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Aliens, Deportation And The Equal Protection Clause: A Critical Reappraisal

Terry Jane Helbush*

INTRODUCTION

The last years of the Warren Court saw a great expansion of the concept of equal protection. Some of the most emphatic cases were those involving aliens. In *Graham v. Richardson*,[1] *Sugarman v. Dougall*,[2] and *In re Griffiths*,[3] state laws barring aliens from welfare benefits, state employment and law practice were struck down. Those cases signaled the demise of all statutes barring aliens from benefits or opportunities provided by the state, and they demonstrated a view that lawfully admitted resident aliens should enjoy almost all the rights and privileges enjoyed by citizens under the Constitution.

In the immigration field, the opposite view of aliens had always been assumed—that they deserved less protection from the government and occupied a somehow inferior position in American society. The view expounded in the equal protection cases directly challenges that assumption. And, while the application of substantive due process has always been denied in the immigration cases, perhaps the new equal protection cases could provide an avenue to challenge immigration statutes heretofore invulnerable to constitutional attack.

There is no doubt that equal protection challenges will not be accepted in the near future. The lower federal courts have thus far rebuffed them,[4] and the most recent immigration decisions of the

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* Member, third year class.

1. 403 U.S. 365 (1971).
2. 413 U.S. 634 (1973).
3. 413 U.S. 717 (1973).
4. Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3585 (U.S. April 3, 1975) (No. 1257); Dunn v. Immigration & Nat. Serv., 499 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975); Pedroza-Sandoval v. Immigration & Nat. Serv., 498 F.2d 899 (7th Cir. 1974); Pelaez v. Immigration & Nat. Serv., 513 F.2d 303 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3053 (U.S. July 10, 1975) (No. 55);

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United States Supreme Court hardly reveal any increased willingness to question congressional determinations or Immigration and Naturalization Service policy.[5] Thus, the purpose of this article cannot be to herald any impending change, but to: (1) once again assert that the plenary power theory which has thus far blocked constitutional challenges of immigration statutes should be abandoned[6] and that such statutes should be evaluated along the traditional lines of constitutional adjudication; (2) show that the view of resident aliens' status which is contained in the immigration cases cannot be reconciled with the history of the equal protection afforded aliens or the reality of the resident aliens' situation in this country; and (3) suggest possible equal protection analysis in the immigration context which would demonstrate that allowing such constitutional challenges would not unduly hamper the government and, in fact, provide a better accommodation of government and alien interests.

I. THE PLENARY POWER THEORY

The United States is a nation founded by immigrants, and for the first 75 years of its life immigration was unrestricted. In the second half of the nineteenth century, Congress first began to regulate the entry of aliens, beginning with restrictions against convicts and prostitutes and then against Chinese.[7] The immigration laws eventually evolved into a complex system of quotas and regulations. In 1965, the national quota system was abolished and replaced by a system of preferences which retained, for quota purposes only, a distinction between Western Hemisphere natives and all others.[8] The new immigration statutes have eliminated many of the most flagrant inequities of the old quota sys-

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Santelises v. Immigration & Nat. Serv., 491 F.2d 1254 (2d Cir.), *cert. denied*, 417 U.S. 968 (1974); Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y.), *aff'd per curiam*, 449 F.2d 1305 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

5. Reid v. Immigration & Nat. Serv., 420 U.S. 619 (1975); Saxbe v. Bustos, 419 U.S. 65 (1974).

6. The commentators have uniformly condemned the broad sweep of the plenary power theory. For the most definitive expositions of the theory and its frailties see Boudin, *The Settler Within Our Gates* (pts. 1-3), 26 N.Y.U.L. Rev. 266, 451, 634 (1951); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 Yale L.J. 1578 (1959) [hereinafter cited as Hesse I]; Hesse, *The Inherent Limits of the Power to Expel*, 69 Yale L.J. 262 (1959) [hereinafter cited as Hesse II].

7. For a brief history of the evolution of the immigration laws see 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure §§ 1.1-.4 (1975).

8. 8 U.S.C. § 1101(a)(27)(A) (1970). For a brief outline of the quota and preference provisions see notes 200 & 209 *infra*.

tem and have adopted the more admirable goal of preserving family unity.[9] However, the immigration statutes and regulations have always been blatantly racist and have often been tools of repression of basic liberties. Today they are still not free from these faults.[10] Yet, in the immigration field, unlike other fields of government regulation, the content of the statutes regulating aliens[11] has never been subject to challenge on constitutional grounds. Aliens have been accorded a modicum of procedural due process[12] in immigration proceedings, but the Supreme Court has refused to strike down immigration legislation on substantive due process grounds.[13] Uniquely in immigration legislation, Congress has had a free reign accorded it by the judiciary under the doctrine of congressional plenary power over aliens.[14]

The source of congressional power over aliens is found in the constitutionally delegated powers—naturalization, foreign commerce and the war power. The source of the power, though, cannot explain its unfettered or plenary nature; for a power which is unfettered is itself "manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights. . . ."[15] That this is true seems to be an assumption which need not be proven; the constitutional model is one of constitutional power and constitutional restraint.[16] The Court has stated that the substantive due process

9. S. REP. No. 748, 89th Cong., 1st Sess. (1965) [hereinafter cited as 1965 S. REP.].

10. For an example of such a fault in the immigration controls relating to political or subversive activities of aliens see 8 U.S.C. § 1182(a)(28) (1970). For an example of a lingering racism see 1965 S. REP., *supra* note 9, at 56-58 (containing Senator Ervin's comments about Central and South American natives).

11. Statutes within the immigration system have been successfully challenged when they affected citizens, not aliens. Afroyim v. Rusk, 387 U.S. 253 (1967); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964).

12. Yamataya v. Fisher, 189 U.S. 86 (1903); Zakonaite v. Wolf, 226 U.S. 272 (1912). For articles summarizing aliens' due process rights see Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566 (1963); Gordon, *The Alien and the Constitution*, 9 CAL. WEST. L. REV. 1 (1972); Note, *Immigrants, Aliens and the Constitution*, 49 NOTRE DAME LAW. 1075 (1974).

13. By substantive due process grounds is meant constitutional challenges unrelated to procedural due process. For instance, challenges to immigration statutes based on the first amendment have been effectively barred by the plenary power theory. Kleindienst v. Mandel, 408 U.S. 753 (1972), is the most recent example.

14. For the most forceful and complete expressions of the plenary power doctrine see Justice Frankfurter's opinions in Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (concurring opinion), and Galvan v. Press, 347 U.S. 522 (1954).

15. Reid v. Covert, 354 U.S. 1, 17 (1957).

16. Justice Black's argument in *Reid* that laws in pursuance of a treaty can be declared unconstitutional is premised on the idea that all congressional enactments are

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doctrine, which has evolved from the fifth amendment, is a limitation on all congressional powers, even the war power.[17] It would seem logical then that the congressional power over aliens would also be subject to fifth amendment restraints. Justice Frankfurter, in *Galvan v. Press*,[18] made the same observation, but he declined to follow that clearly logical course because he found that the Court was not "writing on a clean slate. . . ."[19] What then forms this cluttered slate of precedent and constitutional theory which excludes only congressional power over aliens from fifth amendment challenge? This section will examine the origin and theoretical bases of the doctrine of the congressional plenary power over aliens. It will be argued that: (1) the foundation cases have been wrongly interpreted to support an unfettered power; (2) one possible theoretical basis for an unrestricted power—its extra-constitutional source in sovereignty—is no longer a viable theory; and (3) the constitutional theories which come into play when the Court evaluates foreign relations questions, which are closely allied with immigration questions, do not support an unrestricted congressional power, rather they imply a model of interest balancing.

A. The Foundation Cases of Plenary Power: *The Chinese Exclusion Case* and *Fong Yue Ting v. United States*

The first immigration cases[20] centered around laws enacted in the 1880s excluding Orientals. These laws responded to Western American fears of an oriental invasion under a policy of free immigration. Subsequent cases throughout the first half of the twentieth century accorded aliens procedural due process rights in deportation proceedings while continuing to affirm Congress' right to form immigration policy.[21] In the 1950s, the Court was

subject to constitutional restraints. He argued that since treaties and statutes are of equal stature, "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution where such an agreement can be overridden by a statute that must conform to that instrument." *Id.* at 18.

