. § 1805(a)(3)(A) (1988)). The statute also provides that: “no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment.” 50 U.S.C. § 1805(a)(3)(4) (1988). The District Court found that the surveillance was legally obtained and refused to allow discovery of the applications for the declaration of legality on the final order allowing the surveillance. Hamide, 914 F.2d at 1149-50. Hamide appealed the district court’s decision to the Ninth Circuit which refused jurisdiction because the court’s ruling was not a final order under the statute, which the circuit court read to define only orders finding illegal surveillance to be final and thus reviewable. Id. at 1150-51. The order, like discovery orders, could only be appealed upon a final order of deportation. Id. at 1153. Hamide also challenged the surveillance in another proceeding on the ground that it violated his First Amendment rights. Id. at 1151 n.3. The District Court in that case dismissed Hamide’s claim for failure to state a claim. Id.}

\footnote{Hamide, 914 F.2d at 1153.}

\footnote{American-Arab Anti-Discrimination Comm. 714 F. Supp. at 1066 n.6. The defendants other than Hamide and Shehadeh were charged with overstaying their visa terms under 8 U.S.C. § 1251(a)(2) (1988). Id. Basher Amer was also charged with “failing to maintain student status under 8 U.S.C. § 1215(a)(9).” Id.}

\footnote{Id. at 1066 (citing 8 U.S.C. 1251(a)(6)(F)(iii) (1988) (repealed 1990).}
Appeals was available.\textsuperscript{196} The Ninth Circuit Court of Appeals also found that Hamide and Shahedeh had not exhausted their administrative remedies.\textsuperscript{197} All eight aliens then applied for District Court review. The District Court found that it had no jurisdiction over Hamide and Shehadeh's claims because of the Ninth Circuit decision finding that administrative remedies had not been exhausted.\textsuperscript{198} The other six did have standing, however, because of the chill that the threat of deportation placed upon expressive activities protected by the First Amendment.\textsuperscript{199} Because the McCarran-Walter charges against the six had been dropped and replaced with non-ideological immigration law violations, the six plaintiffs had to show an authentic interest in engaging in First Amendment activities which would subject them to deportation under the statute, that the government had a strong interest in prosecuting them under the statute, and that their First Amendment activities were chilled by this likelihood of enforcement.\textsuperscript{200} The activities that the plaintiffs were interested in pursuing included "reading and distributing magazines published by the PFLP, supporting or discussing the PFLP or its views in public meetings and demonstrations, and raising money to support these activities."\textsuperscript{201} The court cited the Supreme Court's decision in \textit{NAACP v. Button}\textsuperscript{202} for the proposition that "'[t]he threat of sanctions may deter [the lawful exercise of First Amendment rights] . . . almost as potently as the actual application of sanctions.'"\textsuperscript{203} The court found that the objective threat posed by enforcement of the McCarran-Walter Act provisions was "substantiated by past and present concrete instances of prosecution" under these provisions.\textsuperscript{204} The court also found that the organizational plaintiffs in the case had standing to challenge the statutes because they met the \textit{Hunt} test.\textsuperscript{205} This test\textsuperscript{206} requires that: 1) an organizations' members would have standing; 2) the interests at issue be "germane to the organization's purpose;"\textsuperscript{207} and 3) the participation of each member of the organization is not required by the claim or relief sought.\textsuperscript{208} The court also relied on the six individual plaintiffs' lack of an alternate forum in which to bring their challenge since they were under "a real and immediate threat of deportation, but

