The First Amendment After *Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?

*Maryam Kamali Miyamoto**

Introduction

The United States Constitution makes few distinctions between citizens and noncitizens,[1] and the Bill of Rights makes no reference to citizens at all. Instead, it refers to "persons" or "the people."[2] The Constitution's scarcity of textual references to citizenship as a requisite for rights suggests that, in most cases, U.S. citizens and noncitizens should receive the same protection for their constitutional rights. Such a premise would indicate that the First Amendment rights of free speech and association

* Associate, Cadwalader, Wickersham & Taft, New York; J.D., University of Virginia School of Law, 1999; M.I.A., Columbia University School of International and Public Affairs, 1992; B.A., SUNY-Binghamton, 1990. I would like to thank Professor David Martin at the University of Virginia School of Law for his guidance, extremely helpful suggestions, and encouragement in completing this Article. I am greatly indebted to him. I would also like to thank Douglas Klusmeyer and Ken Miyamoto for their careful readings of final drafts of this Article and their helpful comments.

[1] The Privileges and Immunities Clause of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. However, this clause has been reduced to relative insignificance as a result of the *Slaughter-House Cases*, 83 U.S. 36 (1873).

The importance of the Fourteenth Amendment derives from its due process and equal protection provisions, which apply to *persons* and which the Supreme Court has interpreted as applying to both aliens and citizens. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guy S. Goodwin-Gill, *The Status and Rights of Nonnationals*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 151 (Louis Henkin & Albert J. Rosenthal eds., 1990). Goodwin-Gill writes that:

> [a] remarkable feature of the United States Constitution is the paucity of references to citizenship as a condition of rights, other than in the context of the franchise and eligibility for office .... The Constitution and the Bill of Rights recognize and guarantee the rights of "persons," whatever their political affiliation.

Id.

[2] *See* U.S. CONST. amends. I–X.

apply equally to aliens and citizens, especially if the term "the people" includes aliens.[3]

The central question in this Article is the extent to which the First Amendment of the Constitution applies to aliens. If the First Amendment does apply to aliens, is there any justification for a gradation of First Amendment rights with respect to the different categories of aliens entering and residing in the United States? Although this Article will focus on the rights of free speech and association, the significance of this question extends beyond the First Amendment to other fundamental rights guaranteed by the Constitution.

The values of free speech and association in a democratic society warrant a higher level of protection for the rights of aliens than the customarily deferential stance that the Supreme Court has taken in the context of immigration matters.[4] The Court's deference to the executive and legislative branches on immigration matters stems in part from the Court's recognition of a relationship between immigration and foreign policy and national security, areas in which the Court has traditionally deferred to the Congress.[5] In grappling with this tension between the government's broad power over immigration and competing constitutional values that safeguard fundamental rights, the Supreme Court has distinguished the First Amendment rights of aliens from those of citizens, particularly in the area of exclusion and deportation of aliens from the United States.[6]

---

[3] The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[4] *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Fong Yue Ting v. United States, 149 U.S. 698 (1893). The dissent in *Fong Yue Ting* disagreed with the majority's assertion that the sovereignty of the nation granted Congress the absolute authority to expel aliens unencumbered by the Constitution. In his dissent, Justice Brewer stated that "whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments." *Id.* at 737 (Brewer, J., dissenting). Justice Brewer found the concept of an unlimited sovereign dangerously indefinite, and he found no power to banish resident aliens, although the government had the power to exclude. He interpreted the Bill of Rights as applying to all persons within the United States, noting that the word citizen is not used within it. *See id.* at 739.

[5] *See* discussion *infra* notes 31–34 and accompanying text; *see, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976). The *Mathews* Court explained its deferential stance with respect to immigration matters as follows:

> Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Id. at 81.

[6] Prior to 1996, the distinction between exclusion and deportation turned on *entry*, and not *admission*. Exclusion grounds were applied in exclusion hearings to aliens who had not

The different processes and levels of judicial review used for exclusion and expulsion of aliens from the United States have stemmed from the perception that the fundamental rights accorded to aliens depend on their citizenship status and association with the United States.[7] An analysis of the case law and statutes illustrates the spectrum of constitutional protections accorded to aliens based on their differing levels of connection with this country,[8] ranging from minimal or no protection for aliens applying for initial entry into the United States, to a guarantee of at least some of the rights enumerated in the U.S. Constitution for aliens who have established permanent residence in the United States.[9]

In examining the distinctions made by the U.S. government between aliens and citizens with respect to the First Amendment, this Article shows that an ascending scale of rights based on an alien's citizenship status is highly problematic. It argues that, because free speech and association are rights fundamental to a democracy, they should be safeguarded for all *persons* within the jurisdiction of the United States. While recognizing the government's legitimate interest in protecting its citizens, the Supreme Court should also apply the same level of strict scrutiny to aliens' First Amendment rights. Strict scrutiny would still permit a balancing of the government's interest in protecting its citizens with the interest in safeguarding fundamental rights guaranteed by the Constitution.[10] Such an approach would allow both citizens and noncitizens to benefit from a free discourse of ideas, without unduly compromising the government's strong interest in preventing harmful speech and

---

made an entry into the United States. In contrast, aliens who had entered, whether with or without an inspection, were entitled to deportation hearings. Today, however, the distinction turns on admission. Exclusion grounds are now called *inadmissibility grounds* and apply to any alien who has not been admitted into the United States. *See* § 212 of the Immigration and Nationality Act of 1990 ("INA"), 8 U.S.C. 1182 (1990). Deportability grounds apply only after an alien has been admitted and are covered in § 237(a) of the INA, 8 U.S.C. § 1227 (1990). Deportation can apply to both nonimmigrants and immigrants. *See* THOMAS ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 426 (4th ed. 1998).

[7] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

[8] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950) (discussing an "ascending scale of rights as [the alien] increases his identity within our society").

[9] I use the terms *permanent resident* and *resident alien* interchangeably in this Article to refer to the legal status granted to immigrants by the U.S. government.

[10] Some Justices have argued that balancing under the First Amendment is inappropriate. For example, Justice Black has stated:

> As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.

Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (internal citations omitted).

association that could lead to imminent violent behavior, as in the context of speech that might incite terrorism. Applying the same level of scrutiny in First Amendment cases involving aliens as in those involving citizens would establish a unified and nondiscriminatory Bill of Rights for all persons in the United States.[11]

Part I examines the historical underpinnings for the argument that the Constitution, including the Bill of Rights, should apply to aliens and citizens alike.[12] This section revisits some of the early scholarship and case law to demonstrate that First Amendment rights, like the rights of due process and other guarantees in the Bill of Rights, were intended to be applied uniformly to aliens and citizens. This section also shows that the First Amendment protection afforded to aliens, like other fundamental rights, has at times increased based on citizenship status.[13]

Part II focuses on the Supreme Court's case law with respect to the First Amendment rights of aliens, including the most recent Supreme Court case, *Reno v. American-Arab Anti-Discrimination Committee.*[14] The case law shows that, although the Supreme Court has given deference to Congress's broad power over immigration matters, in many instances, the Court has not distinguished between aliens and citizens for the purpose of resolving First Amendment issues, even in cases where free speech and association were linked with the deportation of aliens.[15] Yet the Court's behavior has been anything but consistent. There are marked differences in the level of judicial scrutiny used in the various cases where free speech and association issues arise in the context of deportation or exclusion of aliens.[16] Cases involving the admission or expulsion of aliens have often developed on a track of judicial scrutiny separate from most constitutional cases that deal with fundamental rights. This development of two-track judicial scrutiny can be traced back to *The*

---

[11] For a discussion of the applicability of constitutional rights outside the territory of the United States, see generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW, 97–117 (1996).

[12] This question could alternatively be understood as one of whether aliens' constitutional rights in immigration matters can be judicially enforced to the same extent as citizens' constitutional rights. *See id.* at 118. For the purposes of this Article, I argue that, if aliens have the same constitutional rights as citizens, then, in areas of fundamental rights, such as the First Amendment rights of free speech and association, aliens should receive the same level of judicial scrutiny and enforcement as citizens.

[13] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply to a search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country). Chief Justice Rehnquist, writing for the Court, argued that the phrase *the people*, as it appeared in the Fourth Amendment, indicated that the Fourth Amendment protected a class of persons who had developed sufficient connections with the United States to be considered part of a "national community." *Id.* at 265. The Court's holding did not make the application of the Fourth Amendment conditional upon the citizenship status of the person, but rather upon his or her ties to the national community.

[14] 525 U.S. 471 (1999).

[15] *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 148 (1945).

[16] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

Chinese Exclusion Case,[17] in which the Supreme Court stated that the power to exclude foreigners was an "incident of sovereignty belonging to the government of the United States."[18] Many immigration questions have been left unanswered, including new issues raised by legislative changes in the immigration and antiterrorism statutes passed in 1996.

When is it justifiable to restrict free speech? Part III examines relevant sections of the Antiterrorism and Effective Death Penalty Act of 1996,[19] the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[20] and the Immigration and Nationality Act of 1990[21] to determine if provisions in these laws would be judged unconstitutional if challenged in the courts. Based on the standards derived from the Supreme Court's jurisprudence, Part III also discusses ways of striking a balance between the interest in protecting aliens' fundamental rights and the government's interest in protecting its citizens from harmful speech and association.

Part IV argues that gradations in the protection of constitutional rights based on an individual's citizenship status are problematic, because granting protection to some groups of aliens and not to others dilutes the meaning of fundamental rights guaranteed by the U.S. Constitution. Moreover, if the rights of aliens were to vary based on their citizenship status and were to be continually subject to further modifications by new legislation, aliens would abstain from controversial First Amendment activity to avoid risking the possibility of deportation or exclusion. Even permanent residents might then choose to exercise caution when expressing themselves.

The Conclusion shows why First Amendment rights are too essential to the values of a democratic society to allow Congress or the courts to restrict them based on an individual's citizenship status. The Constitution explicitly prohibits Congress from making *any* laws that would abridge freedom of speech and association.[22] Even if one were to concede that Congress's broad power over immigration may entitle it to deferential judicial scrutiny in the context of deportation and exclusion, this deference should not extend to cases where fundamental rights are at stake in *nondeportation* or *nonexclusion* settings. Furthermore, where the exclusion or deportation of an alien results directly from his speech or association, the constitutionality of such a procedure should be judged by the same standard as any other First Amendment case, i.e., the means for restricting free speech or association must be narrowly tailored to the

---

[17] Chae Chan Ping v. United States, 130 U.S. 581 (1889) [hereinafter *The Chinese Exclusion Case*].

[18] *Id.* at 609.

[19] 28 U.S.C. § 2261 (1996).

[20] 18 U.S.C. § 758 (1996).

[21] 8 U.S.C. § 1182 (1990).

[22] *See* U.S. CONST. amend. I; *see also* discussion *supra* note 10 and accompanying text.

achievement of a compelling government interest.[23] Otherwise, despite the Constitution's guarantee of fundamental rights to all persons, we would be left with a Bill of Rights that does not apply uniformly to citizens and noncitizens, to the detriment of American society as a whole.

I. Historical Basis for the Uniform Application of the Constitution to Citizens and Noncitizens

In a series of cases dating back to 1886, the Supreme Court has established that many of the fundamental rights guaranteed to U.S. citizens by the Constitution are also guaranteed to noncitizens. Numerous cases have established that aliens have the same due process rights as citizens.[24] These cases support the proposition that other fundamental rights, such as the First Amendment rights of free speech and association, should also apply equally to aliens and citizens. Like due process rights, First Amendment rights are fundamental rights guaranteed by the U.S. Constitution, without reference to one's citizenship status.

The long-running debate about whether aliens have constitutional rights extends back to the passage of the Alien and Sedition Acts in 1798.[25] During the debates on passage of the Virginia and Kentucky Resolutions, Thomas Jefferson and James Madison denounced the Alien and Sedition Acts, urging that they be declared unconstitutional.[26] Ultimately, Madison drafted a report, adopted in 1800 by the Virginia Legislature, that argued that aliens were entitled to the protection of the Constitution.[27]

In the debates on the Alien and Sedition Acts of 1798, Madison spoke out against the Acts, arguing:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have not right to its protection. Aliens are no more parties to laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a tem-

---

[23] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (requiring that government regulation of First Amendment activity further a compelling interest unrelated to the suppression of speech and that there be no less restrictive alternative to the regulation).