17. Hirabayashi v. United States, 320 U.S. 81, 93-102 (1943); Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919).

18. 347 U.S. 522 (1954).

19. *Id.* at 530.

20. The Chinese Exclusion Case, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

21. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Ng Fung Ho v. White, 259 U.S. 276 (1922); Bugajewitz v. Adams, 228 U.S. 585 (1913); Zakonaite v. Wolf, 226 U.S. 272 (1912); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

again called upon to evaluate legislation aimed at ridding the United States of unwanted aliens—this time ex-communist party members. In a series of decisions,[22] some of which were the harshest of all the Court's decisions on anti-communist legislation,[23] the Court upheld deportations of long time resident aliens who were former communist party members. It is those decisions[24] which in their severity form the bulwark against a fifth amendment challenge to immigration laws. Yet, the Court in those cases professed to do no more than abide by its earlier decisions in the Chinese immigration cases. Those cases then, decided almost a century ago, need be initially reexamined.

The foundation case of all immigration decisions is *The Chinese Exclusion Case*[25] decided in 1889. That case concerned a Chinese laborer who had left the United States with a certificate insuring his return. While he was gone, Congress passed a law invalidating such certificates and upon his return he was denied entry. His counsel argued that the congressional act invalidating the certificate violated existing treaties and denied vested rights. Justice Field, writing for a unanimous Court, denied the habeas corpus writ. In a lengthy opinion, he made two points. First, as to the treaty issue, he stated that because both congressional acts and treaties are the law of the land and of equal status, the later congressional act superseded the earlier treaty. Second, and more important to future immigration cases, he concluded that there was no vested right to entry or re-entry.

In the course of making his second point, he stated that the "power of exclusion of foreigners [was] an incident of sovereignty belonging to the government of the United States, as part of those

22. Galvan v. Press, 347 U.S. 522 (1954); Carlson v. Landon, 342 U.S. 524 (1952); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

23. The immigration cases were decided after Dennis v. United States, 341 U.S. 494 (1951), but before Yates v. United States, 354 U.S. 298 (1957). They allowed deportation for mere membership in the communist party without any advocacy of unlawful action. They are therefore in conflict with the Court's final position in the communist cases, as illustrated in Konigsberg v. State Bar of California, 366 U.S. 36 (1961), Scales v. United States, 367 U.S. 203 (1961), and United States v. Robel, 389 U.S. 258 (1967). Yet, because their holdings rest on the plenary power doctrine rather than a first amendment analysis, the immigration cases still stand as good law. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); notes 152-54 *infra* and accompanying text.

24. *See also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), where the Court upheld deportations of entering aliens without a hearing upon the recommendation of the Attorney General that they were "security risks."

25. The Chinese Exclusion Case, 130 U.S. 581 (1889).

sovereign powers delegated by the Constitution. . . ."[26] It is this confusion of the concepts of inherent sovereign powers and delegated powers which underlies the subsequent development of the plenary power theory. All the immigration cases have repeated the same litany of "sovereign delegated powers," without acknowledging the contradiction of sovereign but delegated power. A sovereign power, as suggested in the immigration cases, is one whose source is outside the Constitution and therefore not bound by the strictures of the Constitution, whereas a delegated power is one whose source is the letter of the Constitution. In carefully examining the decision, it is apparent that Justice Field himself did not share that confusion of inherent sovereignty and delegated powers which was subsequently attributed to his opinion.[27] Justice Field implied a traditional substantive due process restraint when he gave an elaborate justification of the exclusion of the Chinese.[28] His use of the concept of sovereignty then was not to establish an extra-constitutional source of power, but to answer counsel's argument that there was no power to exclude aliens because it was not enumerated in the Constitution. It was simply evident to Justice Field that the essential prerequisite of a territorial nation state is its power to exclude, the power to maintain its borders.[29] To deny to the government the power to exclude aliens "would be to that extent [to] subject [it to] the control of another power."[30] Thus, *The Chinese Exclusion Case* can stand for no more than its specific holding—Congress has the power-to exclude any class of aliens whose entry it deems injurious to the public good despite earlier treaties or laws to the contrary.

In *Fong Yue Ting v. United States*,[31] decided three years after *The Chinese Exclusion Case*, the Supreme Court was faced with the constitutionality of an 1892 act which: (1) required all Chinese aliens residing in the United States to obtain certificates verifying their residency; (2) required one white witness to testify as to the Chinese aliens' residency; and (3) instructed the Attorney Gen-

26. *Id.* at 609.

27. Justice Field likened the power over aliens to the more familiar delegated powers to "declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, [and] secure a republican form of government to the States . . . ." *Id.* at 604.

28. *Id.* at 593-97.

29. *See* Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 775 (1971).

30. 130 U.S. at 604.

31. 149 U.S. 698 (1893).

eral to deport any aliens without such certificates. The Court affirmed the constitutionality of the act in an opinion by Justice Gray over three dissents. Justice Gray's opinion is characterized by its sweeping language as to the sovereign congressional right to deport all aliens for whatever reason. The most oft-quoted passage is:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[32]

Justice Gray's forceful language and the angry dissents of Justices Brewer and Field have obscured the fact that in Justice Gray's framing of the issues, the case decided little more than *The Chinese Exclusion Case, i.e.*, the congressional power to exclude aliens, for Justice Gray assumed the aliens were unlawfully admitted. Therefore, their deportation was simply a remedial procedure to remove those who should not have been admitted in the first place. Such was his basic disagreement with Justice Field who, in finding the aliens lawfully in the country argued that their situation could not be likened to the one in *The Chinese Exclusion Case*. The only two commentators to extensively analyze these two cases, Seigfried Hesse[33] and Louis Boudin,[34] both point out that *Fong Yue Ting* and the decisions following it[35] which quote the sovereignty language, decide only the same issue—the right to exclude unlawfully admitted aliens.[36]

Justice Gray, as evidenced by his opinion, certainly thought he was going no further than *The Chinese Exclusion Case*. He too rested the power of Congress on the specific grants in the Constitution. Despite the abundance of language about the inherent sovereign power, other language indicates that he did not hold the congressional power to be unrestrained:

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32. *Id*. at 707.
33. Hesse I & II, *supra* note 6.
34. Boudin, *supra* note 6.
35. *See* cases cited at note 21 *supra*.
36. Hesse calls his theory "the conditional entry argument," which summarized means that an alien can be deported for acts while in the United States which if performed before entry would have made him excludable. The acts thus provide an evidentiary presumption of unlawful entry; if the presumption is rebutted, deportation is avoided. Hesse I, *supra* note 6, at 1611-25.

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> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or *is required by the paramount law of the Constitution, to intervene*.[37]

Taken together *The Chinese Exclusion Case* and *Fong Yue Ting* stand for the proposition that Congress has the power, delegated by the Constitution, to admit or deny entry to aliens, and to deport those aliens who are unlawfully in the country. They do not establish a power to deport aliens for reasons other than entry requirements, nor a congressional power not subject to constitutional restraint. Undoubtedly, the language of *Fong Yue Ting* and the general climate of opinion regarding aliens at the time of these decisions[38] would indicate that the Court supported an expansive congressional power over aliens. However, as social attitudes altered and new constitutional theories developed,[39] the Court's underlying view of the proper extent of the congressional power over aliens could have been reduced without interfering with the holdings of the two foundation cases. The results in the communist cases, though, demonstrate that the Court has chosen emphatically not to follow that course. The plenary power theory today stands for an unfettered congressional power.

Constructed from suggestions in the communist alien cases and based on the undeniable relationship between immigration policy and foreign policy, the doctrine of congressional plenary power includes two complementary component theories: (1) there is an extra-constitutional source of power over aliens inherent in sovereignty; and (2) the judiciary should tread warily in evaluating immigration legislation for it concerns problems and issues in foreign relations and national security possibly outside

37. 149 U.S. at 713 (emphasis added).