\begin{footnotes}
\item[196] Id.
\item[197] Id.
\item[198] Id. at 1072-73.
\item[199] Id.
\item[200] Id. at 1067.
\item[201] Id.
\item[203] \textit{American-Arab Anti-Discrimination Comm}, 714 F. Supp. at 1069 (quoting \textit{NAACP v. Button}, 371 U.S. at 433). The court also stated that: "[p]articularly with pre-enforcement First Amendment challenges, courts have found standing based, in part, on their sensitivity to the danger of 'self-censorship[,] a harm that can be realized even without an actual prosecution.'" Id. at 1069 (quoting \textit{Virginia v. American Book Sellers Ass'n}, 484 U.S. 383, 392 (1988)) (alteration in original).
\item[204] Id. at 1070.
\item[206] \textit{American-Arab Anti-Discrimination Comm.}, 714 F. Supp. at 1071-72.
\item[207] Id. (quoting \textit{New York State Club Ass'n v. City of New York}, 487 U.S. 1, 8 (1988) (quoting \textit{Hunt}, 432 U.S. at 343)).
\item[208] Id. (citing \textit{Hunt}, 432 U.S. at 343).
\end{footnotes}
not an actual deportation,"\(^{209}\) in which case they could bring their challenge to the Ninth Circuit Court of Appeals.\(^{210}\) The district court thus decided to entertain the six plaintiffs' constitutional challenges stating: "[b]ecause the threat of prosecution can be as effective as an actual prosecution . . . the Government could effectively quell protected constitutional activity by threatening, but never instituting, deportation proceedings."\(^{211}\) Plaintiffs would be placed between the "Scylla of intentionally flouting the law and the Charybdis of foregoing what [they] believe to be constitutionally protected activity in order to avoid becoming enmeshed in a [deportation proceeding]."\(^{212}\)

The Government conceded "that aliens have First Amendment rights,"\(^{213}\) so the question became to what extent those rights could be limited in deportation.\(^{214}\) The Government argued that aliens' First Amendment rights "are drastically limited in the deportation context due to Congress' plenary power over immigration."\(^{215}\) Judge Wilson's decision ultimately asserted that aliens within the United States were entitled to full protection under the First Amendment and that this protection was "not limited in the deportation arena by the Government's plenary immigration power."\(^{216}\) The court found that Congress' deportation power, as opposed to its exclusionary power, was bounded by constitutional limitations.\(^{217}\) Further, the court asserted that only one decision had addressed aliens' First Amendment rights in the deportation context: \emph{Harisiades v. Shaughnessy}.\(^{218}\) Judge Wilson cited \emph{Harisiades} to support constitutional limitations of Congress' power over immigration.\(^{219}\) Judge Wilson relied on \emph{Harisiades'} assertion that the Court "had the duty of distinguishing between aliens', . . . 'advocacy of political methods' and their unprotected 'methodical but prudent incitement to violence.'"\(^{220}\) Judge Wilson read \emph{Harisiades} to extend First Amendment protection to aliens' activities that did not exceed the advocacy of political methods.\(^{221}\) Although \emph{Harisiade}'s First Amendment challenge had been unsuccessful, Judge Wilson inferred from the Supreme Court's application of the \emph{Dennis} test, which was applied to United States citizens, that aliens enjoy

\(^{209}\) Id. at 1074.
\(^{210}\) Id.
\(^{211}\) Id.
\(^{212}\) Id. (citation omitted) (quoting Steffel v. Thompson, 415 U.S. 452, 462 (1974)) (alterations in original). The court changed the language of this quote from "a criminal proceeding" to "a deportation proceeding." Id. The equation of deportation proceedings to criminal proceedings is controversial, deportation more often being characterized as civil proceedings. See Mahler v. Eby, 264 U.S. 32, 39 (1924); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
\(^{213}\) American-Arab Anti-DisCrimination Comm., 714 F. Supp. at 1074.
\(^{214}\) Id. at 1075.
\(^{215}\) Id.
\(^{216}\) Id. at 1063.
\(^{217}\) Id. at 1075-76.
\(^{218}\) Id. at 1076 (citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952)).
\(^{219}\) Id. at 1078.
\(^{220}\) Id. at 1077 (quoting Harisiades, 342 U.S. at 592).
\(^{221}\) Id.
First Amendment protections to the same extent as do citizens. Judge Wilson concluded that "while the Court will defer to Congress's plenary immigration power in the substantive due process area, the Court will not accord Congress the same amount of deference in the First Amendment field."

