Immigrants, Aliens, and the Constitution

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IMMIGRANTS, ALIENS, AND THE CONSTITUTION

And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt. . . .

Leviticus, xix, 33:34.

In three recent cases, the Supreme Court has expanded the constitutional protections accorded to aliens. In *Graham v. Richardson*, the Court struck down a state statute which limited welfare benefits to U.S. citizens. Such a restriction was held to violate equal protection, and the Court stated that classifications on the basis of alienage are "inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." The Court also reaffirmed that constitutional standards apply to state action in the granting of a privilege which the state may refuse altogether, as in the case of welfare.

In *Sugarman v. Dougal*, the Court applied this same argument in striking down a New York statute which limited employment in the competitive civil service to citizens. The Court held that "a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment."

In *In re Griffiths*, the Court held to be violative of equal protection a state bar rule which prohibited the admission to the bar of aliens. "In order to justify the use of a suspect classification," said the Court, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest." Restriction of the bar to citizens was held not to be necessary to safeguard the interests of the people of the state or of the state itself. The holdings of these cases may be stated briefly as follows:

1. Classifications based on alienage are inherently suspect and subject to close judicial scrutiny.
2. Such a classification must be for a constitutional purpose and the purpose or interest involved must be a substantial one.
3. The classification must be necessary to the accomplishment of the legislative purpose.
4. These tests of the classification apply whether the benefit to the alien which is involved can be considered a "right" or a "privilege."

The holdings in these cases, taken together, call into question much of the present law concerning aliens. In particular, they provide the basis for a broad

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1 403 U.S. 365 (1971).
2 403 U.S. at 376.
3 403 U.S. at 374.
5 93 S.Ct. at 2850.
7 93 S.Ct. at 2855.
reinterpretation of the constitutional rights of immigrants to the United States and other resident aliens at all stages of the immigration process. Re-examination of the rights of immigrants in proceedings to naturalize has been considered elsewhere. This article examines the impact of these cases on three other areas: admission of immigrants and other aliens, the civil rights of resident aliens, and the rights of aliens in proceedings to deport.

I. The Right of Entry

The early history of immigration in the United States was one of admission without restriction. Immigrants could enter freely, and in some cases there was encouragement of immigration by state and federal governments. The Supreme Court forbade the states from limiting and regulating immigration, *e.g.*, by levying landing taxes, on the grounds that such a tax was an interference with foreign commerce and that such regulation was vested in Congress.

The first act of Congress restricting immigration, passed in 1875, excluded prostitutes and convicts. Later statutes excluded idiots, lunatics, and those likely to become public charges. In 1882, Congress passed the first act excluding Chinese immigration, and since that time has been active in legislating restrictions on immigration. It has barred immigration on grounds of political opinions; and, under the quota system, first adopted in 1921, fostered an explicitly racial and eugenic scheme of immigration aimed at encouraging immigration from northern and western Europe rather than southern and eastern Europe and Asia, while at the same time placing a fixed limit on yearly immigration. Racial quotas were not dropped until 1965 by an act which replaced exclusion on racial grounds with a preference system. Under this system pref-

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11 Id.
12 The Head Money Cases, 112 U.S. 580 (1884).
17 Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213. This act provided for exclusion of "anarchists, or persons who believe in, or advocate the overthrow by force or violence of the government of the United States, or of all government, or of all forms of law, or the assassination of public officials" (emphasis added).
18 Act of May 19, 1921, ch. 8, 42 Stat. 5; Act of May 26, 1924, ch. 190, 43 Stat. 153.
19 M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 29-33 (1946). The effect of the law was to severely restrict immigration from southern and eastern Europe, while leaving that from northern and western European countries unaffected. Earlier legislation had barred virtually all Asiatic immigration, Act of Feb. 5, 1917, ch. 29, § 2, 39 Stat. 874; and to this exclusion was added exclusion of the Japanese in violation of the Gentlemen's Agreement of 1907. *Id.* at 22-29.
erence is given to relatives of citizens and resident aliens, and an immigrant is not barred on grounds of race or national origin. If he is entering to work he must establish that he will not compete with present workers. The courts have upheld this changing pattern of restrictive legislation. Initially the power to restrict and regulate immigration was found in the commerce clause. Later cases, however, stated that the federal power to exclude or deport aliens was plenary and derived from inherent powers of sovereignty. This theory was first set out in The Chinese Exclusion Case. That case involved a Chinese laborer who had lived in San Francisco for 12 years. He obtained a certificate of re-entry issued pursuant to the Chinese exclusion statutes and left for China. Upon his return to San Francisco, he was denied entry on the grounds that an act of Congress, passed after he had left China but before his arrival in the U.S., had annulled the certificate and abrogated his right to return. Justice Field, speaking for a unanimous Court, upheld the exclusion. The Court admitted that the act of Congress upon which exclusion was based violated the express terms of treaties between the U.S. and China; the act, however, was held to have superseded those treaty provisions, which provided that the United States could not completely ban Chinese immigration. Justice Field went on to argue that the power to exclude was a “sovereign [power], restricted in [its] exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.” If Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security,” it may exclude them even in time of peace, and this exclusion will be conclusive on the judiciary. Justice Field saw the congressional action to be justified by the “well-founded apprehension . . . that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there.” The Court, in the broadest terms, upheld the right to exclude any aliens, even though the basis for exclusion be racial discrimination. This same plenary power was later applied to deportation.

22 The Head Money Cases, 112 U.S. 580 (1884).
24 130 U.S. 581 (1899).
27 130 U.S. at 600.
28 130 U.S. at 600.
29 130 U.S. at 604.
30 130 U.S. at 606.
31 130 U.S. at 594.
32 A Chinese resident in California was subject to other legal restrictions at this time: he paid special taxes, he was excluded from schools, he could not vote, and he could not testify in court for or against a Caucasian. He was harassed by discriminatory legislation, as seen in Yick Wo v. Hopkins, 118 U.S. 356 (1886). As Senator Hoar replied to Justice Field’s argument that the Chinese would not assimilate, “it takes two to assimilate.” M. Konvitz, The Alien and the Asiatic in American Law 10 (1946).
33 Fong Yue Ting v. United States, 149 U.S. 698 (1893). Justice Brewer dissented in
The plenary power to exclude has been held to mean that an alien seeking admission has no substantive rights under the Constitution. Exclusion has been upheld where based on race and where based on political opinion. An immigrant seeking admission has also been denied virtually all procedural rights. If held in custody, an alien may bring a suit in habeus corpus; but an alien seeking admission has no right of due process and may be excluded without hearing. Justice Minton disposed of the due process argument in a sentence: "Whatever the procedure authorized by Congress is, it is due process so far as an alien denied entry is concerned."