[24] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Yamataya v. Fisher, 189 U.S. 86, 101 (1903); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[25] The Alien and Sedition Acts included three statutes directed specifically at aliens: the Naturalization Act of 1798, Pub. L. No. 106-73, 1 Stat. 566 (1798), the Alien Enemies Act, Pub. L. No. 106-73, 1 Stat. 570 (1798), and the Sedition Act of 1798, Pub. L. No. 106-73, 1 Stat. 596 (1798). *See* NEUMAN, *supra* note 11, at 40. The Alien and Sedition Acts subjected aliens to expulsion on a mere suspicion of treason, through orders issued ex parte by the President. *See id.* at 53.

[26] *See id.*

[27] *See id.* Neuman refers to this position as the "mutuality of legal obligation." *Id.* at 57.

> porary obedience, they are entitled, in return, to their protection and advantage.[28]

Over 150 years later, in *United States v. Verdugo-Urquidez*,[29] Justice Brennan, in dissent, insisted that "[m]utuality is essential to ensure the fundamental fairness that underlies our Bill of Rights."[30] Although most provisions of the Constitution created rights without express limitations as to citizenship or territorial boundaries, immigration law soon became isolated from many of the usual constitutional constraints on the power of Congress.[31] The Supreme Court's designation of plenary power to Congress to exclude or expel aliens, unconstrained by judicially enforceable constitutional limits, further reinforced this isolation.[32] The nineteenth-century development of the plenary power doctrine did not necessarily mean that the Constitution applied only to citizens. However, it did mandate a much lower level of judicial scrutiny where aliens' fundamental rights were concerned and a greater degree of deference to Congress in its broad powers over immigration.[33] This lower level of scrutiny permitted the exclusion of aliens from the United States on grounds of their

---

[28] United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (citing Madison's Report on the Virginia Resolutions (1800), reprinted in 4 ELLIOT'S DEBATES 556 (2d ed. 1836)).

[29] 494 U.S. 259 (1990).

[30] *Id.* at 284 (Brennan, J., dissenting).

[31] *See* NEUMAN, *supra* note 11, at 13.

[32] *See The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889) (upholding Congress's broad plenary power to exclude aliens: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); *see also* NEUMAN, *supra* note 11, at 14. According to Neuman, the enduring legacy of *The Chinese Exclusion Case* is that constitutional limits on immigration power do exist, but the courts should be wary of enforcing them. This tradition of treating immigration rules as political, rather than consitutional, has led to an exceptionally deferential standard of review, rendering the constitutional limits judicially unenforceable in practice. *See id.* at 134.

[33] *See The Chinese Exclusion Case*, 130 U.S. at 609 (interpreting U.S. CONST. art. I, § 8, cl. 4: "[The Congress shall have power to] establish a uniform Rule of Naturalization."). This clause has been used to justify Congress's plenary power over immigration. *But see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987) (harshly criticizing the view that the constitution imposes no limits on the plenary power of Congress to exclude or deport aliens, which he regards as having emerged "in the oppressive shadow of a racist nativist mood a hundred years ago"). Henkin writes:

> Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional. The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints.

Id.

political views or their race. These undesirable practices remained integral to immigration policy well into the first half of the twentieth century.[34]

The Supreme Court eventually condemned racial discrimination against aliens with respect to their treatment inside the country, confirming that an alien was indeed a "person" protected by the Equal Protection Clause of the Constitution.[35] In *Yick Wo v. Hopkins*,[36] Justice Matthews, writing for the Court, ruled:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any *person* of life, liberty, or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all *persons* within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[37]

This decision supports the proposition that aliens are entitled to the same constitutional rights as citizens where the Constitution refers to "persons."

Thus, as early as 1886, the Supreme Court had determined that at least one of the fundamental concepts embodied in the Constitution, equal protection of the laws, applied equally to citizens and aliens.[38] This determination laid the foundation for an equal application of other provisions of the Bill of Rights,[39] including the First Amendment rights of free speech and association.

---

[34] *See* NEUMAN, *supra* note 11, at 14. An example of racially motivated immigration policies is the national origins system, instituted in 1921 and 1924, with selection criteria designed to replicate the ethnic composition of the United States. *See* Hiroshi Motomura, *Review Essay: Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1594 (1997).

[35] *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that a San Francisco ordinance was administered in a discriminatory manner against Chinese aliens in violation of their Fourteenth Amendment equal protection rights).

[36] 118 U.S. 356 (1886).

[37] *Id.* at 369 (emphasis added).

[38] According to Neuman, "[t]he legislative history of the 1866 Civil Rights Act and the Fourteenth Amendment . . . and the debates call attention to the rights of aliens as 'persons' within the due process and equal protection clauses." NEUMAN, *supra* note 11, at 61.

[39] *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.'") (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)). In *Verdugo-Urquidez*, Justice Brennan, in dissent, wrote that "[b]y concluding that respondent is not one of 'the people' protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them." 494 U.S. 259, 284 (1990) (Brennan, J., dissenting). Neuman writes that, although no Supreme Court case before the

Wong Wing v. United States[40] provides additional support for an equal application of the Bill of Rights to aliens and citizens. The *Wong Wing* Court extended *Yick Wo*'s[41] holding that the Fourteenth Amendment applies equally to all persons within the jurisdiction of the United States to the Fifth and Sixth Amendments.[42] Based on the reasoning of *Yick Wo*, the *Wong Wing* Court unanimously struck down a congressional act that subjected Chinese immigrants unlawfully within the country to one year's imprisonment at hard labor before their deportation without indictment or trial by jury.[43] The Court stated:

> [I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.[44]

In *Kwong Hai Chew v. Colding*,[45] the Supreme Court expressly stated that permanent resident aliens were entitled to the protection of the

---

Civil War gave the Court occasion to hold that aliens possessed constitutional rights, one major factor contributing to this silence was that the Bill of Rights only applied to the federal government. *See* NEUMAN, *supra* note 11, at 61. The regulation of aliens at that time, however, was carried out largely by the states. *See id.* The Supreme Court confirmed that nonmembership in the social compact does not deprive individuals present within the United States of protection of the fundamental law of the land. *See id.* at 63.

[40] 163 U.S. 228 (1896).

[41] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[42] *Wong Wing*, 163 U.S. at 238.

[43] *See id.*

[44] *Id.*; *see also* Yamataya v. Fisher, 189 U.S. 86 (1903) (holding that an alien has due process rights in deportation proceedings). The procedural protection of *Yamataya*, however, did not extend to aliens seeking to enter the United States for the first time or to those returning after an extended absence. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213–16 (1953) (holding that the government could bar an alien's return to the United States without giving him any explanation of its reasons for considering him a security risk).

David Martin writes that "[i]n nearly all instances, our Constitution extends rights to aliens and citizens alike. This broad reach is one of the proudest elements of our constitutional heritage, and indeed the Supreme Court has sometimes indulged in rather boastful language in describing it." David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983) (citing Plyler v. Doe, 457 U.S. 202 (1982)).

[45] 344 U.S. 590 (1953). The case involved a habeas corpus proceeding by an alien who was a lawful permanent resident and who was also a seaman returning from a voyage on an American vessel. The Attorney General had detained him on the vessel upon his return, without a hearing, because of a determination that his entry into the United States was "prejudicial to the public interest." *Id.* at 592. Justice Burton stated: "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law." *Id.* at 596 (citing Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).

Fifth Amendment and could not be deprived of their due process rights.[46] In its decision, the Court emphasized that Congress's power over immigration did not give it the right to disregard an alien's constitutional rights.[47] Justice Burton, writing for the majority, stated that, "although Congress may prescribe conditions for [an alien's] expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard."[48] The Court also held that the alien's constitutional rights were not to be terminated because of his trip abroad. The Court strengthened the constitutional status of resident aliens by determining that they would be entitled to due process, regardless of whether or not the immigration laws designated a resident alien as "an entrant alien" upon return to the United States.[49]

The concept of membership also influenced the Court's application of the Bill of Rights toward aliens. For example, in *United States v. Verdugo-Urquidez*,[50] Justice Rehnquist contrasted the language of the Fourth Amendment, with its reference to "the people," with the Fifth and Sixth Amendments, which use the words "person" and "accused" instead. Rehnquist stated:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[51]

---

[46] *Kwong Hai Chew*, 344 U.S. at 596.

[47] *See id.*; *see also* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) (stating that there is "a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . .").

[48] *Kwong Hai Chew*, 344 U.S. at 597–98.

[49] *Id.* (stating that "[f]rom a constitutional point of view, [the defendant] is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien . . . .") The decision in *Chew* was in contrast with *Mezei*, which was decided the same year. In *Mezei*, the Court's decision put returning permanent residents in a precarious position by finding that they were in no better position to assert procedural due process rights than first-time entrants. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953). Ironically, the *Mezei* Court cited the *Chew* case for the proposition that "a lawful resident alien may not captiously [sic] be deprived of his constitutional rights to procedural due process." *Id.* The Court distinguished the permanent residency of *Chew* from that of *Mezei* by protecting the former through some form of due process, but not the latter. *See* ALEINIKOFF, *supra* note 6, at 816. Justice Clark's opinion in *Mezei* referred to several factors, such as length of absence and nature of activities while outside of the United States, that could explain the different treatment of the two cases, but did not specify which one was decisive. *See Mezei*, 345 U.S. at 213.

[50] 494 U.S. 259 (1990).

[51] *Id.* at 265.

The Court concluded, therefore, that aliens would only be entitled to Fourth Amendment protections if they had "developed sufficient connection with this country to be considered part of that community."[52] One could use a similar argument, by analogy, to the First Amendment, given its reference to "the people."

These early cases and concepts have laid the foundation for the Supreme Court's treatment of aliens' First Amendment rights. By establishing that aliens constitute "persons" within the language of the Constitution, the Court has recognized that aliens and citizens should benefit equally from the protection of their constitutional rights. The next section focuses specifically on the Supreme Court's approach to First Amendment cases involving aliens. It highlights a dichotomy with regard to the scrutiny level the Court applies in cases dealing with the exclusion and deportation of aliens for ideological reasons and in cases dealing with First Amendment issues outside of such a context.

II. The Supreme Court's First Amendment Jurisprudence

A. Historical Background

The exclusion and deportation of aliens on ideological grounds has been one of the most controversial aspects of U.S. immigration policy. Aliens have been excluded or deported from the United States on the basis of political belief and affiliation since at least 1903, when the first legislation excluding anarchists was passed.[53] Congress has enacted numerous statutes that mandated the exclusion or deportation of aliens deemed to be subversives on the basis of their political beliefs and activities. The passage of these statutes coincided with nativist reaction to the growth of a radical labor movement in the late 1880s and early 1900s and to Chinese immigration. In the public mind, anarchists, communists, labor organizers, and pacifists were linked with aliens.[54] Some scholars believe that aliens' links with these groups made them scapegoats for American hysteria over radical labor and political movements.[55]

In contrast, in nonexclusion and nondeportation contexts, U.S. law has generally protected aliens' speech from criminal punishment using the same standards that apply to citizens, because such cases are not con-

---

[52] *Id.*

[53] "The [Immigration] Act of March 3, 1903, provided for the exclusion of alien anarchists and aliens opposed to organized government." Courtney Elizabeth Pellegrino, *A Generously Fluctuating Scale of Rights: Resident Aliens and First Amendment Free Speech Protections*, 46 SMU L. REV. 225, 233 n.75 (1992) (citing Immigration Act, Pub. L. No. 106-73, 23 Stat. 1213 (1903)).

[54] *See* ALEINIKOFF, *supra* note 6, at 695. The authors point out that pinning the blame for social unrest on foreigners also probably helped to deny the legitimacy of indigenous radical movements. *See id.* at 695 n.4.

[55] *See id.*

strained by the plenary power doctrine.[56] Courts have treated *alienage* cases—cases which deal with the status of aliens after their admission or immigration into the United States—differently than cases which deal strictly with admission or exclusion.[57] In alienage cases, the standard of review used by courts has been higher, whereas in immigration cases, courts have often deferred to Congress's power over admission and exclusion of aliens. In reality, there is much overlap between the two classes of cases. Because deportation is characterized as a civil regulatory measure, rather than as punishment, aliens have been deported for speech for which they could not be "punished."[58] Yet, because of the high stakes involved for the alien being deported, deportation can have a significant chilling effect on speech and association.