The District Court also rejected the Government's argument that analogized the situation of aliens in the deportation context to the lowered First Amendment standard applicable to prisoners, students, and the military. The court distinguished these limitations because they only applied to the individuals within a limited environment (the prison, the school, during military service) and did not affect the individual's First Amendment rights when not within that environment. It would have been "impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting." The court then proceeded to examine the challenged provisions under a First Amendment overbreadth analysis: "whether the enactment reaches a substantial amount of constitutionally protected conduct." The court applied the imminent lawless action test to the First Amendment freedoms potentially infringed upon by the challenged statutes. Because the provisions did not distinguish between speech, which could be prohibited because of its incitement to imminent lawless action, and protected activities, which merely advocated illegal action in the future, the court found them to be overbroad. American-Arab Anti-

222. Id.
223. Id. at 1078.
224. Id. at 1081. The Government cited Pell v. Procunier, 417 U.S. 817 (1974), to show that "a prisoner retains only those First Amendment rights that are not 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.' " American-Arab Anti-Discrimination Comm., 714 F. Supp. at 1081 (quoting Pell, 417 U.S. at 822).
225. American-Arab Anti-Discrimination Comm., 714 F. Supp. at 1081 (quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969) ("[S]tudents do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' "); (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("[T]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").
226. American-Arab Anti-Discrimination Comm., 714 F. Supp. at 1081 (citing Parker v. Levy, 417 U.S. 733, 756 (1974) ("[F]or reasons which differentiate military society from civilian society, we think congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.").)
227. Id. at 1081.
228. Id.; see id. at 1081-82. Judge Wilson commented that "[s]imply stated, the Government's view is that aliens are free to say whatever they wish but the government maintains the ability to deport them for the content of their speech. To state the proposition is to reject it." Id. at 1082.
230. Id. at 1083. "Consistent with the First Amendment, the government may only prohibit advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.' " Id. (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).
231. Id.
Discrimination Committee devoted one footnote to the government’s interests in national security and foreign policy issues arising in the immigration context.\textsuperscript{232} The court asserted that the imminent lawless action standard provides sufficient protection.\textsuperscript{233} Additionally, the court suggested that deportation of individuals because of affiliation or membership in certain organizations would comport with First Amendment protections “if it is established that group affiliation posed a legitimate threat to the government.”\textsuperscript{234} The court concluded that:

as long as the Government narrowly tailors its deportation laws to further its compelling interests in foreign policy and national security, it can enact laws, (e.g., espionage or national secrecy laws), that allow for the deportation of aliens on the basis of their First Amendment activities. Thus, there is no basis for a lower standard of First Amendment protection for aliens.\textsuperscript{235}

This seemingly insignificant footnote signaled the return of the foreign policy/national security limitation of aliens’ First Amendment protections. It is all the more surprising, set as it is in the midst of the strongest language advocating full First Amendment protections for aliens since Justice Murphy’s concurrence in Bridges v. Wixon.\textsuperscript{236}

The decision in American-Arab Anti-Discrimination Comm. was hailed as the first substantive extension of full First Amendment protections to aliens in deportation proceedings.\textsuperscript{237}

The district court’s decision regarding the standing of the plaintiffs and the ripeness of the issues was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court’s holding that the plaintiffs had standing, but reversed its decision on the issue of ripeness.\textsuperscript{238} The Ninth Circuit found that the factual issues of the case had not been sufficiently developed to allow a judicial decision and that there had been no opportunity for the INS to present its interpretation of the challenged provisions.\textsuperscript{239} The appeals court also stressed that

[t]o exercise jurisdiction, in advance of action by the INS, might well

\begin{quote}
Simply writing, publishing, circulating, distributing, printing, displaying, and possessing material advocating or teaching the prohibited ideologies cannot be equated with advocacy of imminent unlawful action. “[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”
\end{quote}