There are five leading cases on the power of Congress to exclude, and all demonstrate the harshness of a rule which gives to a suitor no substantive and virtually no procedural rights. In The Chinese Exclusion Case, a resident of the United States for 12 years was denied readmission though this denial violated treaty rights and though the alien had been granted a valid re-entry certificate upon his departure. In United States ex rel. Turner v. Williams, the exclusion was upheld of an alien who held the political philosophy that absence of government was preferable to its existence, and who was a philosophical, as opposed to a practising, anarchist. In United States ex rel. Knauff v. Shaughnessy, the Court in a 4-3 decision upheld the exclusion of the wife of a former member of the U.S. armed forces seeking admission under the War Brides Act, without a hearing, and with no facts stated as grounds for the allegation that her admission would be "prejudicial to the interests of the United States." In Shaughnessy v. United States ex rel. Mezei, petitioner had resided in the United States for 25 years. He left to visit his dying mother in Romania and was refused re-entry on the basis of confidential information from secret informers. Because no

this case, arguing that a person subject to deportation who is a lawful resident of the United States is within the protection of the Constitution, and might not be deprived of liberty and punished without due process of law, and in disregard of constitutional guarantees. 149 U.S. at 733. Justice Brewer criticized the doctrine of inherent sovereignty as being indefinite and dangerous. He distinguished deportation from exclusion cases on the grounds that the Constitution has no extraterritorial effect. 149 U.S. at 737-38. Justice Field also dissented. 149 U.S. at 744.

34 The Japanese Immigrant Case, 189 U.S. 86 (1903); The Chinese Exclusion Case, 130 U.S. 581 (1899).

35 United States ex rel. Turner v. Williams, 194 U.S. 279 (1904). Cf., Kleindienst v. Mandel, 408 U.S. 753 (1972). In Turner the ratio decidendi of the case is not wholly clear, and it has been argued that the case might as clearly stand for the proposition that an alien does not have standing to demand admission on constitutional grounds. Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 548-49 (1953). In Mandel, the Court said that it would not look behind a decision of the Attorney General made for a legitimate and bona-fide reason or weigh it against the first amendment interests of those who would personally communicate with the alien. 408 U.S. at 770.

36 Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).


38 Id. at 544.

39 130 U.S. 581 (1889).

40 194 U.S. 279 (1904).

41 194 U.S. at 292-294.

42 338 U.S. 537 (1950).


44 338 U.S. at 539. Mrs. Knauff was detained by the immigration authorities for about 3 years before she was finally admitted following a reversal by the Board of Immigration Appeals. M. Konvitz, Civil Rights in Immigration 49 (1953).

45 345 U.S. 206 (1953).
other country would accept him, he was detained for over two years at Ellis Island. The Court upheld the refusal to permit entry, on a 5-4 vote even if this meant indefinite detention at Ellis Island.\(^{46}\) In *Kleindienst v. Mandel*,\(^ {47}\) a Belgian Marxist theoretician and working journalist was excluded and prevented from attending conferences and giving lectures at Stanford, Princeton, Amherst, Columbia, Vassar, and before other groups on the discretion of the Attorney General to admit or exclude aliens who advocate or have at any time advocated the doctrines of world communism.\(^ {48}\)

The plenary power of Congress to exclude immigrants and other aliens is based on an inherent power of sovereignty, on principles derived from international law.\(^ {49}\) Most authorities on international law agree that states have the power to exclude and expel aliens.\(^ {50}\) This theory has been criticized, however, as interfering with a fundamental right of international intercourse between states.\(^ {51}\) That the power to exclude may be one which is granted by international law does not, in any case, resolve the question of the application of the Constitution to the exclusion of immigrants and other aliens. The language of the decisions has indicated that this power is not to be found in the Constitution, but resides solely in the legislative branch subject to delegation to the executive. It is said not to be subject to judicial review. Logically, if the power is plenary, Congress might use it to bar the entrance of aliens on grounds other than race or national origin. For example, it might base exclusion on religious beliefs in apparent violation of the first amendment. Because the federal government has the power to exclude or admit, goes the argument, Congress may impose unconstitutional conditions upon the immigrant and may adopt unconstitutional classifications. This argument is the Holmesian argument that if the sovereign may withhold a privilege from all, it may make any classification as to those receiving the privilege.\(^ {52}\) The argument runs: Congress may exclude immigrants, under

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\(^{46}\) Justice Jackson in dissent argued that the petitioner was entitled at least to procedural due process:

> Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law? Here we have a case that lies between the taking of life and the taking of property: it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law. 345 U.S. at 226-27.

\(^{47}\) 408 U.S. 753 (1972).

\(^{48}\) One of his lectures was later given by transatlantic telephone. 408 U.S. at 759. Justices Douglas, Marshall, and Brennan dissented.

\(^{49}\) The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

\(^{50}\) See e.g., I. Brownlee, Principles of Public International Law 505 (1973); 1 Oppenheim, International Law 498-502 (3rd ed. 1920).

\(^{51}\) E. Borchard, The Diplomatic Protection of Citizens Abroad 45 (1915). A resolution of the Institute of International Law proposed this standard: "The free entrance of aliens on the territory can only be prohibited in a general and permanent manner for reasons of public interest and extremely grave motives, e.g., by reason of a fundamental difference of morals or civilization, or by reason of an organization or dangerous accumulation of aliens who appear hostile." Quoted in Id. at 45, n.2.

\(^{52}\) Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 550 (1953). In the case of McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, (1892), Justice Holmes spoke for the Massachusetts Supreme Judicial Court in denying the petition
international law, and probably also under the commerce clause. If Congress has the power wholly to exclude, then the immigrant has no right of entry and may only request the privilege of entry. Congress may grant the privilege on whatever grounds it chooses, and the immigrant will have no basis for complaint. In the Massachusetts case of Commonwealth v. Davis, Holmes upheld the constitutionality of an ordinance which limited the use of Boston Commons for public addresses:

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.

By the same argument, because the immigrant has no proprietary right of entry (only a mere privilege), Congress may wholly end that right or impose any lesser limitation on the granting of the right of entry. In Davis, a limitation on free speech in a public park was upheld; in the immigration cases, exclusions based on free speech, political or religious beliefs, race, or national origin could be similarly upheld.

Later cases have recognized that the application of the Holmes theory to the public sector could have devastating effects on private constitutional rights. Under this theory the state might impose the surrender of a constitutional right as a condition for the granting of any privilege. The state might require a welfare recipient to surrender his right to be free from unreasonable search and seizure. The state might use arbitrary or discriminatory classifications for the granting of welfare or of public employment. With the expansion of governmental activities and the growing importance of public employment, welfare, unemployment and other government programs, the potential for abuse of constitutional rights under this theory has been recognized. The Holmes theory has in consequence been struck down in several recent cases.

of a policeman who had been fired for violating a regulation which restricted his political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).