The Supreme Court has often upheld exclusion and deportation for ideological reasons, such as revolutionary advocacy.[59] In *United States ex rel. Turner v. Williams*,[60] for example, John Turner was deported for being an anarchist lecturer. Turner invoked the First Amendment in his defense, but the Court stated that deporting an alien who has illegally entered the United States did not deprive him of his liberty without due process of law.[61] Justice Fuller responded to the alien's claim by stating:

---

[56] *See* NEUMAN, *supra* note 11, at 139; *see also* Brunnenkant v. Laird, 360 F. Supp. 1330 (D.D.C. 1973) (holding that withdrawal of an alien's security clearance, as a result of the expression of heterodox political, social, and economic views violated his First Amendment rights). But compare *Price v. INS*, 962 F.2d 836 (9th Cir. 1992), where the Ninth Circuit Court of Appeals found that the United States 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. The court acknowledged that "[i]t has long been recognized that resident aliens enjoy the protections of the First Amendment," but it added that "the protection afforded resident aliens may be limited." *Id.* at 841. The court supported its limitation argument with a passage from *Verdugo-Urquidez* that upheld a challenged search of a Mexican citizen's residence in Mexico by United States officials. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). Pellegrino writes that the court's decision in *Price* in effect misapplied the *Verdugo-Urquidez* limitation of constitutional protections for aliens in general to permanent resident aliens. *See* Pellegrino, *supra* note 53, at 253. The court confused Congress's and the Executive's powers in dealing with a resident alien applying for naturalization with their powers to exclude a nonresident alien, an area least fettered by the judiciary. *See id.* at 254.

[57] *See* ALEINIKOFF, *supra* note 6, at 511.

[58] *Id.* Even though deportation is not characterized as criminal punishment, the Supreme Court has recognized the severity of deporting someone from this country. *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 147 (1945) ("[I]t must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.") (internal citations omitted). In *Wixon*, the Court emphasized the hardships of deportation. Justice Douglas, writing for the Court, stated: "Meticulous care must be exercised lest the procedure by which [an individual] is deprived of that liberty not meet the essential standards of fairness." *Id.* at 154.

[59] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (involving deportation of aliens for their prior membership in the Communist Party); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 294 (1904) (upholding challenge to legislation that excluded anarchists).

[60] 194 U.S. 279 (1904).

[61] *See id.* at 290.

> It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.[62]

One could interpret the Court's reasoning as indicating that the right to engage in a constitutionally protected activity does not necessarily imply that a person has the right to come to the United States to engage in that activity.[63] A less favorable interpretation would be that the First Amendment does not constrain exclusion policy, because aliens who are outside of the United States do not have First Amendment rights.[64] However, one could also interpret the case as being indicative of the Court's deference to the legislative and executive branches with regard to exclusion policies, irrespective of First Amendment issues. Justice Fuller's reference to "an attempt to enter forbidden by law" is an example of the Court's different treatment of aliens' rights when they are seeking admission versus when they are outside of the immigration context. In addition, it is interesting to note that Fuller makes a distinction between those individuals who belong to the country and those who do not.[65] Justice Fuller's statement that "those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong *as citizens or otherwise*" suggests that the criteria for belonging is not solely citizenship.[66]

An early First Amendment case, *Schneiderman v. United States*,[67] involving the revocation of citizenship of a naturalized resident alien, demonstrated the conflict between Congress's plenary power in immigra-

---

[62] *Id.* at 292.

[63] *See* NEUMAN, *supra* note 11, at 130. This interpretation suggests that the Court is making a distinction between rights and privileges. Entry into the country is interpreted as a privilege, rather than a right, so freedom of speech would not entail a right to enter the United States in order to speak here. *See id.* Neuman makes an analogy to Holmes's justification for the government's firing of a policeman for his political speech: "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." *Id.* at 129 (quoting McAuliffe v. New Bedford, 29 N.E. 517, 518 (Mass. 1892)). The right/privilege distinction, however, has lost much of its force in recent years. *See* NEUMAN, *supra* note 11, at 129. Finally, in *Turner*, one could argue that the greater power to exclude included the lesser power to exercise a constitutional right. *See id.*

[64] This conclusion may no longer be good law. *See* NEUMAN, *supra* note 11, at 129.

[65] *See Turner*, 194 U.S. at 292.

[66] *Id.* (emphasis added).

[67] 320 U.S. 118 (1943).

tion matters and First Amendment protection of free speech and association. The U.S. government sought denaturalization of Schneiderman because he had not revealed his membership in the Communist Party at the time of his naturalization.[68] Although the naturalization laws at the time did not expressly disqualify Communist Party members, 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 of being attached to the Constitution and well disposed to the good order of the United States.[69]

Justice Murphy, writing for the Court, rejected the argument that Schneiderman's membership in the Communist Party necessarily implied that he did not uphold the Constitution and the order of the United States.[70] More importantly, the Court stated that the goals and beliefs of the party to which Schneiderman belonged could not be imputed to him without proof of his individual belief in those principles.[71] In short, membership in the Communist Party alone was insufficient to disqualify Schneiderman from naturalization.[72] Justice Murphy admitted that naturalization was a privilege that Congress granted or withheld based on its constitutional power to "establish a uniform rule of naturalization."[73] However, he also cited to Justice Holmes's dissent in *United States v. Schwimmer*[74] to emphasize the importance of First Amendment rights: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought we hate."[75] As a noncitizen who had applied for and received U.S. citizenship, Schneiderman was entitled to maintain his citizenship status despite his unpopular beliefs. Thus, *Schneiderman* indirectly addressed the First Amendment rights of aliens.

In the case of *Kleindienst v. Mandel*,[76] the issue before the Supreme Court was the constitutionality of specific provisions of the McCarran-

---

[68] *See id.* at 120–21.

[69] *See id.* at 122.

[70] *See id.* at 136.

[71] *See id.*

[72] The statute at issue in this case was the Immigration Act of June 29, 1906, Pub. L. No. 106-73, 34 Stat. 601 (1906) (current version at 8 U.S.C. § 1451). Schneiderman's certificate of citizenship was granted in 1927, but § 15 of the 1906 Act permitted the government to "set aside and cancel certificates of citizenship on the ground of 'fraud' or on the ground that they were 'illegally procured.'" *Schneiderman*, 320 U.S. at 120–21. In this case, the government claimed illegal procurement by Schneiderman because he was alleged not to have "behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States . . . ." 320 U.S. at 121.

[73] *Id.* at 131 (citing U.S. CONST. art. I, § 8, cl.4).

[74] 279 U.S. 644 (1929).

[75] 320 U.S. at 138 (citing *Schwimmer*, 279 U.S. at 654).

[76] 408 U.S. 753 (1972).

Walter Act,[77] which, at that time, excluded Mandel, a Belgian journalist and Marxist theoretician invited by American citizens to participate in an academic conference, from admission into the United States.[78] The Court treated the exclusion based on the ideology of an alien seeking entry into the United States differently yet again, once more emphasizing the dichotomy between the Court's treatment of the First Amendment rights of aliens in the immigration contexts of exclusion and deportation and the treatment outside such contexts.

The Supreme Court addressed the First Amendment issue by focusing on the American citizens' freedom of speech, particularly their rights to hear the ideas presented by Mandel.[79] The Court stated that, in the exercise of Congress's plenary power to exclude aliens or prescribe the conditions for their entry into the country, Congress had delegated conditional exercise of this power to the executive branch.[80] The Court further held that, when the executive branch exercised this power negatively on the basis of a "facially legitimate and bona fide reason," the courts would not test it.[81] This conclusion left unanswered the question of which First Amendment or other constitutional grounds might be available for attacking the exercise of discretion for which no justification has been offered.[82]

The Supreme Court's decision in *Bridges v. Wixon*,[83] however, firmly established that aliens do have the same First Amendment rights as citizens. Harry Bridges was an alien who entered the United States from Australia in 1920.[84] In 1938, Bridges faced deportation proceedings based upon the allegation that he had been, and still was, a member of, or affiliated with, the Communist Party, which allegedly advised and taught the overthrow of the government by force.[85] However, under the existing

---

[77] 8 U.S.C. § 1101 (1952).

[78] *See Kleindienst*, 408 U.S. at 754. The provisions at issue were § 212(a)(28)(D) & (G)(v) and § 212(d)(3)(A) of the McCarran-Walter Act, 8 U.S.C. § 1182(a) (28) (D) & (G)(v) and § 1182(d)(3)(A). Those who advocated or published "the economic, international, and governmental doctrines of world communism" were barred from entry into the United States. *See id.*

[79] The Court stated:

> Plaintiff-appellees claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment . . . [T]he American appellees assert that "they sue to enforce their rights, individually and as members of the American public," and assert none on the part of the invited alien . . . .

408 U.S. at 762.

[80] *See id.* at 768.

[81] *Id.* at 770.

[82] *See id.*

[83] 326 U.S. 135 (1945).

[84] *See id.* at 137.

[85] *See id.*

statute, past membership or affiliation was insufficient for deportation.[86] In 1940, the federal government enacted the Alien Registration Act (the "Smith Act"),[87] which reversed *Kessler* so that an alien could be deported if, "at the time of entering the United States or at any time thereafter, he was a member of or affiliated with an organization advocating the forceful overthrow of the Government."[88] This change in the law permitted the government to undertake deportation proceedings against Bridges.

The Court's decision first focused on the meaning of affiliation, concluding that Bridges's associations with various communist groups were cooperative measures aimed at attaining legitimate objectives.[89] Justice Douglas, writing for the Court, then referred to the Court's earlier decision in *Bridges v. California*,[90] reiterating that "[f]reedom of speech and of press is accorded aliens residing in this country."[91] This is significant because it encompasses aliens in general, not just permanent resident aliens.[92]

Analyzing the Smith Act and Congress's intent, Justice Douglas determined that Bridges's speech and association were protected by the First Amendment. According to Douglas, the Court could not assume that Congress, when it passed the statute, meant to use the term *affiliation* in such a broad manner that it would result in significant hardships on aliens for "slight or insubstantial reasons."[93] The Court did not dispute that Congress desired to rid the country of those aliens who were adherents of force and violence, but it also determined that Congress did not intend 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."[94] The Court found that Bridges's views might have been radical, but that the

---

[86] *See id.* at 138 (citing Kessler v. Strecker, 307 U.S. 22 (1939)).

[87] Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 673 (1940) (enactment repealed).

[88] § 23 (b) (cited in Bridges v. Wixon, 326 U.S. 135, 158 (1945)).

[89] *See Wixon*, 326 U.S. at 144. Justice Douglas, writing for the Court, stated:

> [T]he Marine Workers Industrial Union . . . was found to have, and we assume it did have, the illegitimate objective of overthrowing the government by force. But it also had the objective of improving the lot of its members in the normal trade union sense. One who cooperated with it in promoting its legitimate objectives certainly could not by that fact alone be said to sponsor or approve of its general or unlawful objectives.

Id. at 147.

[90] 314 U.S. 252 (1941).

[91] *Wixon*, 326 U.S. at 148.

[92] See Pellegrino, *supra* note 53, at 236–37, for a less favorable interpretation of the case. Pellegrino writes that Douglas's opinion in *Wixon* grounded resident aliens' First Amendment rights in a narrow reading of the legislative intent of Congress, reading this as the Court's recognition of Congress's power to provide for the deportation of resident aliens for activities normally protected by the First Amendment. *See id.*

[93] 326 U.S. at 147.

[94] *Id.* at 147–48.

proof presented failed to establish that the methods that he sought to use lay beyond the framework of democracy and the Constitution.[95]

Justice Murphy, in his concurrence in *Wixon*, took Justice Douglas's statement that "[f]reedom of speech and of press is accorded aliens residing in this country"[96] one step further by emphasizing that aliens, particularly resident aliens, have the same constitutional rights as citizens.[97] At first glance, Justice Murphy's opinion seems to give only resident aliens the same constitutional rights given to citizens, but, upon closer reading, it is apparent that Justice Murphy intended that *all* aliens *lawfully* present in the United States be entitled to constitutional rights. In discussing the interplay between the plenary power of Congress to exclude and the guarantees of the Bill of Rights, he wrote:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien *lawfully* enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.[98]

In some places, Justice Murphy went further and referred to "human beings" as being entitled to certain freedoms: "Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a *human being* and that is guaranteed to him by the Constitution."[99]

Justice Murphy's opinion argued strongly in favor of retaining constitutional guarantees, especially those granted by the Bill of Rights, even in the context of a deportation setting. He cited the majority opinion in *Jones v. Opelika*[100] when he stated:

---

[95] *See id.* at 149.