38. Chinese at the time of *Fong Yue Ting* were ineligible for citizenship. It was only in 1952 that Congress declared that naturalization could not be denied on racial grounds. 8 U.S.C. § 1422 (1970). *See* Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 791 (1971).

39. Since the nineteenth century, there has been a change in the overt amount of racial prejudice tolerated. The revision of the immigration laws in 1965 reflected the shift from viewing Asians as non-assimilable foreigners. Also reflecting the shift to tolerance are the Supreme Court decisions striking governmental racial discrimination.

of the purview of the courts. Most opinions present an amalgam of these two ideas which together become the plenary congressional power. A typical example is the language in *Shaughnessy v. United States ex rel. Mezei*:[40]

> Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.[41]

Neither of these ideas is unique to the immigration field, and neither theory standing alone outside the immigration field compels the conclusion that Congress' power to exclude aliens is unrestrained.

B. Extra-Constitutional Source of Power: Inherent in Sovereignty

Though neither *Fong Yue Ting* nor *The Chinese Exclusion Case* found a source for the congressional power over aliens outside of the specific grants of the Constitution, subsequent court decisions have created the aura that the congressional power is of extra-constitutional origin. For instance, in *Harisiades v. Shaughnessy*,[42] Justice Jackson stated:

> [The right to expel aliens] is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien.[43]

The theory of an extra-constitutional source of power over aliens seemingly finds support in Justice Sutherland's similar theory of an inherent sovereign power over foreign relations expounded in *United States v. Curtiss-Wright Export Corp.*[44] Justice Sutherland cites *The Chinese Exclusion Case* to support his theory[45] and some later immigration decisions have reciprocated by citing *Curtiss-Wright.*[46]

40. 345 U.S. 206 (1953).
41. *Id.* at 210.
42. 342 U.S. 580 (1952).
43. *Id.* at 588-89.
44. 299 U.S. 304 (1936).
45. *Id.* at 317.
46. Carlson v. Landon, 342 U.S. 524, 534 (1952); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

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In *Curtiss-Wright*, Justice Sutherland proposed that the enumerated power doctrine was only applicable in domestic affairs. In foreign affairs, he proposed a broad, inherent power in general and an expansive presidential power in particular. *Curtiss-Wright* has been a frequently cited case and has never been overruled, but its theory of an extra-constitutional source of power now enjoys only a limited acceptance in Supreme Court jurisprudence.[47] The Court has not thrown out the logical import of the constitutional model even in deciding foreign relations questions.[48] Sovereignty has not proved to be a magic incantation for unlimited power. Under our theory of constitutional government, original sovereignty is in the people,[49] and governmental powers are relinquished by the people through the specifically delegated powers (and the necessary and proper clause) in the Constitution. The limits of other nations' sovereignty are irrelevant; the United States Government is bound by its Constitution.[50]

When *Curtiss-Wright* is cited, it is not to invoke Justice Sutherland's theory of an extra-constitutional source of power; it is to indicate the special deference to the legislative and executive branches shown by the judiciary when foreign affairs questions

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47. *See* Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Patterson, *In re The United States v. The Curtiss-Wright Corp.* (pts. 1-2), 22 TEX. L. REV. 286, 445 (1944). These articles show: (1) Justice Sutherland's historical argument was inaccurate; (2) the only two cases to follow *Curtiss-Wright* explicitly—United States v. Belmont, 301 U.S. 324 (1937) and United States v. Pink, 315 U.S. 203 (1942)—have limited applicability; and (3) the foreign relations cases of recent vintage have not followed *Curtiss-Wright*'s broad interpretation of the federal power. *See* note 48 *infra*.

48. *See, e.g.*, Perez v. Brownell, 356 U.S. 44 (1958); Kent v. Dulles, 357 U.S. 116 (1958); Schneider v. Rusk, 377 U.S. 163 (1964).

49. Fong Yue Ting v. United States, 149 U.S. 698, 758 (1893), (Field, J., dissenting); Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

50. Afroyim v. Rusk, 387 U.S. 253, 257 (1967). It is an obfuscation in immigration cases to infer a constitutionally unrestrained power over aliens from international law. What is at issue is the alien's rights under the Constitution. Justice Field early realized the dangers of calling the congressional power "sovereign." In his dissent in *Fong Yue Ting*, he sought to dispel any belief in an unrestrained sovereign power which he might have created in his opinion in *The Chinese Exclusion Case*:

> The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by a supposed inherent sovereignty.

149 U.S. at 757.

are at issue.[51] Immigration opinions, notably the *Galvan* opinion and most recently *Kleindienst v. Mandel*,[52] have similarly avoided the implications of the international law and inherent sovereignty language in *Harisiades* in favor of a theory of judicial deference in immigration questions. In *Galvan* Justice Frankfurter states:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government . . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[53]

The idea of judicial deference stems from the proximity of immigration policy to foreign relations and national security policy. Such deference was suggested in *The Chinese Exclusion Case* and *Fong Yue Ting* and has subsequently emerged as the most important element of the plenary power theory. The next logical step, then, is to look at the Court's role and practice in foreign affairs cases to determine if the doctrine of congressional plenary power over aliens can be supported by the theories in those cases.

C. Foreign Relations: Justiciability and Balancing

The power to direct foreign affairs has been constitutionally delegated to the executive and legislative branches. But, following *Marbury v. Madison*,[54] the Court has the duty to decide the constitutionality of congressional enactments and to decide whether the behavior of the other branches meets constitutional standards. For this reason, the legislative and executive branches cannot act even in the field of foreign affairs without being subject to judicial review. The judiciary has, though, treated foreign af-

51. *See* Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451 (1956); Scharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 Yale L.J. 517 (1966). A recent federal case, United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974), applying *Curtiss-Wright* to fourth amendment issues involving surveillance of alleged foreign agents, held that *Curtiss-Wright* did not compel abandonment of fourth amendment restraints. *But cf.* United States v. United States District Court, 407 U.S. 297, 322 n.20 (1972); United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971); United States v. Clay, 430 F.2d 165 (5th Cir. 1970).

52. 408 U.S. 753 (1972).

53. 347 U.S. 522, 531 (1954).

54. 5 U.S. (1 Cranch) 137 (1803).

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fairs cases as being different than those of domestic affairs.[55]

The Court has dealt with these problems in foreign affairs in two distinct ways. Some questions it has simply found outside the scope of its jurisdiction as being political questions.[56] Or, with overtones of *Curtiss-Wright*, it has shown a reluctance to disturb the congressional or executive determination of foreign relations policy. Each method represents a careful evaluation by the Court of the circumstances of each case and the foreign relations interests involved; only in the immigration field is a plenary power invoked to settle all controversies. Elsewhere, the Court, while acknowledging the federal power in foreign affairs, has specifically declared that power to be limited.[57]

The justiciability issue in foreign relations questions reduces to the query: What is a political question, and therefore not a proper subject for judicial review? In *Baker v. Carr*,[58] the most recent and currently the most explicit political question case, Justice Brennan stated for the majority that the "non-justiciability of a political question is primarily a function of the separation of powers."[59] But to say that to regulate foreign affairs is the legislative or executive prerogative hardly answers the query. There are a proliferation of subjects assigned to the executive or legislative departments to govern, and almost none of those subjects involve political questions. Certain foreign affairs questions, however, have traditionally been regarded as "political questions."

Among these other categories of foreign affairs questions which are political questions, the immigration cases are anomalous. Justice Brennan, in his summary of political questions in *Baker v. Carr*, does not even mention them. The other categories—recognition of national governments, sovereign im-

55. The difference is not illogical when foreign affairs are a question of one nation state vis-a-vis another. The government then needs to act with speed and flexibility; it needs to be certain that its decisions will not be subject to future judicial intervention.

56. A political question, explained simply, is one which the court finds beyond its function to review. Therefore, the question is non-justiciable and there is no jurisdiction since there is no "case or controversy" as defined by article III, section 2 of the United States Constitution.