\textit{Id.} (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
\textsuperscript{232} \textit{Id.} at 1082 n.18.
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{Id.} (citations omitted).
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} 326 U.S. 135, 157-66 (1945) (Murphy, J., concurring); see supra notes 111-16 and accompanying text.
\textsuperscript{238} American-Arab Anti-Discrimination Comm., 940 F.2d 445, 449 (9th Cir. 1991).
\textsuperscript{239} \textit{Id.} at 454.
propel us into contravening the 'basic rationale' of the ripeness doctrine: the court would become entangled in an abstract disagreement over administrative policy and would interfere before any INS decision was made affecting the parties in any concrete way.\textsuperscript{240} 

C. Chilling Resident Aliens' Free Speech Rights Through the Denial of Naturalization

In \textit{Price v. United States Immigration and Naturalization Service},\textsuperscript{241} the Ninth Circuit Court of Appeals found that the Attorney General's broad inquiry into any matters that might affect eligibility for naturalization did not serve to chill the exercise of First Amendment rights by resident aliens seeking naturalization.\textsuperscript{242} John Eric Price was an engineer who had been a lawful permanent resident of the United States since 1960.\textsuperscript{243} This case arose because Price refused to comply with an INS request that he list all affiliations with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other country or place. Price refused to answer the question because it violated Price's First Amendment right of association.\textsuperscript{244} Price did assert that he had not been a member of or affiliated with any proscribed organization.\textsuperscript{245}

Price's petition for naturalization was denied by the district court.\textsuperscript{246} Price argued that the Attorney General's authority to inquire into group membership and affiliation was limited to those organizations listed by Congress which barred an alien from naturalization. The court found that, under the statutes regulating naturalization, the examination of aliens was limited to "inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write and speak English, and other qualifications to become a naturalized citizen as required by law."\textsuperscript{247} The Attorney General, however, 

\textsuperscript{240} Id.
\textsuperscript{241} 941 F.2d 878 (9th Cir. 1991).
\textsuperscript{242} Id. at 882.
\textsuperscript{244} Price, 941 F.2d at 879.
\textsuperscript{245} Id. (citing 8 U.S.C. 1424(a) § 313 (1988)). Price stated that:

I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

8 U.S.C. § 1424 prohibits the naturalization of any person falling into the listed classes. \textit{Id.} Its language is identical to that used in the former Deportation statute section 1252. \textit{Id.} See \textit{infra} note 276 for the text of § 1251. Section 1182 remains enforce.
\textsuperscript{246} Id. at 879.
\textsuperscript{247} Id. at 881 (citing 8 U.S.C. § 1443(a) (1988)). The requirements for naturalization are:

1) status as a lawfully admitted permanent resident alien; 2) residence in the United States for at least five years prior to the filing of the naturalization petition; 3) residence in the United States for the period between the filing of the petition and admission to citizenship; and, 4) physical presence in the United States for at least half of the required residency period. \textit{Id.}
could require an alien to “ aver to ‘all facts which in the opinion of the Attorney General may be material to the applicant’s naturalization,’ ” and have INS employees obtain “ testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization.” The Price court interpreted these grants of authority to permit the Attorney General to make broad inquiries, “ as long as they are related in some way to the naturalization requirements.” The court reasoned that an alien might not know that the organization of which the alien was a member or affiliated with was a communist front. The alien would not therefore provide this information if responding only to the specific list of organizations in section 1424(a). An alien who did not know that an organization was a communist front might still be found to have reason to know of this fact, however, and thereby be prohibited from naturalization. It is only, therefore, by examining all organizations which an alien has been a member of or affiliated with that the Attorney General may determine whether the alien had reason to believe that the organization was a communist front. The wide discretion given to the INS was based on the Agency’s “ ‘especially sensitive political functions that implicate questions of foreign relations. . . .’ ”