34 162 Mass. at 511, 39 N.E. at 113.


37 Van Alstyne, supra note 55.

In *Graham v. Richardson*, the Court held that state statutes which deny welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years violated the equal protection clause. The Court stated that "this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.'" The Court went on to find that the state's concern for fiscal integrity was not a sufficiently compelling justification for the denial of welfare payments to aliens. The same principles apply to entry as to other government-granted privileges. To permit unconstitutional conditions to be imposed on immigrants could result in depriving resident aliens of various constitutional rights and protections. The government might require immigrants to waive various constitutional rights and protections. An important problem in applying constitutional standards to exclusion is that of providing due process to immigrants and others seeking entry. The only remedy which is available to the excluded alien is habeus corpus, which is available where the alien is in custody to test either (1) that the statutory procedure had not been circumvented, or (2) that the statutory procedure had been administered fairly. For an immigrant or other alien who is denied a visa by a consular officer, this remedy is unavailable even though the privilege of entry be denied on unconstitutional grounds. The Administrative Procedure Act is

60 403 U.S. at 374.
61 403 U.S. at 375.
62 *Infra at notes 108-10.*
the standard of due process for other governmental administrative agencies which apply to residents, *e.g.*, to the granting of government employment, Social Security, and other government benefits. It is submitted that this would also be the proper standard of due process for reviewing administrative decisions to exclude, absent some showing of a compelling reason to apply a different standard.68

The proper constitutional test for restrictions on entry is the two-level test applied to legislation generally. Where the restriction does not involve a suspect classification or impinge on fundamental rights, a restriction on entry would have to bear a reasonable relationship to a legitimate government interest.67 Present immigration law contains various exclusion provisions which would need to meet the test of a reasonable relationship to a legitimate state interest. We may consider these as falling under the broad interests of public health and safety, public morals, fiscal integrity, and national security, though these categories overlap to a degree.

A. Public health and safety

Under present law, aliens who are afflicted with any dangerous contagious disease are refused entry.68 This is the clearest example of exclusion to protect public health and safety. Aliens may also be excluded who have noncontagious diseases or physical defects;69 such exclusion is not based on preserving the public health, but rather on grounds of preventing expenditure for treatment or for support of an alien who might become a public charge. An argument might, perhaps, be made on eugenic grounds that immigrants with hereditary defects, *e.g.*, hemophilia, color blindness, or Huntington’s chorea, be excluded; but present immigration law makes no provision for exclusion on this sort of eugenic grounds.

A major area of exclusion is of persons with mental defects or histories of insanity. A person who is insane70 or who has suffered one or more attacks of insanity71 or who is afflicted with a psychopathic personality, sexual deviation, or mental defect may not be admitted.72 Where there is evidence of criminal pathology, exclusion on grounds of public safety would be proper. In other cases of mental defects, the relationship to a government interest would have to be found in prevention of public expense or treatment; or perhaps, where quotas are oversubscribed, in the greater public contribution which could be made by an immigrant without such a defect. In the case of a physical defect, however, the alien is excluded only if it would affect his capacity to earn a living and only if he needs to work to earn a living. An alien with a mental defect is excluded regardless of his capacity or need to work. It would appear that where there is no danger to public safety the same test should apply to mental defects as to phys-

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rical ones. Other categories also cause difficulties. It has been held that a homosexual is a "psychopathic personality" and excludable under the immigration laws. It is at least questionable that there is any legitimate state interest in excluding homosexuals who would otherwise qualify for entry.

Also ineligible for admission are aliens who are mentally retarded. In some cases this might be a proper basis for exclusion where the alien might become a public charge. In other cases, however, the effect of this exclusion may well be to force a family with a retarded member to choose between splitting the family by immigrating or staying together in the foreign country. Where the family as a whole would be a welcome addition to the United States, it is submitted that it is unreasonable to exclude it because of a trait such as mental retardation which poses no hazard to society. In fact, this is recognized in the immigration law, which permits entry (subject to certain regulations) to a mentally retarded alien who is the spouse, the unmarried son or daughter, or the parent of a U.S. citizen or of any alien lawfully admitted for permanent residence or as an immigrant. The effect of the exclusion rule, then, is that an immigrant with a mentally retarded spouse, parent, or child cannot bring this person with him at the time of his entry, but may later send for the person—a procedure which seems unnecessarily cumbersome.

Also excludable on grounds of public safety are aliens who have been convicted of a crime (other than a purely political offense) involving moral turpitude, or two or more offenses of any kind, or of crimes relating to traffic in narcotic drugs or marijuana. Exclusion on this ground would seem to be reasonably related to the protection of public safety. Difficulty arises, however, with the provision that aliens are excludable:

[Who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.]

This section would seem to permit virtually unfettered discretion to exclude aliens otherwise admissible, without opportunity for hearing, on the basis solely of a "reason to believe" that there is some threat to public safety, without even

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79 It has been argued that the standard of "moral turpitude" is unconstitutionally vague. In Jordan v. DeGeorge, 341 U.S. 223 (1951), the Court upheld the constitutionality of that standard, and held that distilling alcohol with intent to evade tax on the distilled spirits involved moral turpitude. Justice Jackson, joined by Justices Black and Frankfurter, dissented: So far as this offense is concerned with whiskey, it is not particularly un-American, and we see no reason to strain to make the penalty for the same act so much more severe in the case of an alien "bootlegger" than it is in the case of a native "moonshiner." I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst. 341 U.S. at 241.
the chance to prove, for example, mistaken identity. Although it is not clear that this provision has been relied upon to exclude, it is submitted that such a sweeping delegation of authority, in such broad terms, is unconstitutional for vagueness.

B. Protection of public morals

Also excludable are certain classes of aliens who would seem to pose no direct threat of harm to public health or safety, but who are excludable, it appears, on grounds of protecting public morals. These include prostitutes and procurers;\(^8\) polygamy or those who advocate polygamy;\(^8\) narcotic drug addicts or chronic alcoholics;\(^8\) paupers, professional beggars, and vagrants;\(^8\) and those coming to the United States to engage in any immoral sexual act.\(^8\) In general, these would appear to be reasonable bases for exclusion since the classifications involve behavior which would be criminal or because the alien would be likely to become a public charge.