[96] *Id.* at 148 (citing Bridges v. California, 314 U.S. 252 (1941)).

[97] Justice Murphy wrote: "Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation." *Wixon*, 326 U.S. at 161 (Murphy, J., concurring).

[98] *Id.* at 161 (emphasis added).

[99] *Id.* at 157 (emphasis added).

[100] *Id.* (quoting Jones v. Opelika, 316 U.S. 584, 609–10 (1942)).

> "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws . . . ." By the same token the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a "plenary power" of the Government.[101]

Justice Murphy concluded that the Constitution did not support Congress's exercise of the plenary power in a manner that would override the rights enumerated in the Bill of Rights. Otherwise, constitutional safeguards would be "transitory and discriminatory in nature."[102]

For Justice Murphy, permitting the government to suspend an alien's constitutional rights simply due to the commencement of deportation proceedings would create an anomalous situation. The government would be precluded from punishing an alien for exercising his freedom of speech, but, at the same time, it would be free to deport him for exercising that very same freedom. "The alien," Justice Murphy observed, "would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him."[103] Such a situation would, in Justice Murphy's words, make "an empty mockery of human freedoms."[104]

Faced with congressional hostility to its decision in *Wixon*, the Supreme Court, in *Harisiades v. Shaughnessy*,[105] held the 1940 Alien Registration Act valid against challenges under the Due Process Clause, the First Amendment, and the prohibition on ex post facto laws.[106] In *Harisiades*, three resident aliens challenged the constitutionality of the Alien Registration Act, which allowed resident aliens who joined the Communist Party after being lawfully admitted to the United States to be de-

---

[101] *Wixon*, 326 U.S. at 162 (Murphy, J., concurring) (citing *Opelika*, 316 U.S. at 609).

[102] 326 U.S. at 162.

[103] *Id.* One way by which the anomaly of the First Amendment's prohibition against imprisoning an alien for protected speech can be reconciled with the government's power to deport such alien is to return to the plenary power argument. *See* ALEINIKOFF, *supra* note 6, at 710. However, it is not clear that the principles of sovereignty and self-preservation identified by the Court in earlier decisions would necessitate such an anomalous result. One would still need a compelling government interest to outweigh both the individual's interest and the society's interest in maintaining a nondiscriminatory application of First Amendment rights.

An alternative explanation to which the authors refer is that, because immigration decisions are intimately linked to the process of national self-definition, the nation could adopt a deportation provision that denies aliens membership on political grounds, even if it is unable to control the conduct of present members. *See id.* However, there is nothing to prevent those same aliens who were inhibited from membership in certain organizations to join the same organizations as soon as they became naturalized. The danger to the state, therefore, is only postponed.

[104] *Wixon*, 326 U.S. at 162.

[105] 342 U.S. 580 (1952).

[106] *See id.* at 580.

ported.[107] Each of the aliens in *Harisiades* had lived in the United States as legal permanent residents for more than thirty years.[108]

Harisiades is commonly viewed as signaling the end of First Amendment review in the deportation context. However, the decision in *Harisiades* could also be interpreted to mean that the Court will review deportation grounds under the same standard that it applies to other burdens on First Amendment rights.[109] The Court in *Harisiades* relied on the holding of *Dennis v. United States*,[110] which sustained the statutory provision in the Smith Act against First and Fifth Amendment challenges.[111] The Act 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."[112]

Justice Jackson, writing for the Court in *Harisiades*, distinguished "advocacy of political methods" from "incitement to violence" in order to employ the clear and present danger test articulated in *Dennis v. United States*.[113] He stated: "[O]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech."[114] The *Harisiades* majority found that the aliens' membership in the Communist Party satisfied the test and subjected them to deportation. At the time, the First Amendment, as applied in the *Dennis* case, did not invalidate the convictions of citizens who were members of the Communist Party, nor did it invalidate convictions of resident aliens.[115] The Court applied the clear and present danger test to First Amendment cases involving citizens as well as aliens. The Court's level of scrutiny, thus, did not make any distinction between aliens and citi-

---

[107] *See id.* at 581–83.

[108] *See id.*

[109] *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989) ("[R]ead carefully, *Harisiades* does not support the claim that the First Amendment does not limit the deportation power. Nowhere does Justice Jackson's majority opinion suggest that the deportation of an alien for membership in the Communist Party raises no First Amendment issue.").

[110] 341 U.S. 494 (1951).

[111] *See* Aleinikoff, *supra* note 109, at 869.

[112] *Dennis*, 341 U.S. at 517 (Frankfurter, J., concurring) (construing the Smith Act, ch. 439, § 2 (a) (3), 54 Stat. 670, 671 (1940) (enactment repealed)).

[113] 342 U.S. at 592 (citing *Dennis*, 341 U.S. at 513). The *Harisiades* Court relied on the *Dennis* Court's formulation of the clear and present danger test, which requires that there be a clear and present danger that the defendant's expression will result in a "substantive public evil" that Congress has the authority to prevent. *Dennis*, 341 U.S. at 508 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950)). *See* Pellegrino, *supra* note 53, at 240.

[114] *Dennis*, 341 U.S. at 509.

[115] *See* George C. Beck, *Deportation on Security Grounds and the First Amendment: Closing the Gap Between Resident Aliens and Citizens*, 6 GEO. IMMIGR. L.J. 803, 807 (1992).

zens,[116] but the deportation penalty reserved for aliens could be a harsher form of punishment.

The next section analyzes the most recent Supreme Court case dealing with the First Amendment rights of aliens, *Reno v. American-Arab Anti-Discrimination Committee ("AADC").*[117] This case, however, has left more questions unanswered about the status of aliens' First Amendment rights than it has answered. *AADC* is important because it discussed a particular type of First Amendment claim: selective enforcement of deportation because of political affiliation. The case is also significant because of its potential to undermine *Bridges v. Wixon*, which held that aliens do have First Amendment rights.

B. Reno v. American-Arab Anti-Discrimination Committee *and Its Significance for the First Amendment Rights of Aliens*

With the Supreme Court's recent decision in *AADC*, it is uncertain whether aliens still enjoy the same First Amendment rights as citizens. The case has left many questions regarding the First Amendment rights of aliens unresolved because the Court's decision focused on whether federal courts may rule on aliens' constitutional claims prior to the completion of deportation proceedings. When the Court did address the First Amendment claim of the parties, it did so only in conjunction with their selective enforcement charge, thereby limiting the relevance of the decision to a specific kind of First Amendment claim, where aliens are already deportable on other grounds.

The case, which began in 1987, finally reached the Supreme Court in 1999.[118] The plaintiffs, eight aliens who belonged to the Popular Front for the Liberation of Palestine ("PFLP"),[119] which the government charac-

---

[116] Pellegrino distinguishes *Dennis* from *Harisiades* by pointing to the *Dennis* Court's reliance on proof of an individual's intent to overthrow the government through force and violence, as opposed to the *Harisiades* decision, in which proof of intent was merely implied from active membership in an organization that advocated the overthrow of government through force and violence. *See* Pellegrino, *supra* note 53, at 242.

[117] 525 U.S. 471 (1999).

[118] The suit made four trips through the District Court and the United States Court of Appeals for the Ninth Circuit before reaching the Supreme Court in 1999. The first two appeals concerned jurisdictional issues. *See* American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991); Hamide v. United States District Court, No. 87-7249, slip op., (9th Cir. Feb. 24, 1988). In 1994, the District Court preliminarily enjoined deportation proceedings against the six temporary residents, holding that they were likely to be able to prove that the INS had selectively enforced deportation proceedings against them because of their association with the PFLP and expressing concern with the "chill to their First Amendment rights" while the proceedings were pending. *See AADC*, 525 U.S. at 475.

[119] Of the eight respondents in *AADC*, six were temporary residents who had entered the United States legally, and two were permanent residents. The latter two individuals had resided in the United States lawfully for more than 20 years. *See* David Cole, *Supreme Court Denies First Amendment Rights to Legal Aliens*, LEGAL TIMES, Mar. 8, 1999, at 19. Subsequent to the first proceeding against them, three of the other six became permanent

terized as an international terrorist and communist organization,[120] challenged the constitutionality of the anticommunism provisions of the McCarran-Walter Act, under which they were charged.[121] The plaintiffs sued the Immmigration and Naturalizations Service ("INS") for allegedly targeting them for deportation because of their affiliation with a politically unpopular group,[122] arguing that selective enforcement of the immigration laws violated their First and Fifth Amendment rights.[123] The INS responded by dropping the charges relating to advocacy of communism, while retaining the technical violation charges against six of the respondents, who were temporary residents.[124] In addition, the INS charged the two permanent residents under a different section of the McCarran-Walter Act, which authorized the deportation of aliens who were members of an organization advocating "the duty, necessity, or propriety of the unlawful assaulting or killing of any [government] officer or officers" and "the unlawful damage, injury, or destruction of property."[125]

In 1989, the federal district court, in *American-Arab Anti-Discrimination Committee v. Meese*,[126] held that aliens enjoyed full First Amendment rights in the deportation context and that the standard governing their First Amendment challenge was the same as the standard governing

---

residents. *See id.* at 20. Cole writes that the other three would also be eligible to remain in the United States permanently if not for the government's objections to their political activities. The eight plaintiffs (seven Palestinians and one Kenyan) participated in PFLP events to varying degrees. *See* American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367 (9th Cir. 1997).

[120] *See* 525 U.S. at 473. The INS initially charged the eight respondents under the McCarran-Walter Act, which, as amended in 1981 but prior to the amendments contained in the Immigration and Nationality Act of 1990 ("INA"), had provided for the deportation of aliens who "advocate . . . world communism," 8 U.S.C. § 1251(a)(6)(D), (G)(v), (H) (1982).

[121] *See AADC*, 525 U.S. at 473.

[122] *See id.*

[123] *See id.* at 474.

[124] *See id.*

[125] *Id.* (quoting the McCarran-Walter Act, 8 U.S.C. § 1251(a)(6)(F)(ii)–(iii) (1982)). The INA amended the McCarran-Walter Act, adding a new terrorist activity provision. *See* 8 U.S.C. § 1227(a)(4)(B) (Supp. III 1994); *AADC*, 525 U.S. at 474. The INS charged the two permanent residents (Hamide and Shehadeh) under this new provision. Despite the change in the charges, the INS still based its effort to deport Hamide and Shehadeh on their affiliation with the PFLP, later submitting new evidence to the district court regarding the aliens' support of PFLP fundraising activities. *See* American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1376 (9th Cir. 1997). The INS submitted this evidence to argue that, under the applicable First Amendment standard, aliens could be sanctioned for their fundraising for an allegedly terrorist organization. The former FBI director involved in the case testified before Congress that "[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation .... [I]f these individuals had been United States citizens, there would not have been a basis for their arrest." *Id.* at 1370 (citing *Hearings Before Senate Select Committee on Intelligence on the Nomination of William H. Webster to Be Director of Central Intelligence*, 100th Cong., 94, 95 (1987)).

[126] 714 F. Supp. 1060 (C.D. Cal. 1989), *rev'd sub nom.* American-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445 (9th Cir. 1991).

a challenge by citizens.[127] The court concluded: "Since aliens enjoy full First Amendment protection outside the deportation setting, we decline to adopt a lesser First Amendment test for use within that setting."[128] In addition, the court ruled that the provisions of the McCarran-Walter Act that mandated deportation on ideological grounds were overly broad.[129]

In *American-Arab Anti-Discrimination Committee v. Reno*, the Ninth Circuit rejected the Attorney General's argument that selective enforcement claims were inappropriate in the immigration context.[130] The court also rejected the alternative argument that the statutory review provision of the McCarran-Walter Act precluded review until a deportation order was issued.[131] While the Attorney General's appeal of the district court and court of appeals decisions were still pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[132] which instituted a new judicial review procedure. Based upon the new law, the Attorney General filed motions in both the federal district court and the court of appeals, arguing that the courts no longer had jurisdiction over the respondents' selective enforcement claim. The Solicitor General sought Supreme Court review on the jurisdictional issue, as well as the substantive merits of the First Amendment claim. The Court granted a writ of certiorari only on the jurisdictional issue.[133] Nevertheless, the Court decided both issues when it reviewed the case.

Writing for the Court, Justice Scalia devoted much of the opinion to addressing the jurisdiction question, which arose from the difficulty of reconciling two different provisions of IIRIRA.[134] In addition to overrul-

---

[127] *See AADC*, 714 F. Supp. at 1063.

[128] *Id.* at 1082.