The majority also rejected Price’s First Amendment challenge. Although the court stated that “[i]t has long been recognized that resident aliens enjoy the protection of the First Amendment,” the opinion then asserted that “the protection afforded resident aliens may be limited.” The court derived support for the limitation of resident aliens’ constitutional protections from a passage in United States v. Verdugo-Urquidez, which upheld a challenged search of a Mexican citizen’s residence in Mexico by United States officials. The Price court read a general discussion of the constitutional protections applicable to all aliens to apply to permanent resident aliens within the territories of the United States. According to the Price court, this passage established that constitutional protection for aliens within the territory of the United States are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that

Additionally, the alien must also not be in any of the classes described in 8 U.S.C. § 1424(a) (1988).

Id.

249. Id. (quoting 8 U.S.C. § 1446(b) (1988)) (emphasis omitted).
250. Id.
251. Id. at 885.
252. Id. at 882.
253. Id.
255. Id. at 884.
256. Id. at 882 (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953)) (quoting Bridges, 326 U.S. at 161 (Murphy, J., concurring)); Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309 n.5 (1970) (same quotation); United States v. Verdugo-Urquidez, 856 F.2d 1214, 1222 (9th Cir. 1988), rev’d on other grounds, 494 U.S. 259 (1990)).
257. Id. The court cites no direct authority for this proposition.
258. Id. (quoting Verdugo-Urquidez, 494 U.S. at 273).
259. Verdugo-Urquidez, 494 U.S. at 261.
the particular provisions in question were not intended to extend to aliens in the same degree as to citizens.\textsuperscript{261} The \textit{Price} court then stated that the "Court has historically afforded Congress great deference in the area of immigration and naturalization."\textsuperscript{262} This deference places decisions to expel or exclude aliens in the political branches of the Executive or the Legislature, thereby excluding these decisions from all but the narrowest review because they may implicate foreign policy matters.\textsuperscript{263} The court then stated "[i]n the exercise of its broad power over immigration and naturalization Congress regularly makes rules that would be unacceptable if applied to citizens."\textsuperscript{264} The court ultimately applied the \textit{Kleindienst}\textsuperscript{265} test which held that when the executive exercises this [exclusionary] power negatively 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 applicant.\textsuperscript{266}

Here, the court equated Price's position as applicant for naturalization with the \textit{Kleindienst} plaintiffs, United States citizens who challenged the denial of a non-immigrant visa to a nonresident alien, and reasoned that Price was entitled to no greater First Amendment protection than were United States citizens.\textsuperscript{267} This conclusion ignored the basis of the wide discretion to exclude allowed the Attorney General in \textit{Kleindienst}: that the decision was one to exclude a nonresident alien, in which area Congress' and the Executive's power is least fettered by the judiciary and constitutional limitations. The court justified this conflation of standards applicable to resident and nonresident aliens because "the determination of who will become a citizen of the United States is at least as 'peculiarly concerned with the political conduct of government' as the decision of who will be allowed to enter, if not more so."\textsuperscript{268} The majority concluded that:

\textit{[a]lthough a resident alien desiring eventually to petition for naturalization may find himself choosing between future citizenship and association with groups whose affiliation he does not wish to disclose, once naturalized he is afforded precisely the same protection of his right to associate as is a natural born citizen.}\textsuperscript{269}

Circuit Judge Noonan's dissent directly addressed the First Amendment issue of whether the inquiry itself violated the free exercise of First Amendment rights, stating: "[t]he Immigration Service propounds a question to persons seeking naturalization that would be intolerable if asked by a gov-