57. Perez v. Brownell, 356 U.S. 44 (1958). *Perez* states:

> Broad as the power in the national government to regulate foreign affairs must necessarily be, it is not without limitation.

Id. at 58.

58. 369 U.S. 186 (1962).

59. *Id.* at 210.

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munity, territorial disputes and certain treaty questions—all concern an executive or legislative decision in areas involving directly either foreign trade or political relations between nation states. Commentators on political questions find immigration cases to be the exception to their theoretical conclusions.[60] Very few immigration cases have involved questions of foreign relations or international law; most involved a conflict between the alien's individual rights and governmental interests.[61] Yet, immigration cases, alone, have seemingly declined to adjudicate issues of personal constitutional rights on justiciability grounds.[62] In fact, Professor Scharpf, in his excellent theoretical review of political questions,[63] noted:

> [W]ith the exception of a few cases dealing with the exclusion and expulsion of aliens and arguably of *United States v. Pink*, the Court has consistently decided *on their merits* all constitutional issues arising out of cases involving the foreign relations power.[64]

That is not to say that every immigration case presents justiciable issues. Conceivably, questions of admission procedures, *e.g.*, quotas and refugee problems,[65] could present non-justiciable issues. It is suggested, however, that the decision of whether issues in immigration cases are justiciable should be made on the basis of the usual criteria for determining political questions,[66] and not be obscured behind the opaque veil of the congressional

60. *See* articles cited at note 51 *supra*.

61. *See* Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205, 218 (1953). Concededly, the immigration policy can affect the government in its relations with foreign states. Witness the strained American-Japanese relations in the 1920s. But, the primary motivations for immigration policy decisions are usually domestic concerns, such as protecting the domestic labor market. *Id.*

62. Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033, 1044 (1968).

63. Scharpf, *supra* note 51.

64. *Id.* at 542 (footnote omitted) (emphasis added).

65. For a discussion of the quota provisions see note 209 *infra*. For discussions of refugee provisions see 1 C. GORDON & H. ROSENFIELD, *supra* note 7, § 2.27h; 8 U.S.C. §§ 1153(a)(7), (h) (1970) (refugees' entrance status); Pub. L. 89-732 (Nov. 2, 1966), 80 Stat. 1161 (special provisions for Cuban refugees).

66. The present criteria as derived from Baker v. Carr, 369 U.S. 186 (1961), is the presence of

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy de-

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plenary power doctrine. And, if the issues are justiciable, as they are in the great majority of immigration cases, they should be dealt with in the same manner as the Court has dealt with other issues in other cases where the government has urged an overriding governmental interest in foreign relations to be a limitation on individual constitutional rights.

The landmark case in the foreign relations field is *Perez v. Brownell.*[67] Its holding that the expatriation of a citizen who had voted in a foreign election was constitutional has been overruled,[68] but its scheme of analysis provides a starting point for approaching foreign relations questions. Justice Frankfurter, in his opinion, used the substantive due process standard of a rational nexus between the legitimate congressional aims—its foreign relations interest—or its means of implementation of those aims. This simple formula needs to be fleshed out by the added observation that the Court looks to several factors,[69] including: (1) the degree of necessity;[70] (2) other available alternatives;[71] and (3) the degree and nature of the rights invaded by the statute in question.[72]

> termination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

67. 356 U.S. 44 (1958).

68. *See* notes 139-41 *infra* and accompanying text.

69. The best summary of the rational nexus requirement of substantive due process was voiced by Justice Brennan in his concurrence in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963):

> My premise [in *Trop*] was the simple and fundamental one that legislation so profoundly destructive of individual rights must keep within the limits of palpable reason and rest upon some modicum of discoverable necessity . . . . It was evident that recognizable achievement of legitimate congressional purposes through the expatriation device was at best remote; and that far more promising alternative methods existed and had, in fact, been employed.

Id. at 188-89.

70. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

71. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Trop v. Dulles, 356 U.S. 86, 105 (1958) (Brennan, J., concurring).

72. Kent v. Dulles, 357 U.S. 116 (1958); Schneider v. Rusk, 377 U.S. 163 (1964); Afroyim v. Rusk, 387 U.S. 253 (1967).

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The real method of the Court's evaluation of foreign relations questions emerges as a balancing process wherein the foreign relations interest is balanced against the deprivation of a constitutional right. In cases involving the individual's rights of travel, free speech[73] and citizenship,[74] the Court has found the governmental interest to be outweighed. Only in *Perez*, now overruled, some of the earlier communist free speech cases,[75] and in the wartime Japanese internment cases[76] has the Court found that the government's interest in national security[77] or foreign affairs prevailed over the individual's constitutional rights.

In contrast, the alien deportation cases deny at the outset any form of balancing.[78] However, the plenary power over aliens has traditionally been allied with the foreign relations power and the government interests encompassed are in part those same interests involved in foreign relations and national security questions. The other interests encompassed in the plenary power over aliens, such as the protection of domestic labor and the prevention of criminal and social problems, are essentially domestic questions.[79] In that area, the Court has, in fact, shown less deference to congressional or executive policy. Therefore, the plenary power over aliens should not be greater than that exercised under the foreign affairs power.

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73. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958); *cf.* Zemel v. Rusk, 381 U.S. 1 (1964). All these cases involved denial of application of passports; both the right to travel and first amendment rights were at issue. *Kent* and *Aptheker* presented similar situations—denial of a passport based on the bearer's personal beliefs. *Zemel*, though, presented slightly different issues. The denial of the right to travel was applied to all Americans and based on the politics, not of the citizen, but of the country of destination—Cuba. As such, *Zemel* presents a foreign relations issue involving relations between nation states.

For another instance where the Court found first amendment rights not to be outweighed by foreign relations interests see New York Times v. United States, 403 U.S. 713 (1971) (Pentagon Papers case).

74. *See* Schneider v. Rusk, 377 U.S. 163 (1964); notes 139-41 *infra* and accompanying text.

75. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

76. Korematsu v. United States, 323 U.S. 214 (1945); Hirabayashi v. United States, 320 U.S. 81 (1943).

77. *See generally Developments in the Law–The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

78. Kleindienst v. Mandel, 408 U.S. 753 (1972).

79. *See* Spacil v. Crowe, 489 F.2d 614, 619-20 n.7 (5th Cir. 1974), wherein the distinction between justiciable issues and non-justiciable ones is the distinction between the foreign affairs sphere and the domestic sphere.

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The theory of the congressional plenary power over aliens should be modified to allow for constitutional challenge of the content of immigration laws, policy and procedure, modeled on the Court's approach in evaluating foreign affairs questions. Constitutional challenge to immigration laws and statutes should compel a two-pronged evaluation: (1) are the issues justiciable? and (2) does the traditional governmental interests served by the regulation of aliens outweigh the individual right invaded?

Although it is apparent that the theoretical impediment to challenge of the immigration statutes is the plenary power theory, a rejection of that theory's logic will not necessarily insure successful challenges. Under the above model, the result reached by the courts would depend on the weight given the conflicting interests. The traditional weight given the government's interest in immigration has, of course, been phrased in terms of the plenary power theory. A reconsideration of governmental interests in the immigration field therefore requires a new evaluation of alien status in relation to the government and in American society.

Clearly, it has been the fact that aliens' rights have been evaded which forms the substance of the "unclean slate" of which Justice Frankfurter spoke; the plenary power doctrine has not been invoked to deny citizens' rights within the immigration system.[80] Behind the doctrine is an unspoken characterization of aliens as strangers, transients and guests in a foreign land. Yet, the Court outside the immigration system has demonstrated a significantly different view of aliens' status in according them substantial rights of participation in American society. The next section will examine the contradiction between the judicial conception of alien status within and without the immigration system and suggest that a more consistent and accurate view of alien status would stem from the recognition of the special interest of resident aliens.