C. Fiscal integrity and economic welfare

Aliens are excludable who are likely to become public charges.\(^8\) Exclusion to prevent entry of aliens who would likely increase public expenditure also, no doubt, lies behind the exclusion of paupers, drug addicts, and alcoholics. The 1965 immigration act\(^8\) has extended this ground of exclusion to give preference to immigrants who are members of the professions or who have exceptional ability in the arts or sciences and to skilled and semi-skilled workers.\(^8\) For such workers and for others seeking entry to work, there must be a shortage of employable and willing persons in the United States as certified by the Secretary of Labor.\(^8\) Thus, to the requirement that one seeking entry must not be likely to become a public charge is added the requirement that one seeking entry to work must provide a needed skill or otherwise not take a job which might be filled by a person already in the United States. Such a preference system is clearly related to the national interest in promoting the economy\(^8\) although it raises questions of the Brain Drain and of American relations with other countries.\(^8\)

D. National security

Various political activists and thinkers are excludable. These include anarchists; members of the Communist Party and those who have ever been members; those who advocate doctrines of international communism; those who write, publish, or distribute journals or printed matter which advocates the overthrow of the government, assassination of public officials, sabotage, or the doctrines of world communism; and other similar categories. An alien excludable under this section may be admissible if he can establish that his membership or affiliation was either involuntary; when he was under 16 years of age; by operation of law; for purposes of obtaining food or other essentials of living; or that this membership or affiliation had terminated at least 5 years prior to the date of application, that he had since actively opposed the doctrines, etc., of the organization, and that his admission would be in the public interest. An alien may also be excluded "with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe" probably would engage in subversive activities or join subversive organizations. National security is certainly a reasonable basis for exclusion. The difficulties with these provisions arise from their conflict with first amendment rights of free speech, and from the broad powers of discretionary exclusion they provide to consular officials, especially when it is realized that it is virtually impossible to challenge the exercise of this discretion in the courts. Where exclusion is used to prevent free speech and the expression of political ideas, the exclusion conflicts with a fundamental right and should be subject to the strict scrutiny test; that is, the exclusion should be based upon a compelling state interest. As a practical matter, it is difficult to perceive any real danger from the expression of radical or subversive ideas by aliens, dangers which could not be obviated by other means; e.g., limitations of time, posting of bond, etc., and would require their exclusion. In Sugarman v. Dougall the Court indicated that a compelling interest to define the political community permitted the restriction of aliens from the exercise of the political rights of citizens. This argument could be applied to restrict the political activity of aliens seeking entry (e.g., raising funds, lobbying, participating in political campaigns and demonstrations) while protecting rights of free speech and press. Under the present statute an alien might be excluded for acts done outside the United States which would be protected by the first amendment within the United States. Properly, such activity might be received as evidence that an alien seeking admission would damage national security, and the alien could be required to prove his constitutional entitlement to entry. A law which bans entry solely because of political opinion, however, imposes an unconstitutional condi-
tion on the privilege of entry and, under Graham and other cases, should be unconstitutional.

In Kleindienst v. Mandel, the Court was presented with this issue in the case of a Belgian Marxist author and editor whose request for entry to address college audiences and participate in other events was denied under the discretion of the Attorney General. The opinion of the Court, however, does little to resolve the issues involved. It does not consider the standing to sue of the alien, and it specifically does not consider the plenary power doctrine. The Court holds that if legislative authority is properly delegated and if the Attorney General gives “a facially legitimate and bona fide reason [for the exclusion] 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.” The Court declined to address the issue of whether the first amendment or other grounds might be available where no justification for exclusion was given. The Mandel case upheld the exclusion of an alien on very narrow grounds where the basis of the exclusion was clearly the political opinions of the alien. However, the language of the case indicates a retreat from the broad statement of the plenary power doctrine and suggests that future cases might establish the principle that this power is subject to constitutional limitations.

It was suggested above that the right of free speech is a fundamental right and that restrictions of entry for the purpose of restricting free speech, to be upheld, should be based upon a compelling governmental interest. The compelling governmental interest test for constitutionality applies to legislation which either infringes on fundamental rights or which employs suspect criteria; e.g., race, religion, or national origin. The government has the burden of proving that such legislation is based upon a compelling interest in order to sustain constitutionality.

Restrictions on immigration have frequently discriminated on grounds of race and national origins. Chinese were wholly excluded and other Asians had very small quotas. Under the quota system instituted in the 1920’s, northern and western Europeans were highly favored, while all others were, in effect, largely excluded. These provisions were abolished in 1965 by an act which provided, with certain exceptions, that:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence. . . .

98 408 U.S. 753 (1972).
99 408 U.S. at 767.
100 The reason upon which the court found exclusion could be based was that on an earlier visit Mandel might have exceeded the limitations on his visa. 408 U.S. at 758, n.5. This point was not relied on by the government, however, which conceded that Mandel might not have been notified of the limitations. 408 U.S. at 769.
101 408 U.S. at 770.
103 M. Konvitz, supra note 19.
The exceptions relate to family relationships with United States residents, special provisions for refugees, and special provisions for aliens from Western Hemisphere countries. For other immigrants, each country is limited to 20,000 visas a year within an Eastern Hemisphere total of 170,000. The effect of this change in the law has been a large increase in the number of immigrants from Asia and from countries such as Greece and Italy which previously had oversubscribed quotas. It might be argued that the 20,000 limit for visas per year per country is in effect discrimination on the basis of national origin, but because the purpose of the law is to encourage diversity and because it is not aimed at any particular national groups, this classificatory scheme would appear to be proper.

II. Rights of Resident Aliens

Immigrants and other aliens resident in the United States are subject to the law of the United States. They are “persons” under the fourteenth amendment and the Civil Rights Act of 1870. Nonetheless, legal restrictions of resident aliens have been permitted in certain areas, notably on the right to own land, the right to public employment, and the right to engage in various professions and occupations. These restrictions have been almost entirely invalidated by the holding in *Graham v. Richardson* that classifications on the basis of alienage are inherently suspect and by the application of this equal protection standard to public employment in *Sugarman v. Dougall* and to state restrictions on engaging in the professions in *In re Griffiths*. The major areas in which the rights of aliens now differ from those of citizens are the areas of political rights (e.g., to vote, to hold elective and high public office, and to serve on a jury) and of rights with respect to deportation.