\begin{itemize}
  \item \textsuperscript{261} \textit{Id.} (quoting \textit{Verdugo-Urquidez}, 494 U.S. at 273 (citations omitted)).
  \item \textsuperscript{262} \textit{Id.}
  \item \textsuperscript{263} \textit{Id.} at 882-83.
  \item \textsuperscript{264} \textit{Id.} at 883 (quoting \textit{Fiallo v. Bell}, 430 U.S. 787, 792 (1977) (citations omitted) (quoting \textit{Mathews v. Diaz}, 426 U.S. 67, 80 (1976))).
  \item \textsuperscript{265} \textit{Kleindienst v. Mandel}, 408 U.S. 753 (1972).
  \item \textsuperscript{266} \textit{Price}, 941 F.2d at 883 (emphasis omitted) (citing \textit{Kleindienst}, 408 U.S. at 770).
  \item \textsuperscript{267} \textit{Id.} at 883-84.
  \item \textsuperscript{268} \textit{Id.} at 883 (quoting \textit{Galvan v. Press}, 347 U.S. 522, 531 (1954)).
  \item \textsuperscript{269} \textit{Id.} at 884-85.
\end{itemize}
ernment agency of an American citizen. It is an intimidating question. It chills the right of free association guaranteed by the First Amendment. Circuit Judge Noonan would have allowed resident aliens full First Amendment protections but with some limitations "in matters which 'may implicate our relations with foreign powers.'" Circuit Judge Noonan claimed that "[t]he Supreme Court has drawn a firm line between resident and non-resident aliens." Congress therefore has the exclusive power to define the protections and status of nonresident aliens but is limited by the First Amendment with regard to resident aliens.

III. THE IMMIGRATION ACT OF 1990: TERRORISM AND FOREIGN POLICY

A. Rewriting McCarran-Walter

The Immigration Act of 1990 has been hailed as removing many of the substantive grounds of exclusion for political belief and association under which many of the First Amendment challenges to immigration laws were brought. The 1990 Act has retained, however, a majority of the McCarran-Walter Act's ideological provisions with regard to immigrant aliens.

270. Id. at 885 (Noonan, J., dissenting).
271. Id. (quoting Fiallo, 430 U.S. at 476).
272. Id.
273. Id.
276. 8 U.S.C. § 1251 (1990 Supp. II). Section 1251(a)(1)(A) defines excludable aliens as: "[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable." 8 U.S.C. § 1251(a)(1)(A) (1990 Supp. II). In addition, section 1251(a)(4) and (5) excludes aliens on the basis of security and public charge grounds. These sections provide:
(4) Security and related grounds
(A) In general
   Any alien who has engaged, is engaged, or at any time after entry has engaged in—
   (i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information.
   (ii) any other criminal activity which endangers public safety or national security, or
   (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.
(B) Terrorist activities
   Any alien who has engaged, is engaged, or at any time after entry has engaged in any terrorist activity (as defined in section 1182(a)(3)(B)(iii) of this title) is deportable.
(C) Foreign policy
   (i) In general
      An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.
The Naturalization statute is unaffected by the Immigration Act of 1990 and continues the McCarron-Walter's Act prohibition against the naturalization of aliens who support the overthrow of organized government.  

(ii) Exceptions
The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to excludability under section 1182(a)(3)(C)(i) of this title.

(D) Assisted in Nazi persecution or engaged in genocide
Any alien described in clause (i) or (ii) of section 1182(a)(3)(E) of this title is deportable.

(5) Public Charge
Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.


277. 8 U.S.C. § 1182 (1990 Supp. II). Section 1182 defines excludable aliens and provides that:

(B) Terrorist activities
(i) In general
Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)), is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) “Terrorist activity” defined
As used in this chapter, the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(IV) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) “Engage in terrorist activity” defined
As used in this chapter, the term “engage in terrorist activity” means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives,
residents, free speech retains deportability for membership in a totalitarian party. The Act makes an exception to excludability for involuntary membership, past membership, and for close family members of United States citizens or lawful permanent residents. The Attorney General’s discretion in the or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(C) Foreign policy

(i) In general
An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is excludable.

(ii) Exception for officials
An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens
An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien’s past, current, or expected beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.


279. 8 U.S.C. § 1182(a)(2)(D)(ii). The section provides that:
Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

Id.