II. ALIENS' STATUS WITHIN AND WITHOUT THE IMMIGRATION SYSTEM

Under the plenary power theory and in constitutional adjudication, there are two classes of American residents—aliens and citizens. Resident aliens have never been given recognition as a separate status from those aliens not lawfully admitted for

80. Trop v. Dulles, 356 U.S. 86, 98 (1958).

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residence.[81] Yet, because *all persons* are covered by the terms of the Constitution, aliens, especially resident aliens, have been increasingly recognized outside the immigration system as deserving substantial protection. This has resulted in the incongruous situation that resident aliens now enjoy constitutional protection of their rights to work and live in the country on a parity with citizens, but their ability to stay in the country in order to enjoy those rights is accorded no protection.

This section will investigate this situation, looking first at the respective status of citizens, resident aliens and non-immigrants. The rights of aliens within and without the immigration system will also be examined. Special attention will be focused on the injustices caused the resident alien by the application of the plenary power theory. However, the plenary quality of the congressional power is not the only villain; other complementary theories also contribute, both in supporting the plenary power theory and in maintaining the fiction that all aliens are to be treated alike for constitutional purposes. These theories will therefore also be discussed as integral ingredients of the scheme of aliens' position within the immigration system.

A. Citizens, Resident Aliens, Non-Immigrants

A citizen is defined by the fourteenth amendment as one who is native-born or naturalized.[82] An alien is defined in the immigration statutes as one who is not a citizen or national of the United States.[83] The mere conclusion of alienage, with no further examination of the nature of an alien's status, has been sufficient within the immigration system to bring the plenary power theory into play. Yet within the immigration system itself there are several classes of immigrants, the most important distinction being between resident aliens and non-immigrants. Resident aliens are those who have decided to make a permanent home in the United States.[84] A non-immigrant, in contrast, is regarded as a visitor—someone who does not plan to transfer allegiance to the United States.[85] Under the immigration statutes, non-immigrants are subject to no quota limitations and can have documentary and

81. *But cf.* 8 U.S.C. §§ 1101(a)(27)(B), 1181(b)(1970); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); notes 129-42 *supra* and accompanying text.
82. U.S. Const. amend. XIV, § 1.
83. 8 U.S.C. § 1101(a)(3) (1970).
84. *Id.* § 1101(a)(20).
85. *Id.* §§ 1101(a)(15)(A)-(L).

substantive[86] requirements for entry waived. The entry requirements are vigorous and are essentially the same as the substantive requirements for naturalization. The only additional requirements for naturalization are the English language, durational residency requirements and a finding of good moral character.[87] And, since naturalization is not obligatory, a resident alien may have satisfied naturalization requirements while in fact not becoming a citizen. In this sense, resident aliens are more like naturalized citizens than non-immigrants.

In international law the concept of a "citizen" is closely allied if not interchangeable with the concept of a "national"[88] and a "subject."[89] It implies an idea of reciprocity between the individual and the state; those who owe duties and allegiance to the state can expect protection in return.[90] International law allows each nation state to decide who its citizens or nationals are.[91] Under the theory of reciprocity, it would seem that an alien would be entitled to full protection from the government. The alien pays taxes, and is subject to the laws and was subject to the draft. Aliens have even been held to be subject to prosecution for treason.[92] Yet, they have been held to exhibit only "temporary allegiance" and have not been extended diplomatic protection,[93] nor full constitutional protection.

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86. *Id.* § 1182(a).

87. *Id.* § 1423 (english language requirement), §§ 1427(a)-(c) (residency), and (d)-(e) (moral character).

88. Several federal statutes acknowledge a category of "United States national." 8 U.S.C. §§ 1101(a)(21), 1502-03 (1970); 22 U.S.C. § 212 (1970). However, the only persons to be acknowledged as American nationals under those sections are non-American citizens of American territories. Cabebe v. Acheson, 183 F.2d 795 (9th Cir. 1950), *aff'g* 84 F. Supp. 639 (D. Hawaii 1949); Vallejos v. Barber, 146 F. Supp. 781 (N.D. Cal. 1956); 26 Op. Att'y. Gen. 376 (1907).

89. W. Bishop, International Law: Cases and Materials 488 (3rd ed. 1971). For a discussion of the meanings of these various terms see Koessler, *"Subject," "citizen," "national," and "permanent allegiance,"* 56 Yale L.J. 58 (1946).

90. Note, *Constitutional Limitations on the Naturalization Power,* 80 Yale L.J. 769, 778-79 (1971).

91. 8 M. Whiteman, Digest of International Law 1 (1967).

92. Note, *Constitutional Limitations on the Naturalization Power,* 80 Yale L.J. 769, 779 n.45 (1971).

93. There was at the time of *Fong Yue Ting* an understanding that resident aliens could be granted diplomatic protection, though this is no longer the position of the American government. *See* Koessler, *Rights and Duties of Declarant Aliens,* 91 U. Pa. L. Rev. 321, 324-29 (1942). In his dissent in *Fong Yue Ting,* Justice Brewer argued there should be a status of "denizen"—a foreign resident who is "in kind of a middle state, between an alien and a natural-born subject, and partakes of both of them." Fong Yue Ting, 149 U.S. 698, 736 (1893).

If the resident alien had been accorded an independent status in recognition of the decision to cast his lot with the United States, there would be an easier path to argue for taking resident aliens at least out of the range of the plenary power theory's effectiveness. However, nowhere in American jurisprudence is there a clear intent to establish a separate status for resident aliens, and if resident aliens are to be given substantially more protection than non-immigrants, it will have to be in the context of specific constitutional adjudication. The fact that an alien cannot be classed as a citizen or something in between alien and citizen need not control what constitutional protections he is afforded. For that determination, we look to the Constitution. The Constitution and the Bill of Rights speak generally in terms of "people," "persons" and "person." The only distinctions between citizens and aliens made were the requirement that Senators, Congressmen and the President be citizens[94] and, impliedly, in the granting of the power of naturalization.[95] Since immigration was unregulated in the early years of the country, the only real immigration issue prior to the Civil War was the status of the slaves. The fourteenth amendment settled that issue by defining citizens as native-born or naturalized. The amendment guaranteed to those citizens that their privileges and immunities could not be abridged, but the second clause, which includes the guarantees of due process and equal protection, does not limit its protection to citizens; it covers all persons.

That the Constitution protects aliens as well as citizens was a tenet of constitutional law theory since the 1886 case of *Yick Wo v. Hopkins*.[96] However, because the history of aliens in the United States is the history of political, national and racial minorities, the constitutional protection afforded them has run an erratic and controversial course. The tension in the alien cases, as in the more famous racial minority cases, is produced from a complicated set of circumstances. Constitutional mandates, the political ramifications of the issue, the Justices' own predilections (and their perception of the national mood), and perhaps a view that the Court should not solve essentially social problems must all be considered. In the alien decisions the Court appears to have found a

94. *See, e.g.*, U.S. Const. art. IV, § 2[2]-[3], amend. V, XIV, § 1 (person); U.S. Const. amend. I, II, IV, X (people); U.S. Const. amend. XIV, §§ 1, 2 (persons).
95. U.S. Const. art. I, §§ 2 [2], 3 [3]; art. II, § 1 [5]. *See also* U.S. Const. amend. XV, XXIV (guaranteeing voting rights to all citizens).
96. 118 U.S. 356 (1886).

logically inconsistent yet effective way of dealing with this tension between competing forces. It has followed a path of insuring to aliens continually increasing rights to work, to own land and generally to participate in American society, while upholding a very limited view of alien rights in what is probably the most important area for immigrants—immigration proceedings.

B. Equal Protection Outside the Immigration System: Aliens and Citizens

The early equal protection cases involving aliens struck down state statutes which manifested an intention to discriminate either against certain alien racial groups or aliens as a class. In *Yick Wo* and *Yu Cong Eng v. Trinidad*,[97] the Court invalidated statutes which on their face applied to all residents but, in fact, discriminated against the Chinese. In *Truax v. Raich*,[98] the Supreme Court found unconstitutional an Arizona statute which forbade employers to employ more than twenty percent aliens. Thirty years later, the Court relied on *Truax* to strike down California laws barring Japanese from land ownership and fishing licenses in *Oyama v. California*[99] and *Takahashi v. Fish & Game Commission*.[100]

Such were the important alien equal protection decisions[101] when the Court decided *Graham v. Richardson*.[102] That case concerned Arizona's denial of welfare benefits to non-citizens. The Court found alienage to be a "suspect category," and thus subjected the action to strict scrutiny. Though the Court's decision could be seen as being compelled by *Takahashi* and *Truax*, *Graham* has assumed the dimensions of a landmark case, most probably because its language brought equal protection for aliens within the ambit of the new equal protection doctrines of the Warren Court, thus signaling an important extension of those doctrines. Also, it labelled as discrimination action which was not directed at just one racial group and which could have been justified by substantial governmental interests.[103] Two years later, the Court

97. 271 U.S. 500 (1926).