[129] *See id.* at 1084. Similarly, in a later case involving an appeal from deportation proceedings by a resident alien, the United States District Court for the District of Columbia held that the provision of the McCarran-Walter Act permitting exclusion of aliens on the basis of activities that the INS believed would be prejudicial to public interest or endanger the welfare, safety, or security of the United States was unconstitutionally vague. *See* Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992).

[130] 70 F.3d 1045 (9th Cir. 1995).

[131] *See id.* at 1056–57. In Justice Scalia's words, "The Ninth Circuit remanded the case to the District Court, which entered an injunction in favor of [the two resident aliens] and denied the Attorney General's request that the existing injunction be dissolved in light of new evidence that all respondents participated in fundraising activities of the PFLP." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 475 (1999).

[132] 18 U.S.C. § 758 (1996).

[133] *See* Reno v. American-Arab Anti-Discrimination Comm., 524 U.S. 903 (1998).

[134] *See AADC*, 525 U.S. at 471. IIRIRA repealed the old judicial review scheme in the INA, 8 U.S.C. § 1105(a) (Supp. III 1994), and inserted a new provision, 8 U.S.C. § 1252(g) (Supp. III 1994), which restricted judicial review of the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." The confusion arose from the inserted provision in INA § 1252(g) that restricted judicial review apply "[e]xcept as provided in this section," § 1252(g), which seemed to contradict IIRIRA § 309(c)(1)'s general rule that the revised procedures for removing aliens, including § 1252's judicial review procedures, did not apply in exclusion or deportation proceedings pending on IIRIRA's effective date. Yet, IIRIRA § 306(c)(1) directed that § 1252(g) should apply "without limitation to claims

ing the Ninth Circuit's opinion that it had jurisdiction to hear the case under IIRIRA provisions,[135] Justice Scalia went on to overrule the aliens' First Amendment claims on the merits, without the benefit of briefing or oral argument on the subject.[136] Justice Scalia apparently deemed that full resolution of the jurisdictional issue required him to resolve the aliens' contention that postponing review of the First Amendment selective enforcement claims until the end of the judicial process itself violated the Constitution. It is uncertain whether this section of the decision will be considered dictum.

According to Justice Scalia, "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity."[137] By rejecting a valid constitutional defense of selective enforcement in this context, Scalia implied that aliens who were unlawfully present in the United States did not enjoy the protection of the First Amendment. Moreover, the Court's decision indicated that an alien's First Amendment rights were irrelevant if the government had an independent reason for deporting him. If the lower courts were to follow this interpretation, it would have grave consequences for the fundamental rights of aliens.

Justice Scalia's references to "violation of immigration laws" and "continuing presence" also suggest that the holding applied to illegal aliens only, because permanent residents are not in the United States in violation of the immigration laws. The difficulty with limiting the Court's decision in *AADC* to illegal aliens, however, is that two permanent resident aliens in the case were also being deported for their activities and membership in an association that the government considered illegal.[138] Thus, although an alien might be in the United States legally, he

---

arising from all past, pending, or future exclusion, deportation, or removal proceedings." The reconciliation of these seemingly contradictory provisions of the statute occupied most of the Court's decision. Justice Scalia's opinion, in effect, allowed retroactive application of the provisions of IIRIRA, even though § 309(c)(1) explicitly provided for exceptions in cases of transition for aliens in proceedings. Justice Scalia's reasoning suggested that § 306(c)(1) of the amended INA overrode § 309(c)(1) of IIRIRA.

[135] *AADC*, 525 U.S. at 486.

[136] *See AADC*, 525 U.S. at 487–88. Justice Scalia reached the First Amendment issue by addressing respondents' contention that lack of prior factual development for their First Amendment claim in the deportation proceedings and the unavailability of habeas relief required them to bring the constitutional claim prior to the completion of the deportation proceedings. *See id.* In addressing this claim, Justice Scalia dismissed the respondents' assertion that their freedom of speech and association would be chilled if they had to await the outcome of the proceedings against them before raising their First Amendment claims. *See id.* Justice Scalia maintained that the doctrine of constitutional doubt did not pertain to this case and could not be applied to permit immediate review of respondents' selective enforcement claims.

[137] *AADC*, 525 U.S. at 491–92.

[138] *See supra* note 119 and accompanying text.

ultimately could end up "in violation of the immigration laws"[139] simply for espousing political views and affiliations that the government considered illegal.

Such an interpretation would extend the outcome of the Supreme Court's decision in *AADC* to both legal and illegal aliens. What constitutes illegal behavior and the basis for deportation according to the harsh 1996 immigration laws would then lie solely within INS's purview, insulated from judicial scrutiny.[140] If lower courts adopt such an interpretation of the *AADC* case, legal resident aliens may face what one author has called an "intolerable Catch-22."[141] If legal resident aliens exercise their First Amendment rights, they may be labeled as "illegal aliens," particularly given IIRIRA and the antiterrorism provisions passed in 1996.[142] Yet, in order to challenge the determination of the INS and their designation as a "special threat," aliens will have to wait until the completion of deportation proceedings. At that point, these legal resident aliens might be unable to raise any constitutional issues, because the INA limits appellate review to the administrative record established during deportation proceedings.[143]

---

[139] *AADC*, 525 U.S. at 491.

[140] *See* Margaret M. Russell, *If Legal Immigrants Can Be Deemed "Illegal" Just for Exercising Their Rights, Who Among Us Is Safe?*, L.A. TIMES, Mar. 12, 1999, at B7.

[141] *Id.*

[142] *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 303, 18 U.S.C. § 2339B (1996) (prohibition on terrorist fundraising); § 411, 8 U.S.C. § 1182 (1996) (exclusion of alien terrorists); § 413, 8 U.S.C. § 1253 (1996) (denial of other relief for alien terrorists); IIRIRA § 306, 8 U.S.C. § 1252 (1996) (judicial review of orders of removal).

[143] *See* 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based."); 119 F.3d at 1373 ("In addition, IIRIRA expressly forecloses the appellate courts from remanding such cases to the [immigration judge] for further factual development under a related provision. . . ."); *id.* at 1374 ("Nor does review of a final order of deportation by habeas corpus offer adequate redress for the [aliens'] claimed constitutional injuries. The limitations on the new statute on habeas relief remain unclear.") (internal citations omitted); *see also* Jean-Baptiste v. Reno, 144 F.3d 212 (2d. Cir. 1998) (holding that IIRIRA provisions denying the court of appeals and district court jurisdiction over claims of aliens arising from deportation proceedings did not violate constitutional clause forbidding suspension of habeas corpus). According to an amicus brief filed by the Criminal Justice Legal Foundation, the aliens should have the ability to litigate their claims on review of a final order of deportation, based on *INS v. Chadha*, 462 U.S. 919 (1983), which stated that a final order of deportation "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of the Petitioners at 9, Reno v. American-Arab Anti-Discrimination Committee, 1998 WL 404566 (U.S. 1998) (No. 97-1252) (citing *Chadha*, 462 U.S. at 938). The brief also argued that judicial review of the aliens' constitutional claims would continue to be available after the 1996 immigration changes enacted by AEDPA, 28 U.S.C. § 2347(b) (1996). This section established a mechanism for review of claims not addressed during the administrative review process, stating that "[w]hen the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law." *Id. See also* discussion *infra* Part II.C.

Under such an interpretation, the *AADC* case contradicts the Supreme Court's earlier decision in *Bridges v. Wixon*,[144] which upheld the First Amendment rights of aliens within the United States. One way to reconcile the two cases would be to limit the holding in *Bridges v. Wixon* as applying only to resident aliens. However, the language of *Wixon* does not support such a limitation. If the holding of *Bridges v. Wixon*—that the First Amendment applies to all persons, citizens and aliens equally—is still good law,[145] then *AADC* implies that aliens whom the government has deemed to be "unlawfully in this country" are nonpersons for purposes of free speech and association in the context of deportation proceedings.[146]

Another way to reconcile *AADC* with *Wixon* would be to limit the Supreme Court's decision in *AADC* to the selective enforcement issue raised by the aliens in that case. One could argue that the Court was primarily interested in addressing the selective enforcement issue, based on its refusal to grant certiorari on the First Amendment claim and Justice Scalia's devotion of most of the decision to the jurisdictional issue raised by the 1996 legislation. In fact, Justice Scalia explicitly stated that the question for the Court's resolution was whether an alien who was unlawfully in this country had a constitutional right to assert selective enforcement as a defense against his deportation. In answering this question, Justice Scalia concluded that the alien did not have such a constitutional right.[147] Justice Scalia's main concern related to the potential for delay if selective enforcement claims were to be permitted in deportation

---

[144] 326 U.S. 135 (1945).

[145] *See id.* at 161 ("Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' powers of deportation.").

[146] A similar argument was made by David A. Martin in his discussion of the *Knauff-Mezei* doctrine, which resulted from the Supreme Court's disturbing decisions in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). Martin argues that the implication of these two cases is that excludable aliens have the status of non-persons: "The *Knauff-Mezei* doctrine comes close to saying that even though the Fifth Amendment due process protection applies to 'persons,' we simply do not regard excludable aliens as falling within that category." *See* Martin, *supra* note 44, at 176.

[147] *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999). Immediately after stating that the alien does *not* have such a right, Justice Scalia found fault with Justice Ginsburg's approach to the case, stating:

> Instead of resolving this constitutional question, Justice Ginsburg chooses to resolve the constitutional question whether Congress can exclude the courts from remedying an alleged First Amendment violation with immediate effects, pending the completion of administrative proceedings. It is not clear to us that this is easier to answer than the question we address . . . .

Id. at 488 n.10. Justice Scalia made it clear that the holding was aimed at depriving aliens of the selective enforcement claim in deportation settings, adding that: "[o]ur holding generally deprives deportable aliens of the defense of selective prosecution. [Justice Ginsburg's] allows all citizens and resident aliens to be deprived of constitutional rights . . . pending the completion of agency proceedings." *Id.*

proceedings.[148] He did not completely rule out the possibility of raising a selective enforcement claim if the "alleged basis of discrimination [were] so outrageous,"[149] but, according to Justice Scalia, such cases would be exceptional.[150]

The general rule Justice Scalia established in *AADC* concerned the barring of selective enforcement claims in the deportation context. One could interpret Justice Scalia's statement that "[w]hen an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the *additional* reason that it believes him to be a member of an organization that supports terrorist activity,"[151] as directed primarily at the selective enforcement claim. The "additional reason" to which Justice Scalia was referring was the First Amendment claim of the aliens' right to associate freely, but the Supreme Court's opinion did not focus on that claim.

By this reasoning, the Court in *AADC* addressed the First Amendment claim of the aliens only to the extent necessary to complete its discussion of the selective enforcement challenge.[152] Arguably, the Court did not directly address the First Amendment rights of the permanent resident aliens involved in the case, because it focused only on those aliens who were unlawfully present in the United States.[153] Such an interpretation would indicate that, where First Amendment rights of legal aliens are concerned, *Bridges v. Wixon* still stands.

C. Unresolved First Amendment Issues

It is unclear which interpretation of *AADC* the lower courts will adopt in deciding future cases in which aliens raise First Amendment defenses in deportation proceedings. Of the many lower courts that have cited the case, most have dealt only with the availability of habeas corpus review for aliens in deportation proceedings. In particular, many of the cases addressed the question of whether federal district courts had subject matter jurisdiction over aliens' habeas corpus petitions, or whether habeas review had been eliminated after the 1996 changes in the immigration laws and the Supreme Court's decision in *AADC*.[154] None of the

---

[148] *See id.* at 488.

[149] *Id.* at 491.

[150] *See id.*

[151] *Id.* at 491–92 (emphasis added).

[152] *See id.* at 476.

[153] An alternate interpretation is that the permanent residents are covered by the Court's decision because their presence in the United States is also unlawful as a result of the allegation that they are members of an organization that supports terrorist activity. If this interpretation is followed, the aliens could later challenge the constitutionality of the terrorist activity grounds as applied to their association with the PFLP.