280. Id. (a)(2)(D)(3). This section provides that:
Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or
(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

Id.

281. Id. at (a)(2)(D)(iv). This section provides in full:
EXCEPTION FOR CLOSE FAMILY MEMBERS—The Attorney General may, in the Attorney General’s discretion, waive the application or clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure
case of close family members is limited in the case of resident aliens to the spouse, son, or daughter of the resident alien. This is in contrast to the broader definition of close family member of a citizen: parent, spouse, son, daughter, brother, or sister. Additionally, the close family member exception seems to be limited to resident aliens admitted for humanitarian purposes. The Act also provides for exclusion of participants in Nazi persecutions or genocide or anyone likely to become a public charge.

The Immigration Act of 1990 has added two significant provisions providing for deportability of resident and nonresident aliens. The first allows exclusion or deportation on foreign policy grounds. The second permits deportation or exclusion for persons engaged in terrorist activity.

Although the 1990 Act has removed the explicitly political grounds for exclusion established by the McCarran-Walter Act for nonimmigrant aliens, it has retained the exception for terrorist activity for all aliens. The terrorist activity provisions of the 1990 Act were drawn from Section 901 of the

family unity, or when it is otherwise in the public interest if the alien is not a threat to the security of the United States.

Id.

282. Id.
283. Id.
284. Id.
285. Id. at (a)(2)(E)(i). This section provides that:

any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
(I) the Nazi government of Germany,
(II) any government in any area occupied by the military forces of the Nazi government of Germany,
(III) any government established with the assistance or cooperation of the Nazi government of Germany, or
(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is excludable.

(ii) PARTICIPATION IN GENOCIDE—Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is excludable.

Id.

286. 8 U.S.C. § 1251(a)(5) (Supp. II 1990). This section provides that: “Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.” Id.
289. 8 U.S.C. Section 1251(a)(4)(B) (Supp. II 1990). “Any alien who has engaged, is engaged, or at any time after entry has engaged in any terrorist activity (as defined in section 1182(a)(3)(B)(iii) of this title) is deportable.” Id. Section 1182 (a)(3)(B)(iii) provides:

(iii) “ENGAGE IN TERRORIST ACTIVITY DEFINED”—As used in this Chapter, the term ‘engage in terrorist activity’ means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:
(I) The preparation or planning of a terrorist activity.
(II) The gathering of information on potential targets for terrorist activity.
(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives,
Foreign Relations Authorization Act of 1987.\textsuperscript{290} Section 901’s provision regarding terrorist activity was much more narrowly drawn than that contained in the 1990 Act. Under section 901, terrorist activity was defined as activities which resulted in or had a substantial risk of resulting in serious bodily harm to persons not involved in armed hostilities.\textsuperscript{291} In contrast, the Immigration Act of 1990 defined terrorist activity as encompassing a wide range of activities, including recruiting members or providing material support to a suspected terrorist organization.\textsuperscript{292} Section 901’s provision had allowed the continued exclusion and deportation of aliens on the basis of association with or membership in organizations which have engaged in terrorist activities.\textsuperscript{293} Implementation of the terrorism provisions under existing naturalization and deportation procedures will likely result in the same wide-sweeping inquiry justified by the McCarren-Walter Act.\textsuperscript{294} Whether the incidence of terrorism in the United States justifies the wide ranging terrorism exceptions is not clear.\textsuperscript{295} According to F.B.I. figures, fifty-three incidents of domestic terrorism occurred from 1985 to 1989.\textsuperscript{296} The Act’s exception from First Amendment protection for aliens considered to be adverse to foreign policy is contained in Section 1251(a)(4)(C).\textsuperscript{297

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or training, to any individual the actor knows or has reason to believe has committed or plans to commit an act of terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.


\textsuperscript{291} \textit{See supra} note 287, for the Act’s definition of terrorist activity.

\textsuperscript{292} Id.