The Supreme Court in *Yick Wo v. Hopkins* held that a resident alien is a person entitled to the protection of the equal protection clause of the fourteenth amendment. In *Wong Wing v. United States*, aliens were held to be protected by the fifth and sixth amendments and to be entitled to due process and trial by jury. There are few cases on the civil rights of resident aliens, and these cases

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105 *Id.*
117 118 U.S. 356 (1886).
118 163 U.S. 228 (1896).
tend to take it for granted that an alien resident in this country is protected by the Bill of Rights.\textsuperscript{119}

Most of the litigation on the rights of resident aliens has been on the application of the equal protection clause to aliens. In \textit{Yick Wo}, a San Francisco ordinance requiring a license to operate a laundry in a wooden building was struck down as being in fact a discriminatory measure against resident Chinese\textsuperscript{120} and designed to restrict the private employment of aliens in a particular occupation. In 1915, in \textit{Truax v. Raich},\textsuperscript{121} the Supreme Court struck down a state statute limiting private employment of aliens. The Arizona statute, which provided that when anyone employed five or more persons not less than eighty percent had to be citizens, was held to violate equal protection.\textsuperscript{122} "It requires no argument," the Court said, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."\textsuperscript{123} The Court noted that the act was not limited to persons engaged in public work,\textsuperscript{124} and found no sufficient public interest involved which would support the classification on grounds of alienage.\textsuperscript{125} Further, the act in effect was considered to infringe on the federal power to control immigration.\textsuperscript{126}

In two cases decided later the same year, the Court found a basis for classification on grounds of alienage where a New York law prohibited state employment of alien laborers.\textsuperscript{127} The state as employer was considered to be in the same position as a private employer. No one has an absolute right to work for the state, the Court reasoned, and therefore the state, equally with private employers, was held to be unrestricted by the fourteenth amendment in the area of public employment.\textsuperscript{128}

State restrictions on employment of aliens have also been upheld under the state's police power. One basis for the state to forbid licensing of aliens has been where the occupation is of a dangerous or anti-social nature. This rationale has been used to forbid resident aliens from operating a pool room,\textsuperscript{129} from selling intoxicating liquors,\textsuperscript{130} from hawking and peddling,\textsuperscript{131} and from acting as

\textsuperscript{120} 118 U.S. 356 (1886).
\textsuperscript{121} 239 U.S. 33 (1915).
\textsuperscript{122} 239 U.S. at 43.
\textsuperscript{123} 239 U.S. at 41.
\textsuperscript{124} 239 U.S. at 40.
\textsuperscript{125} 239 U.S. at 43.
\textsuperscript{126} 239 U.S. at 42.
\textsuperscript{127} Crane v. New York, 239 U.S. 195 (1915); Heim v. McCall, 239 U.S. 175 (1915).
\textsuperscript{128} Heim v. McCall, 239 U.S. 175, 192 (1915).
\textsuperscript{129} Ohio \textit{ex rel.} Clarke v. Deckebach, 274 U.S. 392 (1927).
\textsuperscript{130} Ohio \textit{ex rel.} Clarke v. Deckebach, 274 U.S. 392 (1927).
The logic of these cases is highly dubious, especially because it is difficult to see a connection between the fact of alienage and the threat to public health and safety from these occupations. Cases under the state's police power involve occupations and activities which the state might regulate or wholly prohibit because of their dangerous or antisocial nature. State restrictions have also been imposed on professions subject to state licensing. Resident aliens have been barred in various states from the professions of medicine, law, pharmacy, accounting, and teaching, and from such various occupations as breeding domestic fish, giving manicures, shoeing horses, and promoting wrestling.

The constitutionality of many of these statutory restrictions was called into question by the Supreme Court in Takahashi v. Fish & Game Commission, which involved a California statute prohibiting the issuance of licenses to fish in California waters (and, to effectuate the statutory purpose, from bringing caught fish to California for sale) to aliens not eligible for citizenship. The statute applied primarily to Japanese, who at that time were ineligible for citizenship. The Court found no "special public interest" which would support the California ban and stated that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." This language in Takahashi was expanded by Graham v. Richardson, which held that alienage was a suspect classification and subject to close judicial scrutiny.

In Sugarman v. Dougall, this test was applied to strike down a New York statute restricting employment in the classified civil service to citizens; the Court found no substantial public interest involved in such classification. Further, the Court argued that restrictions on public employment of aliens must be precisely defined and within narrow limits. The effect of the case appears to be that a state may bar aliens only from elective office and from other high public offices. One important question specifically left unanswered in Sugarman is the extent to which the federal government may exclude aliens from federal employment. Unless the Court finds that there is some compelling interest involved in the exclusion of aliens, it would seem that flat federal bans on the employment of aliens also violate equal protection.
On the same day that Sugarman was decided, the Court also invalidated a state bar rule prohibiting the practice of law by resident aliens. In In re Griffiths the Court held that the profession of law does not "place one so close to the core of the political process as to make [one] a formulator of government policy," and that there was in consequence not a substantial enough state interest to justify the restriction of the bar to citizens. The Connecticut bar rule was held to infringe equal protection. The fact that the Supreme Court struck down a rule restricting admission to the bar to citizens is especially significant because law is the profession most closely related to state government itself and is the profession most widely barred to resident aliens. The Court's holding that this restriction is unconstitutional and its criticism of Ohio ex rel. Clarke v. Deckenbach indicate that almost the entire range of state restrictions on alien employment violates equal protection. Private employers may still require that employees be citizens, but the effect of the decisions in Takahashi, Graham, Sugarman, and Griffiths is to eliminate virtually all state classifications based on alienage in regard to state employment, licensed occupations, and professions, with the exception of elective and high public offices. Since alienage is now considered to be an inherently suspect classification, the state would have the burden of establishing the reasonableness of any such classification; and it is difficult to imagine a private occupation in which a classification based on alienage per se would be reasonable. The state may properly require competence and knowledge of American law and society in professions such as law, but it may no longer impose flat bans on alien employment.

The need for the extension of judicial protection of the civil rights of resident aliens is most clear with respect to employment. The arbitrary and almost whimsical state restrictions on alien employment derive largely from the fact that aliens lack the political right to vote and the protection this might give in the political arena. Aliens pay taxes and are subject to all other laws. To permit the widespread restrictions on employment in the professions was to assign aliens to a permanently inferior social and economic position. It is true, of course, that alienage is not necessarily a permanent condition and that in almost all cases the resident alien might be naturalized and granted the political rights of a citizen. It seems proper, however, that the civil rights of aliens be commensurate with their civil responsibilities.

Another important restriction on aliens has been on their right to own

\[\text{Notes and references:}\]

143 93 S. Ct. 2851 (1973).
144 93 S. Ct. at 2858.
145 The Court did not consider the case of rules permitting the membership in the bar to resident aliens who had made a declaration of intention to become a citizen, but not to other resident aliens. The broad language of the decision would indicate that this limitation would also violate equal protection.
147 274 U.S. 392 (1927).
149 In re Griffiths, 93 S. Ct. 2851, 2857 (1973).
150 Justice Rehnquist dissented in Sugarman and (joined by Chief Justice Burger) in Griffiths. He argued that alienage was unlike classifications such as race, national origins, and illegitimacy, in that alienage is generally not a permanent class—the alien through naturalization can obtain the rights of a citizen. By declaring alienage a "suspect classification," he argued, the Court failed to recognize basic differences between aliens and citizens and went beyond the intent of the fourteenth amendment. 93 S. Ct. at 2861.
property. Several Western states passed statutes aimed at preventing Chinese and Japanese from owning farm land; these were upheld by the Supreme Court in a series of cases in the 1920's. The basis of these cases was weakened by *Oyama v. California,* which held unconstitutional a part of the California Alien Land Law. The constitutionality of the restrictions on alien ownership was not decided, but four Justices in concurring opinions would have held the law unconstitutional on this ground. Subsequent state court cases relied on *Oyama* to find alien land statutes unconstitutional on grounds of equal protection. It is most unlikely that any general statute forbidding ownership of land by resident aliens would now be upheld.