[154] *See, e.g.*, Fierro v. INS, 66 F. Supp. 2d 229, 230–31 (D. Mass. 1999) (interpreting *AADC* as not having addressed the issue of whether the 1996 amendments to the INA constituted a repeal of habeas review but instead as merely having noted the divergent views of

cases thus far have revisited the exhaustive limits of administrative review in the context of a First Amendment claim.[155] The Supreme Court itself has referred to the *AADC* ruling only briefly in cases dealing with habeas corpus review.[156] Meanwhile, some lower courts have narrowly interpreted the holding of *AADC*.[157] The issue in *AADC*, according to these lower courts, was whether IIRIRA § 306(a) amended INA § 242(g)[158] so as to deprive the federal courts of jurisdiction over claims by aliens that the Attorney General was selectively enforcing the immigration laws.[159]

---

the circuit courts). The court in *Fierro* stated that it would follow the case of *Mahadeo v. Reno*, 52 F. Supp. 2d 203 (D. Mass. 1999), instead of the all-or-nothing view of habeas jurisdiction adopted by some courts after *AADC*. According to Judge Stearns in *Mahadeo*, the *AADC* opinion limited the scope of IIRIRA, 8 U.S.C. § 1252(g) (1996), which states, "except as provided in this section, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," and its jurisdictional restriction to judicial review of certain discretionary executive functions in immigration proceedings (i.e., three discrete actions that the Attorney General may take: her decision or action to commence proceedings, adjudicate cases, or execute removal orders). *See Mahadeo*, 52 F. Supp. 2d at 204; *see also* Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 305 (5th Cir. 1999) (analyzing the availability of habeas review in light of the Supreme Court's decision in *AADC*, and concluding that "habeas jurisdiction continues to exist under IIRIRA's transitional rules in cases involving final orders of deportation against criminal aliens," and that "habeas jurisdiction is capacious enough to include constitutional and statutory challenges if those challenges cannot be considered on direct review by the court of appeals").

[155] The closest that a case has come to addressing this issue is in passing, while dealing with a habeas corpus review claim. *See* Wallace v. Reno, 39 F. Supp. 2d 101 (D. Mass. 1999). In a footnote interpreting the *AADC* case, the court stated that the Supreme Court, in *AADC*, interpreted IIRIRA by holding that:

> [D]istrict courts lacked jurisdiction for direct review of a First Amendment claim of being targeted for deportation because of affiliation with a politically popular group—ostensibly selective prosecution by the INS. The decision to initiate a deportation proceeding, like the decision to initiate a criminal proceeding, trenches on the broad discretion of the executive.

Id. at 108 (citing Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999)).

[156] *See, e.g.*, Richardson v. Reno, 119 S. Ct. 2016 (1999) (vacating the judgment of the United States Court of Appeals for the Eleventh Circuit "for further consideration in light of *Reno v. American-Arab Anti-Discrimination Committee*"); INS v. Magana-Pizano, 119 S. Ct. 1137 (1999) (vacating the judgment of the Ninth Circuit in a case dealing with habeas corpus review in light of the *AADC* ruling).

[157] *See, e.g.*, Alikhani v. Fasano, 40 F. Supp. 2d 1124, 1256 (S.D. Cal. 1999) (stating that, in *AADC*, the Supreme Court held that 8 U.S.C. § 1252 (g) should be read narrowly so as to apply only to "three discrete actions" that the Attorney General may take: decisions "to commence proceedings, adjudicate cases, or execute removal orders"); *see also* Hernandez v. Reno, 63 F. Supp. 2d 99, 101 (D. Mass. 1999) ("By holding that § 1252 (g) does not apply to the 'universe of deportation claims,' [*AADC*] considerably narrowed the sweep of § 1252 (g)'s seemingly broad brush.") (internal citations omitted).

[158] *See* discussion *supra* note 134 and accompanying text for a description of how IIRIRA § 306 (a) amended INA § 242 (g), as codified in 8 U.S.C. § 1252 (g) (Supp. III 1994).

[159] *See, e.g.*, Desousa v. Reno, 190 F.3d 175, 182 (3d Cir. 1999) (citing *AADC* for the

It is also uncertain how the federal courts will rule on the constitutional claims of the resident alien parties in *AADC* upon completion of their deportation proceedings. The *AADC* Court's decision did not address whether alleged terrorist activity as a grounds for deportation was unconstitutional as applied to them, leaving this claim open for analysis on review of a final deportation order.[160] In fact, the district court in *American-Arab Anti-Discrimination Committee v. Meese*[161] left some room for the possibility that aliens could be deported for their affiliation or membership in certain organizations. The court stated, however, that the prevailing First Amendment standard could be used in such cases for individuals who advocated imminent lawless action and whose speech was likely to induce such action.[162] It is clear that the nonresident alien parties in this case will no longer have the option of raising a selective enforcement claim, even after completion of their deportation proceedings.

One potential danger of the *AADC* decision is the impossibility of separating the lesser protection of First Amendment rights accorded to aliens in deportation settings from their rights outside of that setting.[163] Without the protection against ex post facto laws, for example, the government could pass a law allowing for deportation of aliens for statements or associations made several decades earlier.[164] IIRIRA[165] and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[166] have achieved this end through their designation of certain organizations as illegal. Because an alien, under these statutes, has no way of anticipating whether or not her speech or association might someday become grounds for deportation, the Court's ruling in *AADC* could have a chilling effect on aliens' free speech and associational rights.[167]

Such a scenario would ultimately extend the significance of *AADC* beyond the fate of the eight aliens involved to reach the free speech and association rights of all aliens residing in the United States. Aliens would find themselves obliged to minimize any risk of involvement with asso-

---

proposition that INA § 242 (g), 8 U.S.C. § 1252 (g) (Supp. III 1994), was a narrow provision, "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion.").

[160] *See* Gerald Neuman, *Terrorism, Selective Deportation, and the First Amendment After* Reno v. AADC, GEO. IMMIGR. L.J. (forthcoming) (manuscript on file with author).

[161] 714 F. Supp. 1060 (C.D. Cal. 1989).

[162] *See id.* at 1082 n.18.

[163] *See id.* at 1081.

[164] *See id.* at 1082.

[165] 18 U.S.C. § 758 (1996).

[166] 28 U.S.C. § 2261 (1996).

[167] *Cf.* American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1082 (C.D. Cal. 1989). ("[T]he 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.").

ciations that might retroactively be deemed illegal or terrorist, so as not to jeopardize their stay in the United States.[168]

The chilling effect upon aliens' First Amendment rights is even more problematic when it is directly aimed at aliens' speech,[169] rather than as an incidental result of some other ground for deportation. The *AADC* ruling left this broad issue unresolved, where the INS arguably could have deported six of the eight aliens based on routine status violations, irrespective of their speech and association activities.

As Justice Murphy wrote in his concurring opinion in *Bridges v. Wixon* in 1945:

> The liberties of the 3,500,000 other aliens in this nation are also at stake. Many of these aliens, like many of our forebears, were driven from their original homelands by bigoted authorities who denied the existence of freedom and tolerance. It would be a dismal prospect for them to discover that their freedom in the United States is dependent upon their conformity to the popular notions of the moment. But they do not need to make that discovery. The Bill of Rights belongs to them as well as to all citizens.[170]

To ensure that that the Bill of Rights applies to aliens and citizens equally, the fundamental rights of aliens must be protected from erosion based upon fears about the threat of terrorism or other national security concerns. The next section discusses how the courts should develop standards for evaluating First Amendment claims in light of certain provisions of IIRIRA and other recent antiterrorism legislation.

III. Evaluating First Amendment Claims in Light of the Antiterrorism and Illegal Immigration Statutes

The broad definitions of terrorism contained in AEDPA and IIRIRA, as well as in the INA, create the danger that aliens' fundamental rights of free speech and association will receive a lower level of protection by courts than those of citizens. The government has a legitimate interest in protecting its citizens from harmful speech and associations that could

---

[168] The case law demonstrates that an alien may be deported for conduct that did not render the alien deportable at the time that the act was committed. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); ALEINIKOFF, *supra* note 6, at 718. The issues of retroactivity and ex post facto laws, however, are beyond the scope of this Article.

[169] Neuman writes that, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), "[t]he Supreme Court finally recognized the incidental burdens of exclusion on the First Amendment rights of *citizens* to communicate with excluded aliens . . ." thereby somewhat scrutinizing (though at a low level) the executive decision to exclude the alien. NEUMAN, *supra* note 11, at 130.

[170] 326 U.S. 135, 166 (1945) (Murphy, J., concurring).

lead to imminent violent behavior. However, the government also has a duty to safeguard fundamental rights guaranteed by the Constitution. The strict scrutiny standard, which requires that legislation infringing on an individual's speech or associational rights be narrowly tailored to the advancement of a compelling government interest, strikes an appropriate balance between the government's security interest and aliens' speech and associational rights.

Courts may decide that the government's interest becomes more compelling when certain national security concerns are considered, such as the prevention of terrorism. Such an approach raises the question of when it would be justifiable to restrict speech and association based on an evaluation of the government's compelling interest in protecting its citizens from harm. This section addresses the question in the context of AEDPA and IIRIRA, and it assesses the constitutionality of various potential challenges to the 1996 laws.

A. Applicable Constitutional Standard for Challenges to Deportation or Exclusion on the Basis of Terrorist Activity

The end of the Cold War led to a revision of U.S. law with respect to exclusion based on one's beliefs. The INA of 1990[171] reformed the exclusion grounds of the McCarran-Walter Act,[172] abolishing most exclusion and deportations based solely on an alien's beliefs, writings, or membership in organizations with designated beliefs.[173] However, a number of ideological exclusion and deportation grounds remain, including terrorist activity (which is often broadly defined);[174] membership in a Communist Party "or any other totalitarian party" within recent years;[175] or engaging in activities aimed at the overthrow of the United States government.[176] Such ideological grounds for exclusion and deportation continue to treat aliens differently from U.S. citizens with respect to First Amendment rights.

---

[171] Pub. L. No. 101-649, 104 Stat. 4978 (codified at 8 U.S.C. § 1101 (1990)).

[172] Pub. L. No. 106-73, 66 Stat. 163 (codified at 8 U.S.C. § 1101 (1952)).

[173] The new INA eliminated the provisions of § 241(a), 8 U.S.C. § 1251(a) (1982), which mandated deportation of anarchists and members of the Communist Party and other totalitarian parties).

[174] *See, e.g.*, 8 U.S.C. § 1182(a)(3)(B) (Supp. III 1994) (exclusion for association with broadly defined notion of terrorists); § 1227(a)(4)(B) (deportation for engaging in terrorist activities); § 1182(a)(3)(C) (exclusion based on adverse foreign policy consequences of entry or activities); § 1231(a)(4)(C) (deportation for such entry or activities).

[175] *See* § 1182(a)(3)(D)(i). If the alien shows that she is not otherwise a threat to the security of the United States, termination of membership two years before applying for a visa suffices, unless the party in question is the governing totalitarian dictatorship at the time. § 1182(a)(3)(D)(ii). The statute also makes an exception for *involuntary* members and permits a waiver for close relatives of U.S. residents. § 1182(a)(3)(D)(ii), (iv).

[176] *See* §§ 1182(a)(3)(A)(iii), 237(a)(4)(A)(iii).

The now removed statutory exclusions for anarchists and communists, as well as the current exclusions for members of communist and other totalitarian parties, have been condemned by the Supreme Court for being quite broad.[177] These broad classifications, such as the current definition of terrorism found in the statute, for example, may violate First Amendment principles.[178] The government's need to employ these classifications must be substantial enough to outweigh the burden on constitutional rights. Otherwise, fundamental rights guaranteed by the Bill of Rights would be curtailed under the guise of national security.[179]

AEDPA, in conjunction with existing provisions of the INA, provides for the deportation and exclusion of aliens based on membership in a terrorist organization or advocacy of terrorist activity.[180] Both terrorist activity and the act of engaging in terrorism are broadly defined under the INA.[181] One danger of an excessively broad definition is that the gov-

---

[177] *See* NEUMAN, *supra* note 11, at 155.

[178] *See infra* note 181 for definitions of terrorism.

[179] *See* Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 694 (1998) ("'[B]y abandoning the freedoms of speech and association and the right to due process, we are giving in to terrorists.'") (quoting from *Terrorism in the United States: The Nature and Extent of the Threat and Possible Legislative Response: Hearings Before the Senate Judiciary Comm.*, 104th Cong. 163 (1995) (statement of Donald M. Haines, Legislative Counsel, ACLU)).

[180] *See* AEDPA § 411, 8 U.S.C. § 1182 (1996). Section 411 expands the class of excludable aliens to include any alien who "is a representative . . . of a foreign terrorist organization" or who "is a member of a foreign terrorist organization." Section 302 of the Act, AEDPA § 302, 8 U.S.C. § 1189 (1996), authorizes the Secretary of State to designate "foreign terrorist organizations." Section 302 also prescribes criminal penalties for any person within the United States, or under the jurisdiction thereof, who "knowingly provides material support or resources" to any organization so designated. § 1189.