\textsuperscript{293} \textit{Id.} See Cole, \textit{supra} note 2, at 22, for a discussion of the use of the terrorist activity provision of § 901 to exclude aliens on the basis of association.

\textsuperscript{294} \textit{Id.} See Cole, \textit{supra} note 2, at 22; Ashley Dunn, \textit{McCarthy-Era Legacy Survive With U.S. Government Blacklist}, \textit{The Houston Chronicle}, Oct. 31, 1991, at A9; Bruce Fein, \textit{Foreign Policy Miscue}, \textit{The Wash. Times}, Dec. 19, 1990, at G2. The Bush Administration has proposed a secret deportation tribunal for aliens suspected of terrorism in which the evidence against an alien would be disclosed to the alien only in a summary form, or not at all, on the basis of national security, U.S. foreign relations, important investigatory techniques, or confidential source concerns. Bruce Fein, \textit{Improving on a Terrorist Idea}, \textit{Tex. Law.}, July 1, 1991, at 17. Although this particular proposal was abandoned on June 20, 1991, a more moderate version is in the drafting stage. \textit{Id.} The rationale behind this provision is to avoid exposing intelligence methods and infiltrators. \textit{Id.}

\textsuperscript{295} Fein, \textit{supra} note 294 at 17.

\textsuperscript{296} \textit{Id.} The purpose of the special deportation proceeding would thus seem to be mainly directed toward the control of terrorism in foreign countries. \textit{Id.}

\textsuperscript{297} 8 U.S.C. § 1251(a)(4)(C) (Supp. II 1990). This section provides:

- (i) In General
  - An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

- (ii) Exceptions
  - The exceptions described in clauses (ii) and (iii) of § 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to excludability [sic] under section 1182 (a)(3)(C)(i) of this title.

\textit{Id.}
This Section provides that an alien is deportable if the Secretary of State reasonably believes that the aliens "presence or activities . . . would have potentially serious adverse foreign policy consequences . . . " The discretion given to the Secretary of State to exclude non-immigrant aliens on the basis of foreign policy considerations is limited however, by Section 1182(a)(3)(C)(iii), which provides that:

[a]n alien . . . shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

This limitation was included within the 1990 Act because of Congressional concern over the broad discretion which the Foreign Policy section appeared to grant to the Secretary of State.

B. The Future of First Amendment Protections for Resident Aliens: The Substantial Connection Test of Verdugo-Urquidez

In United States v. Verdugo-Urquidez, the Court stated that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." The first section of this Comment examined the structure established by the sovereignty of the nation and its relations to aliens. The second section discussed the later use of these concepts in the context of the expulsion and restriction of resident aliens through ideological provisions. The final section addressed the return of the sovereign's responsibility for national security in the form of restrictions based on association with groups deemed to be terrorist. The 1990 Act represents the United States most recent statement of immigration policy. It was introduced in order to rid the immigration laws of the anachronistic McCarran-Walter provisions which allowed for denial of naturalization and deportation on the basis of aliens' thoughts, beliefs, and expressive activities. The Act, however, has retained many of the ideological provisions for deportation and denial of naturalization. The constitutional protections of the 1990 Act, additionally, as in Section 901, are not applicable to resident aliens who are by definition immigrant aliens. These protections apply to immigrants only in the context of the foreign policy provision.

298. Id.
301. Id. at 271. The court stated that the First, Fifth, Sixth, and Fourteenth Amendments, the Just Compensation Clause, and the Equal Protection Clause have been held to extend to aliens within the territory of the United States. (citing Plyler v. Doe, 457 U.S. 202, 211-12 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953); Bridges, 326 U.S. at 148; Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
The terrorist provision of the Act is subject to wide ranging use to deport and deny naturalization to resident aliens on the basis of expressive activities running counter to United States interests which would be protected if committed by a United States citizen.

The Act of 1990 thus retains the distinction between citizens and noncitizens for the purposes of free speech protection under the First Amendment.