III. Deportation

An immigrant or other resident alien is protected by the Constitution much as is a citizen. He is a "person" and is entitled to rights under the fourteenth amendment, and to the protection of the fifth and sixth amendments guaranteeing jury trial and due process. The protections provided by these fundamental rights do not extend to proceedings to deport, however. Because deportation has been held to be a civil penalty rather than a criminal one, a resident alien may be detained without bail; may be examined in an administrative hearing without a jury and before a hearing officer who acts as judge and prosecutor; and may be deported no matter how long he may have been a U.S. resident though he has been charged with no criminal act. He may be deported for having performed some act which is constitutionally protected. The language of the courts indicates that he may be deported without reason under the plenary power of Congress.

The theory that Congress has plenary power to deport as well as to exclude was first set out in *Fong Yue Ting v. United States.* The Chinese Exclusion Act of 1892 required all Chinese laborers resident in the United States at the time of the act to apply for a certificate of residence within one year. After that time, any Chinese laborer without a certificate was to be deported unless he could prove unavoidable reasons which prevented his applying and unless he had the testimony of one white witness that he was legally resident at the time of the act. Chinese witnesses were considered not to be credible. The Court upheld the

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151 See note 69 *supra.*
152 332 U.S. 633 (1948).
155 Wong Wing v. United States, 163 U.S. 228 (1896).
159 *Id.* Galvan was ordered deported for being a member of the Communist Party at a time when it was a legal political party.
161 149 U.S. 698 (1893).
162 Act of May 5, 1892, ch. 60, 27 Stat. 25.
act and deportation orders under it as well as arrest without warrant and detention without bail incident to deportation. Dicta in the case indicated that deportation might be effected without trial or examination.\textsuperscript{163}

The Court relied on \textit{The Chinese Exclusion Case}\textsuperscript{164} and various authorities on international law in support of the doctrine that Congress has plenary power to exclude and deport. Resident aliens, the Court said, "remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest."\textsuperscript{165} Further, the Court held that the deportee did not have the procedural rights incident to a criminal proceeding and was not entitled to a trial:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.\textsuperscript{166}

That a person legally resident in the United States could be deprived of such fundamental rights in a determination of whether he was to be expelled from the country was an extraordinary statement. In his dissent, Justice Brewer attacked the theory that the right to expel was an inherent power, and argued that, as the United States is a nation of delegated powers, any "inherent" power must be reserved under the tenth amendment to the states or to the people. The Constitution gave the government no general power to banish. "Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory."\textsuperscript{167} Justice Brewer and the other two dissenters also attacked the theory that deportation was not punishment. Deportation may deprive a person of livelihood, liberty, or property. It involves forcible arrest and removal from family and from business. Justice Brewer quoted Madison: "If a banishment of this sort be not punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."\textsuperscript{168}

In later deportation cases, the Court has followed the majority in \textit{Fong Yue Ting} and held that deportation is a civil rather than a criminal penalty. For this reason, constitutional rights incident to criminal proceedings have been held not to apply. The Court has said that an alien has no right to protest unreasonable

\textsuperscript{163} 149 U.S. at 728.
\textsuperscript{164} 130 U.S. 581 (1889).
\textsuperscript{165} 149 U.S. at 724.
\textsuperscript{166} 149 U.S. at 730.
\textsuperscript{167} 149 U.S. at 737-38.
\textsuperscript{168} 149 U.S. at 741.
searches and seizures incident to deportation, and that he may not obtain judicial review unless the proceedings are shown to have been manifestly unfair. He may even be deported under an ex post facto law.

The civil theory of deportation was reaffirmed in Harisiades v. Shaughnessy and in Galvan v. Press. In the latter case, Justice Frankfurter, in delivering the opinion of the Court, noted that the consequences of deportation are close to those of punishment, and that "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens." But, said Justice Frankfurter, the slate was not clean.

Majority opinions of the Court have recognized the severity of deportation, especially for long-time alien residents, while a series of dissenting opinions have attacked the civil character of deportation proceedings and the plenary power of Congress to deport. These opinions derive special force from the facts of the cases involved. In Galvan v. Press a native Mexican who had lived in the United States for 36 years, from the age of 7, was ordered deported. He had joined the Communist Party in 1944 and was a member for two or three years. At that time, the Party was a legal political organization with candidates on the California ballot. Nevertheless, Galvan was held to be deportable under the Internal Security Act of 1950 which provided for the deportation of any alien who had been a member of the Communist Party at the time of entry or at any time thereafter. As Justice Black said in dissent, "For joining a lawful political group years ago—an act which he had no possible reason to believe would subject him to the slightest penalty—petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country." In Carlson v. Landon the Court upheld the dis-

169 Li Sing v. United States, 180 U.S. 486 (1901).
174 347 U.S. at 530-31.
175 "It visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." Bridges v. Wixon, 326 U.S. 135, 154 (1945); "It may result also in loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); "(D)eportation is a drastic measure and at times the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
178 347 U.S. at 533. Justice Douglas also dissented, arguing: Aliens who live here in peace, who do not abuse our hospitality, who are law-abiding members of our communities, have the right to due process of law. They, too, are "persons" within the meaning of the Fifth Amendment. They can be molested by the Government in times of peace only when their presence here is hostile to the safety or welfare of the Nation. If they are to be deported, it must be for what they are and do, not for what they once believed.

347 U.S. at 534.
cretionary refusal of the Attorney General to grant bail to aliens detained during proceedings for deportation though there was no claim that the resident aliens might leave the jurisdiction where they had homes, jobs, and families. That case also involved alien members of the Communist Party. Justice Black dissented:

Today the Court holds that law-abiding persons, neither charged with nor convicted of any crime, can be held in jail indefinitely, without bail, if a subordinate Washington bureau agent believes they are members of the Communist Party, and therefore dangerous to the Nation because of the possibility of their "indoctrination of others." The extent to which the deportee may be deprived of constitutional rights can be seen in *Abel v. United States.* Petitioner was arrested for deportation upon an administrative warrant without authorization by an independent magistrate. His premises, books, and papers were searched incident to the arrest without search warrant and the evidence found was used in later criminal proceedings. He was not taken before any independent officer, but was taken to local administrative headquarters, then flown to a special detention camp. He was held without bail and interrogated for over five weeks; and while still under detention, he was served with a bench warrant on criminal charges upon an indictment. All of this was upheld because the proceeding was one in deportation and the deportee was not entitled to the same procedural rights as one arrested on a "criminal charge."