98. 239 U.S. 33 (1915).

99. 332 U.S. 633 (1948).

100. 334 U.S. 410 (1948).

101. *See also* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

102. 403 U.S. 365 (1971).

103. *Graham* also expressly discredited the "special public interest" doctrine. *Id.* at 372-75. It had been previously invoked by the Court to uphold a state's preference of

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reaffirmed the *Graham* decision by striking down state statutes limiting aliens' access to government employment in *Sugarman v. Dougall*[104] and the law profession in *In re Griffiths*.[105]

Graham, Sugarman and *Griffiths* represent a strong commitment by the Court that aliens should enjoy almost the same rights as citizens to live and work in the United States. The next question is whether those cases can be extended to apply within the immigration system.[106] The argument that they should apply rests not on the specific equal protection analyses in *Graham, Sugarman* and *Griffiths,* but rather on the underlying view of aliens' status which forms the foundation of those decisions.

The full significance of the holdings in these cases can best be explored by looking in detail at what the majority rejected as seen

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its own citizens in certain instances, primarily in Heim v. McCall, 239 U.S. 175 (1915).

104. 413 U.S. 634 (1973).

105. 413 U.S. 717 (1973). Lower federal court decisions have been quick to strike down statutes limiting aliens' rights. Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1971); Arias v. Examining Bd. of Refrigeration & Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972); Sailer v. Tonkin, 356 F. Supp. 72 (D.V.I. 1973); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973). There are several cases on the Supreme Court's 1974-75 docket concerning state and federal discrimination against aliens. Hampton v. Mow Sung Wong, 42 U.S.L.W. 2405 (Jan. 25, 1974), *cert. granted*, 42 U.S.L.W. 3678 (U.S. June 14, 1974) (No. 1596); Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974), *appeal filed*, 44 U.S.L.W. 3034 (U.S. Aug. 30, 1974) (No. 216); Perkins v. Smith, 42 U.S.L.W. 2406 (D. Md. 1974), *appeal filed*, 43 U.S.L.W. 3021 (U.S. June 21, 1974) (No. 1915); Diaz v. Weinberger, 361 F. Supp. 1 (S.D. Fla. 1973), *appeal filed*, 42 U.S.L.W. 3439 (U.S. Jan. 3, 1974), *prob. juris. noted*, 42 U.S.L.W. 3631 (U.S. May 13, 1974) (No. 1046); Puerto Rico Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, (D.P.R., Dec. 19, 1974), *appeal filed*, 43 U.S.L.W. 3595 (U.S. Apr. 7, 1975), *prob. juris. noted*, 43 U.S.L.W. 3624 (U.S. May 27, 1975).

106. There are two preliminary issues to be decided in applying equal protection doctrines within the immigration system. First, there is the question of whether the fifth amendment compels the same equal protection standard as the fourteenth. This will be discussed more fully in the following section. *See* note 219 *infra*. The second concerns the role of the federal government in immigration. Both *Takahashi* and *Graham* in part relied on a pre-emption theory to discredit any attempt by the states to regulate aliens in the face of the federal government's clear prerogative. *See* Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 569 (1963). There is an implication from that pre-emption theory that the federal power would not be subject to the same restraints as the state power. This is, of course, actually based on the plenary power theory. *Diaz* and *Ramos*, recent federal cases cited in the previous note, now before the Supreme Court, have taken the approach that where federal regulation of aliens is not within the immigration system, the plenary power doctrine should not apply, and the federal government should be held to the same standards as the states. This should be especially evident where, as in the case of *Flores de Otero*, also cited in the previous note, the federal power acts as a substitute for state power in Puerto Rico. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Hurd v. Hodge, 334 U.S. 24 (1948) (discrimination in the District of Columbia).

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in Justice Rehnquist's dissent in *Sugarman*.[107] In essence, he argued two points: (1) there is no basis in the Constitution to hold alienage to be a suspect category for equal protection analysis; and (2) the very real differences between citizens and aliens cannot be ignored and can justify what is on its face discrimination. Justice Rehnquist supported his first point by arguing that there is no mention in the Constitution of suspect categories; the Constitution clearly distinguishes between citizens and aliens; the fourteenth amendment was designed to protect blacks, and by this design it could also protect other racial minorities, but it should not be extended to protect aliens as a class for their status is not immutable.[108] In support of the second point, he argued that the naturalization statutes and the line of decisions culminating in *Afroyim v. Rusk*[109] demonstrate that citizenship is of vital significance,[110] and that denying non-citizens access to public employment is therefore not irrational. The state does have a vital interest in insuring that employees and officers of the court are persons who are knowledgeable about and in accord with the social mores and political attitudes of American society.

That the majority in *Graham*, *Sugarman* and *Griffiths* disregarded these arguments indicates that the conception of alien status in these cases conforms to the model of reciprocity between state and subject, between state and national. The following views can thus be extracted from the three cases: (1) there is not a telling difference between aliens and citizens in terms of their rights, duties and abilities to participate in American society; (2) the state has no legitimate right to protect its own citizens at aliens' expense, nor can it assume that citizens will serve the states' interests with greater understanding, skill or loyalty; and (3) naturalization is not a process of socialization, but merely one which confers on aliens certain political rights and a formal allegiance to the country.

107. 413 U.S. at 649. Justice Rehnquist's dissent applies to *Griffiths* as well. *See also In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting).

108. Justice Rehnquist criticized *Graham*'s reliance on the *Carolene Products* footnote to raise alienage to a suspect classification on two grounds: (1) it is only a footnote and should not be given much weight; and (2) the footnote was directed at the discrimination against racial minorities or persons because of some immutable characteristic. 413 U.S. at 655-57.

109. 387 U.S. 253 (1967).

110. *Graham*, *Sugarman* and *Griffiths* completely ignored this point, indicating that the major practical advantage of citizenship after those decisions is the freedom from deportation.

Those views are contrary to the assumption of the alien's vulnerability which lies at the core of the immigration system. To subject discrimination within the immigration system to a test of "strict scrutiny" would significantly challenge many of the classifications used.[111] Yet, of course, there is still the plenary power doctrine. That doctrine has prevented the application of the equal protection theories to immigration proceedings.[112] If one focuses only on cases outside the immigration field, it is easy to blithely assert that aliens and citizens occupy an almost equal status. The only disadvantages experienced by non-citizens are the lack of certain political rights, *i.e.*, the right to vote and to hold high public office, the inability to ask for diplomatic protection and the vulnerability to deportation. Certainly, the first two liabilities have practically little personal effect on aliens,[113] but the latter liability—being subject to deportation—renders absurd any pretense that aliens and citizens enjoy equal status.

C. Unequal Protection in the Immigration System: Deportation and Expatriation

If an alien is deemed deportable under the immigration statutes, his options are limited to asking for statutory relief[114] or proving the statute was wrongly applied as to his situation; he cannot assert that the law is irrational, that there was discrimination under the law or that he was denied the full due process guarantees of the fourth, fifth, sixth or eighth amendments.[115] Substantive due process and equal protection are denied him by the plenary power doctrine, and while he is accorded a modicum of due process, he is not insured the full panoply of due process rights accorded citizens. If the alien has chosen to become naturalized and thus a citizen, the process is then called expatria-

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111. *See* Comment, *The Constitutional Status of State and Federal Governmental Discrimination Against Resident Aliens*, 16 Harv. Int'l L.J. 113, 131 (1975).