[181] *See* INA § 212(a)(3)(B)(ii), 8 U.S.C. § 1182(a)(3)(B)(ii) (Supp. III 1994), which defines "terrorist activity" as "any activity that 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)" that involves hijacking, seizing, or threatening to injure another individual in order to compel a third party to do something; a violent attack upon an internationally protected person or upon the liberty of such person; an assassination; the use of a weapon with intent, directly or indirectly, to endanger the safety of an individual or to cause substantial damage to property; or a threat, attempt, or conspiracy to do any of the foregoing. The INA's definition of to "engage in terrorist activity" includes 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 documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity;
> (IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization; or
> (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

§ 1182(a)(3)(B)(iii).

ernment has the unrestricted capacity to brand with the terrorist label any organizations that are unpopular or advocate controversial views.[182] AEDPA does not ban support for all groups that engage in terrorist activity, but rather bans only those groups that the Secretary of State deems to be contrary to American security or national interest.[183] The new law's vagueness gives the government the discretion to decide which terrorist organizations may be supported here in the United States.[184]

In addition, the INA expands the classes of aliens subject to deportation by providing that "[a]ny alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity"[185] is deportable, as is "[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."[186] The Act's definition of engaging in terrorist activity includes the provision of material support to terrorist organizations and the solicitation of funds, irrespective of whether or not the funds support legitimate objectives of the organization.[187] Therefore, once an organization is designated *terrorist* by the Secretary of State, any of its members who are engaged in fundraising could be subject to deportation.[188]

There is, however, a knowledge requirement associated with membership, as stated in § 212(a)(3)(B)(iii). This section establishes that "[to] engage in terrorist activity" is "to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which

---

[182] *See* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2086 (1996) [hereinafter *Blown Away*].

[183] *See* INA § 219, 8 U.S.C. § 1189 (Supp. III 1994) (designating foreign terrorist organizations). The Secretary of State is authorized to designate an organization as a foreign terrorist organization if the organization is a foreign organization; the organization engages in terrorist activity (as defined in § 1182(a)(3)(B)); and the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. § 1182(a)(1). Once an organization has been designated as terrorist, the Secretary of the Treasury may require U.S. financial institutions possessing or controlling any assets of the foreign organization to block all financial transactions involving those assets. § 1189(a)(2)(C).

[184] *See* Editorial, *The Constitution and Terrorism*, WASH. POST, Mar. 27, 1998, at A24 (stating that the fact that not all terrorist organizations are banned for fundraising purposes means that the government has "the power to pick and choose which violent causes Americans are allowed to support. So while American citizens cannot raise money for Hamas or the Tamil Tigers, they can still raise money for the Irish Republican Army, which is not currently on the State Department's list."); *see also* David L. Marcus, *Terrorist List Poses Thorny Issues*, BOSTON GLOBE, Feb. 9, 1997, at 6A (discussing the controversy around the State Department's designation of certain groups as terrorist and citing a State Department official's acknowledgment of the difficulty of deciding which groups should be branded as threats: "One man's terrorist is another man's freedom fighter.").

[185] INA § 241(a)(4)(B), 8 U.S.C. § 1231(a)(4)(B) (Supp. III 1994).

[186] § 1231(a)(1)(A).

[187] This restriction may be legitimate, however, because of the fungibility of money. Funds donated to a terrorist organization for nonterrorist activity free up an equal sum of the organization's money for terrorist activity.

[188] *See* INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (Supp. III 1994) (stating that "[a]ny alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in § 212(a)(3)(B)(iii)) is deportable.").

the actor *knows*, or *reasonably should know*, affords material support to any individual, organization, or government in conducting a terrorist activity at any time . . . ."[189] Provision (IV) of INA § 212(a)(3)(B)(iii) extends the knowledge requirement to solicitation of "funds or other things of value for terrorist activity or for any terrorist organization."[190] Where it does apply, this knowledge requirement should at least avoid ex post facto application of the law to people who are mere members of a terrorist organization.

These changes in the INA, along with other provisions in AEDPA limiting the procedural protections to aliens suspected of terrorist activity and against whom deportation proceedings have been brought, make it easier to deport aliens based on their speech and association activities.[191]

B. Appropriate Level of Judicial Scrutiny for Regulation of Speech and Association

The strict scrutiny standard that the Supreme Court used in *Brandenburg v. Ohio*,[192] which remains the standard applied to First Amendment cases involving advocacy of illegal action, is appropriate for aliens, as well as citizens, in most cases dealing with free speech and association. Under the standard enunciated by the Court in *Brandenburg*, only speech or advocacy that is directed to inciting or producing imminent lawless action and that is, in fact, likely to incite or produce imminent lawless action may be prohibited.[193] This is also the appropriate standard for most content-based challenges to AEDPA and IIRIRA, because it would protect fundamental rights without sacrificing the government's national security concerns.

In cases where the regulation of First Amendment activity is content neutral and aimed at the noncommunicative aspect of expressive conduct, a regulation may be upheld upon a balancing of the importance of the government's interest and the extent to which the First Amendment activity is infringed. In such cases, courts rely on the standard enunciated in *United States v. O'Brien*,[194] in which the Court upheld a statute that criminalized certain expressive conduct, i.e., the burning of a draft registration card, because the statute was directed at the noncommunicative impact of the conduct.[195]

---

[189] INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (Supp. III 1994) (emphasis added).

[190] § 1182(a)(3)(B)(iii)(IV).

[191] *See* Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 644 (1996).

[192] 395 U.S. 444 (1969).

[193] *See id.* at 447.

[194] 391 U.S. 367 (1968).

[195] *Id.* at 376.

Courts may consider the citizenship status of the alien as one element, but not the determinative factor, in deciding the appropriate level of judicial scrutiny. Where such fundamental rights as free speech and association are concerned, the main focus should be on ensuring that the means that the government uses to curtail rights are narrowly tailored to a compelling objective.

In cases involving deportation or exclusion of aliens for membership in allegedly terrorist organizations, the government's strong interest in preventing violent behavior, thus, would be balanced against the need to guarantee fundamental rights to all persons protected by the U.S. Constitution.[196] The test should require that the government prove that support of a terrorist organization was carried out knowingly and with intent to further the organization's violent causes. If the government is successful in proving these elements, its interest should prevail over the individual's interest.

In *American-Arab Anti-Discrimination Committee v. Meese*,[197] for instance, the court stated:

> We do not dispute the Government's interests in preserving national security and promoting foreign policy in the exercise of its immigration power. These interests are adequately protected, however, by the prevailing First Amendment standard allowing for the deportation of individuals who advocate imminent lawless action and whose speech is likely to induce such action. The Government could also deport aliens, without violating the First Amendment, for their affiliation with an organization, if it established that that group affiliation posed a legitimate threat to the government. In addition, 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.[198]

For those who are unlawfully present or who are later found to have been inadmissible for such reasons as having committed crimes or engaged in

---

[196] Permanent resident applicants may have substantially more at stake if excluded than nonimmigrant visitors, such as the ability to join their families. Yet, current legislation places harsher criteria on immigrants than nonimmigrants. For example, current provisions on excluding members of Communist and other totalitarian parties apply only to immigrants. *See supra* note 175 and accompanying text.

[197] *See* American-Arab Anti-Discrimination Committee v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989).

[198] *Id.* at 1082 n.18 (citations omitted).

terrorist activity, the courts should continue to allow the administrative procedures established by Congress to be exhausted before addressing the aliens' constitutional claims. This policy would ensure that aliens do not use access to the courts as a way of delaying deportation proceedings. However, once those proceedings are complete, any First Amendment claims should receive the same level of judicial scrutiny as is accorded to the claims of lawful residents and citizens.

There is no justification for different levels of constitutional protection for aliens who are lawfully residing in the United States or subject to its jurisdiction,[199] nor is it justifiable to abridge constitutionally guaranteed fundamental rights; however, it may be justifiable to accord aliens different levels of benefits based on their increased membership, as in equal protection and alienage cases.[200] In cases where the restriction on speech is incidental, the government's interest may well be accorded more weight in balancing the individual's rights against a compelling government objective.

C. Challenges Based on Overbreadth and Vagueness

Many of the provisions of AEDPA and sections of the INA could be challenged on the overbreadth and vagueness grounds that were used in *American-Arab Anti-Discrimination Committee v. Meese* to overrule provisions of the McCarran-Walter Act.[201] In addition, the prohibitions against "directing, counseling, and commanding" with respect to terrorist organizations fail to distinguish between mere advocacy and advocacy of imminent unlawful action that is likely to result in such action. If these provisions were challenged in court, it is likely that they would fail under the standard enunciated in *Brandenburg v. Ohio*.[202]

---

[199] *See* Note, *Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections*, 38 B.C. L. REV. 771, 791–92 (1997) (arguing that resident aliens have the same First Amendment rights as citizens and citing *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995), which held that speech protections of the First Amendment apply to all persons who are legally in this country, including legal visitors). The *Underwager* Court relied on Justice Murphy's concurring opinion in *Bridges v. Wixon*, 326 U.S. 135 (1945), and the text of the First Amendment, which does not contain any express limitation regarding to whom the right of free speech applies. *See Underwager*, 69 F.3d at 365.

[200] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 84 (1976) (upholding a Social Security Act provision that limits eligibility of federal welfare benefits to those immigrants who have lived in the United States for a five-year period). The Court differentiated between state and federal laws because "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 79–80.

[201] *See* 714 F. Supp. 1060, 1062 (C.D. Cal. 1989); *see also* NAACP v. Button, 371 U.S. 415, 438 (1963) (holding that the "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); Plotkin, *supra* note 191, at 651.

[202] 395 U.S. 444 (1969).

If a court were to apply intermediate scrutiny, as established in *United States v. O'Brien*,[203] then the provisions might survive. The appropriate standard for courts to use, however, is that of *Brandenburg v. Ohio*, because these prohibitions are more like content-based regulation than regulation unrelated to the suppression of a particular message or idea. At the very least, courts should require the government to tailor narrowly the legislation's prohibitions on speech, in order to distinguish between content-neutral regulations and content-based ones.

D. Applicable Constitutional Standard for Statutes Forbidding Financial Support for Terrorist Organizations

The fundraising provisions of AEDPA are also problematic from a constitutional perspective. The restriction on material support for groups designated by the Secretary of State[204] may be unconstitutional under *Buckley v. Valeo*,[205] although the legislation does not limit independent expenditures by the designated groups, because these provisions act as a total ban on the freedom of speech for those individuals who want to express their support for such groups. Such a ban might be constitutional if the government can show that its interest in banning material support for terrorist groups is stronger than its interest in limiting campaign speech.[206]

The fundraising provisions of AEDPA may pass constitutional muster if courts use a lower level of scrutiny than the one found in *Brandenburg v. Ohio*. For example, in *Humanitarian Law Project v. Reno*, the court analyzed certain provisions of AEDPA under the *O'Brien* standard.[207] The court applied this standard because the regulations were aimed at prohibiting noncommunicative action, such as money contributions or material support, that incidentally limited the abilities of the plaintiffs to express their political association with certain terrorist organizations.[208] The district court in that case thus subjected the regulation to an intermediate level of scrutiny.[209] Questions remain regarding the appropriate level of judicial scrutiny for legislation on freedom of speech and association. The next section discusses why it is important to apply the Bill of Rights, especially the First Amendment, equally to all citizens.

---

[203] 391 U.S. 367 (1968).

[204] *See* AEDPA, 22 U.S.C. 2261 (1996).

[205] 424 U.S. 1 (1976) (per curiam).

[206] *See Blown Away*, *supra* note 182, at 2080–81. In 1990, the INA made aliens who "engaged in terrorist activity" or provided material support or fundraising subject to deportation. These grounds for deportation are problematic for two reasons. First, they apply retroactively; second, they do not give aliens notice as to which organizations the government will actually be willing to condemn as terrorist. *See* Neuman, *supra* note 160.

[207] 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

[208] *See id.* at 1187 (citing *O'Brien*, 391 U.S. at 376).

[209] *See Humanitarian Law Project*, 9 F. Supp. 2d at 1188.