The Court has used two basic arguments in upholding the narrow limits of due process in proceedings to deport. First, it has argued that the power to expel, as the power to exclude, is a plenary power deriving from the nature of sovereignty. Carried to its logical conclusion, this argument would support mass exile, without hearing or cause, of aliens long resident in the United States. It would support political or religious persecution of resident aliens. For example, the government might expel Jewish or Catholic aliens under this logic; a Democratic administration might expel aliens it believed favored the Republicans, or vice versa. The theory of plenary power would support such action.

The Court has set certain limits to the plenary power, however. Where a criminal penalty is imposed along with deportation, the Court has held that the fifth and sixth amendments do apply. The Court has also indicated that deportation would not be upheld without a fair hearing. These decisions indicate that there is some limit to the sovereign power to deport, at least procedurally.

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180 The Court in that case dismissed the argument that the denial of bail violated the Eighth Amendment with little argument, noting only that in certain cases (murder and cases on appeal which prevent no substantial question), bail might be denied. The Court presented no reason why detention awaiting what it considered to be a civil proceeding, deportation, should not be bailable. 342 U.S. at 545-46.
181 342 U.S. at 547-48.
183 362 U.S. at 251. This case involved the Soviet agent Rudolph Abel. As Justice Douglas said in dissent, "Cases of notorious criminals—like cases of small, miserable ones—are apt to make bad law." 362 U.S. at 241.
184 Wong Wing v. United States, 163 U.S. 228 (1896).
The second basic argument of the Court has been that deportation is not a punishment. This argument in part derives from the sovereign power argument—if an alien may be deported for any reason deemed expedient, then his expulsion is not a criminal punishment for some misdeed. Of course, if the power is truly sovereign, it seems unnecessary to argue whether the penalty is civil or criminal; the classification becomes merely a means of holding that procedural rights do not apply to deportation, without facing the general issue of whether the government may perform such "sovereign" acts in ways repugnant to the Constitution.

The Court's criticism of the theory that deportation is not punishment was noted above. For an alien legally resident in the U.S., one cannot imagine how deportation can be considered anything less than punishment. The alien is deprived of a right granted to him upon entry—the right to reside in this country. The manner of this deprivation is through banishment, which has been recognized as a punishment by the courts when applied to citizens. It is certainly felt as punishment by the alien who loses residence, livelihood, perhaps liberty and property, and much else—and this is felt more deeply, perhaps, where it is imposed for having broken no law. As Justice Brandeis said, "To deport . . . may result in loss of both property and life; or of all that makes life worth living." To hold that a person might be subjected to such a penalty, yet to hold it to be "civil" is wholly unjust.

The courts have recognized the severity of deportation for a resident alien, yet they have as yet been unwilling to extend constitutional protection to cases of deportation. Upon the basis of recent decisions this approach is no longer tenable. The Court held in Graham v. Richardson that alienage is a suspect criterion under the equal protection clause of the fourteenth amendment and the federal government has at least as strict a duty with regard to equal protection as do the states. Yet deportation is a penalty applied only to resident aliens and would be considered punishment for citizens; in fact, it is probably barred as cruel and unusual punishment when applied to a citizen. If equal protection is to have any meaning for a resident alien, surely it must mean that he cannot be deprived

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188 Ng Fung Ho v. White, 259 U.S. 276, 284 (1921).

A resident alien is entitled to due process of law. We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same conviction an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime.

of his right of residence, removed from home and livelihood, and expelled without criminal charge or proceedings. The state may not bar aliens from welfare benefits, from state employment, or from becoming members of the professions; yet if the plenary power doctrine is followed, the federal government might accomplish all of these ends through deportation. Application of the equal protection doctrine to legally resident aliens requires that they not be subjected to the penalty of deportation without the application, at a minimum, of those standards of due process which would be applied in a criminal trial to impose a severe penalty on a citizen. Further, because the Court has recognized that alienage is a suspect criterion, the application of the penalty of deportation, a penalty which applies only to aliens, should be upheld only upon the showing of a compelling state interest.

In outlining the constitutional standards which should be applied to proceedings to deport, it is important to distinguish between legally admitted resident aliens and those who entered illegally. Aliens who have entered illegally should not by entrance alone have acquired any right to residence. Logically, their rights should be of no higher order than those of a non-resident seeking admission. Illegal resident aliens are a serious problem, numbering, it is estimated, between one and two million persons. Entry and residence in the United States are privileges which may be granted or refused, and deportation of illegal resident aliens is clearly proper and necessary as incident to the prevention of illegal entry. Indeed, it has been argued that the plenary power doctrine as set out by the Court in the early cases on deportation applied only to illegal aliens.

Deportation of a legally resident alien takes from him valuable rights. If equal protection for aliens is to have any meaning, this deprivation should be imposed only for serious offenses and upon a compelling state interest. The grounds for deportation under present law are far broader than this. One commissioner of immigration has estimated that there are 700 different grounds for deportation. These may be divided into four broad groups:

(i) Those aliens who entered the United States without inspection; or, having been admitted for a temporary stay, remained longer than permitted or otherwise violated the conditions of their stay.
(ii) Those aliens who were excludable at entry but nevertheless were permitted to enter the country.
(iii) Those aliens who within five years of entry committed an act or assumed a condition that rendered them deportable. Among such acts or conditions are: (1) conviction of a crime involving moral turpitude with a prison sentence for a term of one year or more; (2)

192 Dietz, Deportation in the United States, Great Britain and International Law, 7 International Lawyer 326, 330 (1973).
195 Id. at 315.
being institutionalized at public expense because of a mental disease existing prior to entry; (3) becoming a public charge from causes not arising after entry; (4) conviction of attempting to cause insubordination or disloyalty in the Armed Forces of the United States; (5) assisting another alien for gain in an attempt to enter the United States illegally.\(^{199}\)

(iv) Those aliens who at any time after entry: (1) are convicted of two or more crimes involving moral turpitude;\(^{200}\) (2) willfully fail to comply with the registration requirements of the Alien Registration Act;\(^{201}\) (3) become members of, or “affiliated with,” the Communist Party of the United States or any other totalitarian party;\(^{202}\) (4) become drug addicts or violate the narcotics acts;\(^{203}\) (5) are connected with a house of prostitution or import aliens for immoral purposes;\(^{204}\) (6) are convicted of illegal possession of any automatic guns;\(^{205}\) (7) are convicted of a violation of the espionage, sabotage, selective service, or trading-with-the-enemy acts and, in addition, are found to be undesirable residents.\(^{206}\)

The first category causes few problems constitutionally. Those entering illegally should be subject to deportation, and those granted entry only for a temporary stay may properly be ordered to leave upon the termination of the granted period. Difficulty does arise with provisions for deportation for violation of the conditions of stay. It should be recognized that deportation can be a severe penalty and is not to be imposed for technical violations by legally admitted, permanently resident aliens and immigrants.