112. Perdido v. Immigration & Nat. Serv., 420 F.2d 1179 (5th Cir. 1969); Talanoa v. Immigration & Nat. Serv., 397 F.2d 196 (9th Cir. 1968); Hitai v. Immigration & Nat. Serv., 343 F.2d 466 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Application of Amoury, 307 F. Supp. 213 (S.D.N.Y. 1969).

113. Of course, if aliens as a group could vote, they would have the potential to exercise more influence with the legislature and would be less of the "discrete and insular minority" of the *Carolene Product*'s footnote. *See* Diaz v. Weinberger, 361 F. Supp. 1, 9 (S.D. Fla. 1973).

114. 8 U.S.C. §§ 1254-55, 1255b (1970).

115. *See generally* Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 Vill. L. Rev. 566 (1963).

tion, not deportation, and it can almost never be accomplished against the citizen's will.[116]

The definitive statement on expatriation can be found in *Afroyim*. That case eschewed a substantive due process, procedural due process or equal protection analysis[117] in favor of an analysis under the citizenship clause of the fourteenth amendment. Justice Black, for the majority, held flatly that that clause guaranteed citizenship to the native-born and naturalized and therefore barred any but voluntary expatriation.

The effect of *Afroyim* is to emphasize the polarity of the positions of aliens and citizens; citizens are immune from expatriation, but aliens can be banished or deported for any reason. The polarity exalts form over substance. It ignores the realistic differences between an alien visitor and a resident alien and a naturalized citizen. *Afroyim*, though, cannot be seen as the cause of this polarity; nor would a more realistic appraisal of the relative interests of alien, resident alien and naturalized citizen compel a different result in *Afroyim*. Rather, the Supreme Court's near-sightedness in failing to distinguish between resident aliens and non-immigrants in the immigration context is at fault. The plenary power theory, accepted in all immigration cases and rejected in *Afroyim*,[118] is the umbrella under which rights of all aliens are denied; yet, even the plenary power doctrine does not in itself compel lumping together all aliens in one category.

D. Unequal Protection under the Plenary Power: Complementary Theories

The plenary power doctrine was first articulated in *The Chinese Exclusion Case* which, in terms of the Court's analysis, only concerned an alien seeking admission.[119] *Fong Yue Ting* has

116. The decision in MacKenzie v. Hare, 239 U.S. 299 (1915), where a woman was expatriated upon her marriage to a foreigner, still stands by virtue of the Court's interpretation that it represents a case of voluntary expatriation.

117. The Court at first upheld expatriation for voting in a foreign election in *Perez* under a substantive due process analysis. *See* note 67 *supra* and accompanying text. That decision was limited in Trop v. Dulles, 356 U.S. 86 (1958) and Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), where the Court found the expatriation statutes defective in procedural due process, and Schneider v. Rusk, 377 U.S. 163 (1964), where the statute was struck down on equal protection grounds. *Perez* was directly overruled in *Afroyim*. 387 U.S. at 268.

118. 387 U.S. at 357.

119. This is the beginning of the fiction of the re-entry doctrine, for the alien in *The Chinese Exclusion Case* was a returning alien armed with government authorization per-

been held to have extended the theory's applicability to resident aliens and it was also *Fong Yue Ting* which introduced three other theories: (1) exclusion equals expulsion; (2) the right-privilege distinction; and (3) the view that deportation is not punishment. These theories both support and are supported by the plenary power doctrine. Their relationship to each other and to the plenary power doctrine is complex; it is difficult to discern the precise boundaries of each theory, for they are interwoven in the immigration decisions. Separately, the logic of the position of the theories in constitutional theory is not immediately evident. Together, though, they support a view of alien status which is perhaps the significant underpinning of all immigration decisions. That view postulates the following description of aliens within the immigration system: aliens have neither a right to enter the United States, nor a vested right to remain until they are naturalized and become citizens. Their presence and residency is conditional on fulfilling the requirements in the immigration statutes. If the conditions cannot be met, the alien cannot remain; he is subject to deportation for failure to comply with the standards formulated by Congress. It is the intent in the following discussion to show that the theories, like the plenary power doctrine, cannot be justified individually in constitutional theory. It will therefore be suggested that the view of aliens' status which they support should not stand.

Exclusion-Expulsion

The first confusion (or perhaps a symptom) which is at the root of the denigration of resident alien status is the confusion between exclusion and expulsion. The former refers to the turning back of an alien before entry; the latter to removing a lawfully admitted alien. Both can be termed deportation. For the purposes of the plenary power discussion in section I, it was not necessary to distinguish in detail between the two, but it is their confusion in *Fong Yue Ting* which occasioned the angry dissents in that case and has allowed many of the unconscionable results in subsequent immigration cases.[120] It is the purpose of this discussion to show that the theory equating exclusion and expulsion was a confusion wrongly conceived from the start in *Fong Yue Ting* and

mitting him to return. Since such authorization was revoked by Congress, he then became an alien seeking admission. *See* notes 135-40 *infra* and accompanying text.

120. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States *ex rel.* Polymeris v. Trudell, 49 F.2d 730 (2d Cir. 1931), *aff'd*, 284 U.S. 279 (1932).

has proved to be such a patent fiction that the courts and Congress have had to make a distinction between the two in those areas most vulnerable to abuse of resident aliens' rights.

In *Fong Yue Ting* Justice Gray found no difficulty in equating the power to exclude with the power to expel, relying on two early exclusion cases[121] and international law authorities. Yet, as Justice Field pointed out in his dissent, the cases and authorities cited were only discussing the right to exclude.[122] And, in fact, since Justice Gray assumed in his opinion that the aliens were unlawfully in the country and therefore in the same position as aliens seeking entry, his statements equating exclusion and expulsion were really only dicta.[123]

The dissents affirmatively argued first that the right to exclude rested on the fact of territoriality:[124]

> The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter.[125]

Justices Brewer and Field both observed that, within the borders, the Constitution protected all persons, not just citizens, therefore protecting resident aliens. [126]

Secondly, the dissents argued that the source of the power was not only different, but that those who were affected by exclusion and expulsion also had different rights and interests. When an alien seeks to enter the country, he is realistically asking per-

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

122. 149 U.S. at 756-57.

123. Hesse I, *supra* note 6, at 1592.

124. *See* notes 29-30 *supra* and accompanying text.

125. 149 U.S. at 738.

126. The Constitution has been held, in the alien cases, to protect even those seeking entry, but the constitutional standards are lower for them. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). The idea of territoriality may be better understood not in a constitutionally jurisdictional sense, but as related to the government's foreign relations prerogative. As a nation state, it has the right to say who can enter and under what conditions, but in administering the resulting policy and after the alien has entered, all aliens are persons and therefore fully protected under the fourteenth and fifth amendments.

mission; the country owes him nothing. To be denied that permission, albeit disappointing, will not strip him of anything he had gained. However, when an alien has been given permission to enter and does so, he has gained certain rights and has assumed duties. To deport him will cause great hardship and the longer he resides, the greater those hardships will be when deportation finally occurs.

Subsequent cases deciding substantive due process issues followed the *Fong Yue Ting* majority.[127] Yet, until the communist cases in the 1950s, their holdings need not necessarily be interpreted to support the exclusion-expulsion equation.[128] Undeniably, though, they failed in their opinions to make a clear distinction between the two. This has not been the result in cases deciding procedural due process issues, for in such cases resident aliens have been granted substantially greater rights.

For aliens in exclusion proceedings, the standard elucidated in *United States ex rel. Knauff v. Shaughnessy*[129] is still controlling: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[130] In *Ng Fung Ho v. White*,[131] a case under The Chinese Exclusion Act, the Court indicated that it would not apply the same standard of due process for aliens facing expulsion as for those facing exclusion. In that case, the Court held that due process required a judicial hearing which had earlier been denied to aliens in exclusion proceedings by *United States v. Ju Toy*.[132] Then, in *Kwong Hai Chew v. Colding*,[133] the Court held that a resident alien could not be deported without an opportunity to be heard even though the Attorney General, as in *Knauff*, based his order of deportation on information of a confidential nature.[134]

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127. *See* cases cited in note 21 *supra*.