IV. The Importance of a Uniform Bill of Rights

The Supreme Court's case law establishes a spectrum of rights associated with different categories of aliens, ranging from practically no constitutional rights for an alien seeking entry into the United States for the first time to an almost full array of rights for a permanent resident.[210] The justification for the difference in treatment is based more on notions of Congress's plenary power over immigration and theories of membership than on the text of the Constitution. As a result, case law regarding issues of admission and expulsion of aliens has developed on a track separate from most constitutional cases that deal with fundamental rights, such as free speech and association.

This two-track development, with its various degrees of protection for aliens' constitutional rights, has led to different levels of judicial scrutiny for cases involving aliens. In the exclusion and deportation cases, judicial review has been extremely deferential to Congress's plenary power over immigration. This traditional deference began with the *Chinese Exclusion Case*,[211] in which the Supreme Court stated that the power to exclude foreigners was "an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . ."[212] This plenary power, however, has been widely criticized, because of the absence of an explicit textual reference to such power in the Constitution.[213]

To develop a more unified application of the Constitution, particularly the Bill of Rights, for all persons residing in the United States, the two tracks need to be reconciled. The plenary power over immigration, although valid in most instances dealing with the entry and admission of aliens, should not be construed to infringe on fundamental rights guaranteed by the Constitution to all persons.[214] As previously mentioned, the language of the First Amendment: "Congress shall make no law . . .

---

[210] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (holding that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *see also* Landon v. Plascencia, 459 U.S. 21, 32–33 (1982) (holding that resident alien entitled to constitutional protections, including due process, during INS deportation hearing); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (stating that permanent residents are entitled to the protection of the Fifth Amendment and may not be deprived of their due process rights).

[211] 130 U.S. 581 (1889).

[212] *Id.* at 609.

[213] *See, e.g.*, Note, *"Foreign" Campaign Contributions and the First Amendment*, 110 HARV. L. REV. 1886, 1897 (1997).

[214] The danger with relying excessively on the plenary power doctrine to limit judicial scrutiny in cases involving aliens is that the courts will have, as Justice Frankfurter stated in 1939, the "tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said . . . ." Martin, *supra* note 44, at 234–35 (citing Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring)).

abridging the freedom of speech,"[215] does not permit a limiting interpretation of First Amendment protection. In addition, the Supreme Court's case law, particularly outside of the deportation and exclusion context, has demonstrated a trend toward confirming that aliens, in particular resident aliens, enjoy the same First Amendment rights as citizens.[216] Even in cases that deal with the deportation of aliens, courts have often conceded that aliens have the same First Amendment rights as citizens. This holds especially true with permanent residents.

The uniform application of the Bill of Rights to both citizens and noncitizens would benefit American society for several reasons. First, the rights of aliens and U.S. citizens are closely linked, given the relationships and associations that aliens form with the United States throughout the duration of their stay in the country. Thus, government power over aliens' rights in the United States indirectly affects U.S. citizens, especially where enduring relationships have formed between aliens and citizens in areas such as marriage, friendship, commerce, and education.[217] In addition, aliens may and often do change their legal status from temporary to permanent residents as their links with the United States grow. This change in status can occur, for example, through education, employment, or marriage to U.S. citizens. In many cases, the change in status culminates in aliens becoming citizens and full members of U.S. society, with the interest and ability to participate in its political process. In such cases, the rights of aliens and citizens are jeopardized when normal standards of judicial review are suspended for aliens in the context of immigration policy.[218] Exclusion and deportation may separate families that are composed of both aliens and citizens or undermine communication between citizens and aliens.

Second, granting protection to some groups of aliens but not others would dilute the meaning of the First Amendment itself, making it more likely that all aliens would abstain from controversial speech and association. If the protection that an alien is given against deportation based on his speech were to vary based on the alien's legal status, it is more likely that an alien would abstain from controversial First Amendment activity. An alien is unlikely to risk the harm that could result from being wrong about the level of protection a court will give her.[219] An alien might also abstain from First Amendment activity if she fears that her speech or association may later be deemed illegal, or if she believes that

---

[215] U.S. CONST. amend. I.

[216] *See, e.g.*, Rafeedie v. INS, 795 F. Supp. 13, 22 (D.D.C. 1992) ("Plaintiff is entitled to the same First Amendment protections as United States citizens, including the limitations imposed by the overbreadth and vagueness doctrines.").

[217] *See* NEUMAN, *supra* note 11, at 59 (discussing Madison's view that protecting the rights of aliens made sense, even from the citizen's point of view, because the rights of the two groups were intertwined).

[218] *See id.* at 138.

[219] *See* Plotkin, *supra* note 191, at 641.

her status does not guarantee her the full protection of the First Amendment. Under such a sliding scale of protections, it would be easier for an alien to abstain from controversial advocacy, when the cost of being mistaken about one's rights is deportation.[220] This abstention would lead aliens to censor themselves, a result detrimental to the values underlying the First Amendment.

Third, there is no textual basis in the United States Constitution for radical distinctions between citizens and noncitizens in the protection of individual rights.[221] The United States Constitution refers to *persons* not *citizens*, suggesting that a noncitizen should enjoy the same set of laws and protections as a U.S. citizen.[222] As Justice Field wrote in his dissent in *Fong Yue Ting v. United States*,[223] "[Aliens] differ only from citizens in that they cannot vote or hold public office."[224] Distinctions in the level of protection offered to aliens regarding their fundamental rights would seriously undermine efforts at a nondiscriminatory application of both U.S. law and international human rights law.[225]

---

[220] *See id.*

[221] Louis Henkin, *Immigration and the Constitution: A Clean Slate*, 35 VA. J. INT'L L. 333 (1994). Henkin writes:

> The difference between a citizen and a non-citizen permanent resident is eroding for purposes of "nationality" under international law. That difference needs to be reexamined and largely eliminated from national laws as well. Constitutional principles of protection for individual rights do not require or permit such radical distinctions.

Id. at 338.

[222] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896) (declaring that the Fifth and Sixth Amendments applied equally to all persons within the jurisdiction of the United States); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that "[t]he fourteenth amendment to the Constitution is not confined to the protection of citizens."). In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), Justice Field wrote in dissent:

> The moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection . . . . To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our Constitution.

Id. at 754 (Field, J., dissenting).

[223] 149 U.S. 698 (1893).

[224] *Id.* at 754 (Field, J., dissenting).

[225] The Universal Declaration of Human Rights, for example, does not permit governments to discriminate against resident aliens in the areas of economic and social rights. *See* Universal Declaration of Human Rights, art. 19, U.N. GAOR, 3d Sess., Supp. No. 1 at 74–75, U.N. Doc. A/810 (1948). The Universal Declaration of Human Rights specifically states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.* In addition, Article 20 states: "Everyone has the right to freedom of peaceful assembly and association." *Id.* at art. 20(1).

If such distinctions between U.S. citizens and aliens continue to be tolerated, there is little hope for eradicating discriminatory treatment in other areas of American society. Race, culture, and national origin already play a role in creating subtle discrimination toward even native born Americans who may "look different." Americans who do not neatly fit into conventional stereotypes of what it means to be American may suffer discrimination as if they were aliens. First Amendment values are too important to be restricted based on an individual's citizenship status.

V. Conclusion

The First Amendment's guarantees of free speech and association are not only important individual rights,[226] they are also significant for America's national self-definition and self-understanding. In *United States v. Robel*,[227] Chief Justice Earl Warren emphasized the importance of the First Amendment for national identity when he ruled that a statute automatically excluding members of communist action organizations from employment in defense facilities was overly broad.[228] Chief Justice Warren wrote:

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.[229]

Justice Warren emphasized that Congress had to achieve its "legitimate legislative concerns" by means which had a "'less drastic' impact on the continued vitality of First Amendment freedoms."[230] According to Justice Warren, the statute in question established guilt by association, without establishing that the individual's association actually posed a threat to the

---

[226] Supreme Court cases are replete with examples that emphasize the value of free speech and association. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); NAACP v. Button, 371 U.S. 415, 445 (1963) (holding that constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered").

[227] 389 U.S. 258 (1967).

[228] *See id.* at 264.

[229] *Id.*

[230] *Id.* at 268.

government, thereby inhibiting the exercise of First Amendment rights.[231] Similarly, many portions of the new antiterrorism and immigration statutes passed in 1996 restrict an alien's membership rights and fundraising ability, and broadly define who is a terrorist. These statutes, thus, have an inhibiting effect on the exercise of aliens' free speech and associational rights.

Although certain ideas may create the risk of inciting adherents to violent action, this is a risk that the United States has tolerated because of the value that it places on the First Amendment and the concept of a "marketplace of ideas."[232] As Justice Murphy stated in his concurrence in *Bridges v. Wixon*, "[w]e as a nation lose part of our greatness whenever we deport or punish those who merely exercise their freedoms in an unpopular though innocuous manner."[233]

America's commitment to freedom of speech and association has been evident throughout the history of constitutional law, notwithstanding the fact that immigration cases have not treated this fundamental right consistently. As the noted constitutional law scholar, Gerald Neuman, has observed:

> The strength of freedom of speech in American constitutional law makes it implausible that Congress has the power to designate whatever ideas it chooses as un-American and impose burdens on persons who espouse those ideas . . . to produce cultural homogeneity . . . . [Congress] should also not be free to use the demographic weapon of immigration control for the purpose of isolating the holders of a particular political idea from their intellectual allies and reinforcing the ranks of their opponents . . . . Thus, a broad power of ideological exclusion to shape na-

---

[231] *See id.* at 265. In rendering the Court's decision, Justice Warren did not balance the governmental interests expressed in the statute against the First Amendment rights asserted by the appellee. *See id.* at 238 n.20. Instead, the Court determined that the Constitution required that conflicts between congressional power and individual rights must be reconciled by more narrowly drawn legislation. *See id.* In this case, the means chosen by Congress were determined to be contrary "to the letter and spirit" of the First Amendment. *Id.* at 268 n.20.

[232] *See* Texas v. Johnson, 491 U.S. 397, 418 (1989).

[233] *Id.* at 165. *See* Kleindienst v. Mandel, 408 U.S. 753, where Justice Marshall, in his dissent, stated:

> For those who are not sure that they have attained the final and absolute truth, all ideas, even those forcefully urged, are a contribution to the ongoing political dialogue. The First Amendment represents the view of the Framers that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones"—"more speech."

Id. at 780 (Marshall, J., dissenting) (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

> tional identity would appear to contradict the national commitment to freedom of speech and belief.[234]

By participating in the U.S. political system through speech and association, resident aliens enrich the system and aid in its proper functioning.[235] Moreover, resident aliens are subject to the laws of the federal, state, and local governments and have an interest in communicating their needs and values even before they attain full citizenship rights.[236] Granting them First Amendment rights that equal citizens' First Amendment rights would encourage aliens, particularly permanent residents, to participate in the political discourse of the country and to become better integrated into the United States.[237] American political life would be enriched by the contribution of immigrants, who frequently possess diverse backgrounds and beliefs.

The government has a legitimate and strong interest in protecting everyone residing in the United States from the threat of terrorism. The question is whether it is necessary to weaken aliens' First Amendment rights in the process of protecting the country from such a threat. Although Congress may have the power to control immigration and to regulate alienage and naturalization policies, it is still subject to constitutional constraints in legislating and administering immigration policies.[238] If the legislative and executive branches are constrained by the Constitution in admission and exclusion of aliens, they should be even further constrained where aliens' fundamental rights to free speech and association are concerned.

Ultimately, the U.S. government has the right to achieve its legitimate legislative concerns of deterring and removing terrorists. However, the means that it chooses to carry out its objectives should not lead to a drastic reduction of fundamental rights and liberties for a large segment of the population. As Justice Warren stated in *United States v. Robel*,[239] "[t]he Constitution and the basic position of the First Amendment rights in our democratic fabric demand nothing less."[240]

---

[234] NEUMAN, *supra* note 11, at 159–60.

[235] *See id.* at 161.

[236] *See id.* at 162. Neuman writes: "The fact that [resident aliens] cannot vote makes their interest in other channels of communication all the stronger." *Id.* He adds that, as immigrants, resident aliens are also likely to have knowledge about conditions in foreign countries that citizens lack, which may be relevant to debates concerning foreign policy or trade, etc. *See id.*

[237] *See* Beck, *supra* note 115, at 804.

[238] *See* Henkin, *supra* note 33, at 862–63.

[239] 389 U.S. 258 (1967) (holding that a section of the Subversive Activities Control Act, which made it unlawful for a member of a communist action organization to engage in any employment in a defense facility, was unconstitutional in that it sought to bar employment on the basis of association).

[240] *Id.* at 268.