The second category includes aliens who were excludable at the time of entry but were nonetheless permitted entry. This category raises serious problems. It contains no statute of limitations so that an alien who was admitted though excludable on grounds of mental or physical defect, for example, might be deported even after many years of residence. This also applies to those who were permitted entry without proper travel documents. A defect in such a document, even though unknowing or unintentional, would render a resident alien deportable many years later. In such cases deportation should be limited to fraud to obtain entry or some other attempt to evade the procedures for obtaining entry.

The third category, in effect, provides for a five year probation period during which an alien may be expelled. Deportable offenses include crimes involving moral turpitude, attempting to cause disloyalty in the Armed Forces, and assisting the illegal entry of an alien for gain. As conditions imposed on the rights of residence these provisions are reasonable, especially because they involve conviction of criminal offenses and because there is a limitation to the period of five


years after entry.\textsuperscript{207} The provisions that one who is institutionalized at public expense because of a mental defect or who becomes a public charge within five years after entry be deportable is cruel and constitutionally questionable, however. Under \textit{Graham v. Richardson} a resident alien might not be denied welfare benefits or be subject to a residence period, yet this provision renders an alien who applies for such benefits deportable if the application is within five years of entry. It sets up a federal residence period though a state period has been held violative of equal protection. It places on the alien the burden of proving that the cause for his seeking public assistance or his mental disease or defect arose after entry. Thus an alien properly screened and properly admitted may be deported for the misfortune of mental illness or loss of work through no fault of his own. This is blaming the immigrant for the shortcomings of the immigration system. Such a rule is unconscionable and would appear to violate the holdings in \textit{Graham v. Richardson}.

The fourth category sets out a range of offenses, with no statute of limitations, for which deportation is proper, if committed at any time after entry. In most of these cases deportation is an added penalty, one applicable only to aliens. Such a penalty raises clear equal protection problems. Since aliens are a suspect classification, any such additional penalty must be based upon a compelling governmental interest as well as bearing a reasonable relationship to a legitimate purpose. Fundamentally, this section appears to be based upon prejudice against aliens, a prejudice that they are more likely than citizens to be gangsters, prostitutes, Communists, spies, saboteurs, and drug addicts. It is, presumably, this special danger from aliens, even those who may have entered the country as infants, which is the basis for imposing deportation in addition to normal criminal penalties. Such a statute is simple discrimination against aliens where there is no statute of limitations based upon length of residence in the United States or where deportation is not based on violations in obtaining entry. There may be cases where there is some compelling state interest which would require the expulsion of a legally admitted resident alien. One example is the expulsion or internment of enemy aliens. There may be other circumstances where deportation would be proper also, but the greatest part of present deportation law seems to have no basis in any compelling state interest which would justify the imposition of such a drastic additional penalty.

Other constitutionally guaranteed rights are also denied a resident alien in deportation proceedings. The alien has only minimal rights of due process and may be deported under an ex post facto law.\textsuperscript{208} Again, it is important to distinguish between aliens who entered illegally and those who are legal residents. Illegal entrants form the great bulk of those expelled from the United States.\textsuperscript{209} Illegal aliens are deprived of no right and properly may be expelled upon an ad-

\textsuperscript{207} One problem, however, is that the five year period is computed from the time of last entry made into the country, though this might have been a brief visit. United States \textit{ex rel. Volpe v. Smith}, 289 U.S. 422 (1933); \textit{Lapina v. Williams}, 232 U.S. 78 (1914). \textit{See} Maslow, \textit{supra} note 194, at 327-29.


\textsuperscript{209} In 1972, 467,193 aliens were expelled. Of these, 450,927 were illegal entrants who were required to leave, while 16,266 were deportees. The great majority of illegal aliens are Mexican. 1972 \textit{IMMIGRATION AND NATURALIZATION SERVICE Ann. REP.} 76 (1972).
ministrative hearing. This standard of due process should not be extended to the deportation of legally resident aliens however. If equal protection for the alien is to have meaning, an adjudication on the issue of whether he is to lose his right of residence should require that criminal standards of due process be applied. These standards would require arrest only upon probable cause or judicial warrant, right of bail, freedom from unreasonable search and seizure, and right of counsel at all important stages of the proceedings. None of these rights is now assured the alien in proceedings to deport.

IV. Conclusion

Immigrants throughout our history have made important contributions to American society; the United States is a nation of immigrants, a Nation of nations. One of our proudest national symbols is the Statue of Liberty, a symbol of the American faith in the strength of our institutions and in the human potential of all races and peoples to contribute to those institutions. But the Statue of Liberty also symbolizes the decline of this faith. Its dedication in 1886 was four years after the first restrictions on Chinese immigration. It was six years before the passage of the first deportation law since the Alien and Sedition Acts of 1798. Later legislation has often been racially discriminatory and has been used to attack native political radicalism. Domestically, resident aliens were subjected to increasing restrictions on employment and other rights. All of these restrictions appear to be based on a simple prejudice that many foreigners seeking entry into the U.S. are racially or morally inferior, subversive, or of low intelligence. Further, they are based on the fear that foreigners would not adopt American ways. This attitude was once naively expressed: "We are going to love every foreigner who really becomes an American, and all others we are going to ship back home."

Many states permitted the alien to vote in the nineteenth century; and, indeed, political rights were advertised by the states as inducements for settlement. Resident aliens no longer have the right to vote, and thus have little influence to prevent discriminatory legislation. Before the decisions in Takahashi and Graham they also were given little protection by the courts. These decisions represent a recognition of the alien's vulnerability to prejudice and discrimination.

The illogic of restrictions against aliens is emphasized by the admission procedures under the 1965 Act. To be admitted, an immigrant must either be a close relative of a U.S. citizen or permanent resident, or be certified as filling a job which a resident is not willing or able to fill, or qualify as a refugee. He must also be mentally competent, free of contagious disease, and literate. Immigration under this system is limited to a fixed yearly total. It is difficult to perceive a justification for discriminatory legislation against anyone admitted under these standards. Nevertheless, present immigration law is riddled with other...
examples of discrimination. It has been criticized as undemocratic and as a betrayal of our American traditions.\textsuperscript{213} Its technicalities have bred much injustice.\textsuperscript{214} It has been justly criticized as portraying us to the world as harsh, vindictive, and repressive. Much of the reason for the unfairness of this law can be found in the acquiescence of the courts to government actions which would be unconstitutional if applied to citizens and in the unwillingness of the courts to extend constitutional protections to aliens, the strangers in our midst.

\textit{Daniel Grosh}