128. Hesse I, *supra* note 6, at 1609-25; Hesse II, *supra* note 6, at 271-73. *See* note 36 *supra* for a brief explication of Hesse's conditional entry theory which he formulated to explain the holdings of the early cases, most notably Bugajewitz v. Adams, 228 U.S. 585 (1913).

129. 338 U.S. 537 (1950).

130. *Id*. at 544.

131. 259 U.S. 276 (1922).

132. 198 U.S. 253 (1905).

133. 344 U.S. 590 (1953).

134. Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953), appears to limit *Kwong Hai Chew*. It interprets the latter case to hold that where an entering alien can be "assimilable" to resident alien status upon the facts of the case, he can be accorded the same procedural rights as a present resident alien. This leaves the discretion up to the court when an alien is "assimilable" to resident alien status. *Id*. at 213-14. The *Mezei*

Similarly, when deciding questions of aliens' rights on entry and re-entry, the courts and eventually Congress have been forced to make some distinctions between returning resident aliens and aliens seeking admission for the first time.[135] A corollary to the theory that expulsion and exclusion are identical is the view that all entering aliens have an equal claim to entry.[136] This theory has produced much hardship. The most blatantly inequitable illustration is *Shaughnessy v. United States ex rel. Mezei*,[137] where a resident alien of twenty-seven years duration returning from a visit to his alien mother was denied entry as if he were simply an alien seeking admission for the first time. The severity to resident aliens of the doctrine of equating entry and re-entry prompted the courts to provide some relief, primarily by manipulating the meaning of the term "entry." For purposes of immigration, they found that resident aliens had not made an "entry" when they were returning from an unexpected or fortuitous visit,[138] or from a temporary visit abroad when there was no intent to remain away for a significant length of time.[139] These judicial relief measures were clearly prompted by a perceived difference between the equities of aliens seeking entry and resident aliens returning home.[140]

Yet, the Court's intervention and Congress' subsequent modification of some entry statutes[141] have done little more than

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case suggests the standard is derived from the re-entry cases discussed *infra* at notes 135-40 and accompanying text.

135. It also appears that the Service is willing to make a distinction between exclusion and expulsion where it would serve to delimit aliens' rights. Thus, aliens paroled into the country have been held to have never entered and therefore are not granted the increased rights in deportation guaranteed in *Kwong Hai Chew* to resident aliens. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); Yuen Sang Lou v. Attorney Gen. of the United States, 479 F.2d 820 (9th Cir. 1973), *cert denied*, 414 U.S. 1039 (1973).

136. United States *ex rel.* Stapf v. Corsi, 287 U.S. 129 (1932); United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Stacher v. Rosenberg, 216 F. Supp. 511 (S.D. Cal. 1963).

137. 345 U.S. 206 (1953).

138. Delgadillo v. Carmichael, 332 U.S. 388 (1947) (merchant seaman's ship torpedoed and he was rescued in Cuba); Di Pasquale v. Karnuth, 158 F.2d 878 (2nd Cir. 1947) (traveled through Canada while asleep on train trip to Detroit).

139. Rosenberg v. Fleuti, 374 U.S. 449 (1963); Vargas-Banuelos v. Immigration & Nat. Serv., 466 F.2d 1371 (5th Cir. 1972).

140. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947); Rosenberg v. Fleuti, 374 U.S. 449, 461 (1963).

141. The result of the *Delgadillo* decision was adopted into the immigration statutes in 8 U.S.C. § 1101(a)(13) (1970). In addition, lawful resident aliens are given "special immigrant status," *id.* § 1101 (a)(27)(B), and can have waived documentation requirements at entry. *Id.* § 1181(b).

eliminate the most blatantly unconscionable results.[142] The exclusion-expulsion confusion which is at the root of the re-entry problems retains its force, supported by the plenary power theory. A resident alien leaves the United States at his or her own peril; there is no security for aliens until naturalization. The harsh theory of equating exclusion with expulsion continues in force despite the fact that the two are clearly not equal in either the source of their power or the resulting effect.

The Right-Privilege Distinction

The relationship between aliens and the government in immigration matters is expressed from the standpoint of the government by the plenary power theory and the expulsion equals exclusion formula, but from the standpoint of the alien, it is phrased essentially in terms of the right-privilege distinction.[143] Thus, in *Knauff*, the Court said by way of introduction to its opinion:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.[144]

The connection between the plenary power theory and the right-privilege distinction is evident in the words of *Barsky v. Board of Regents*,[145] wherein the Court upheld New York's suspension of a doctor's license:

> The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a

142. The re-entry doctrine itself has not been modified by the Court, and the statutes liberalizing entry for returning resident aliens allow for the Attorney General's discretion to be the controlling factor. It cannot therefore be said that there has been any significant recognition by the Court or Congress of a resident alien's stake in his continued residency.

143. The right-privilege distinction is a theory promulgated by Justice Holmes. The most succinct expression of it is his quote in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892): "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 216, 29 N.E. at 517.

144. 338 U.S. at 542.

145. 347 U.S. 442 (1954).

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> privilege granted by the State under its substantially plenary power to fix the terms of admission.[146]

The expansive power accorded Congress under the plenary power theory implies that aliens are vulnerable to government needs, at the mercy of the sovereign will, without rights; the immigration system as designed by Congress is in fact operated as a system of privileges granted to alien beneficiaries upon the satisfaction of certain conditions. Yet, by focusing on the plenary power and not on the aliens' rights, the immigration decisions have avoided discussion of the constitutional doctrines which have gradually eroded and finally led to the demise of the right-privilege distinction.[147]

The distinction has been primarily discredited by decisions in two areas—free speech[148] and equal protection.[149] In the free speech area, the Supreme Court has rejected the government's inevitable argument that because a benefit is a privilege it is immune from constitutional challenge. In some cases the Court based its rejection of the right-privilege distinction on the doctrine of unconstitutional conditions, in others on the basis that such conditions would have a chilling effect on free speech.[150] In the equal protection area, the Court voiced similar reasoning; the states cannot unconstitutionally deny benefits to some simply because they can constitutionally deny benefits to all. The basis for these decisions is a view that the government should not be able to indirectly prohibit or penalize, through conditional benefits, that which constitutional safeguards prevent it from directly penalizing or prohibiting.[151]

By this reasoning, it would appear that *Harisiades* and *Galvan* should be robbed of their substance by subsequent first amend-

146. *Id.* at 451.

147. The phrase "demise of the right-privilege distinction" is taken from the article of the same name. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

148. Sherbert v. Verner, 374 U.S. 398 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

149. Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Graham v. Richardson, 403 U.S. 365, 374-75 (1971).

150. *See* Van Alstyne, *supra* note 147, at 1445-51.

151. The Court now flatly states that it does not matter whether the benefit sought is denominated a right or a privilege. Bell v. Burson, 402 U.S. 535, 539 (1970). *Bell* suggests a type of balancing test whereby the greater the importance of the benefit, the greater the governmental interest need be to suppress it and the more due process is required. *Id.* at 540.

ment decisions.[152] Those immigration cases sanctioned deportation because of "unknowing"[153] past membership in the communist party; Galvan, in fact, belonged to the party at a time when it was legal. In subsequent cases concerning communist party members, the Court held that membership was not constitutionally sufficient to allow a penalty to be imposed; there must be knowledge of the aims and personal intent to overthrow the government through action.[154]

Yet, cases such as *Galvan* and *Harisiades* still stand because of the plenary power doctrine. It is time to acknowledge, as one commentator has suggested, that the demise of the right-privilege distinction challenges the theoretical basis of the plenary power doctrine.[155] The demise of the right-privilege distinction should mean that the government as grantor of benefits within the immigration system cannot compel the forfeiture of first amendment rights.[156] The way should therefore theoretically be open to challenge unreasonable requirements for naturalization, entry and continued residency[157] in much the same way that unreasonable requirements for welfare benefits,[158] state licensing,[159] and employment [160] have been successfully challenged as unconstitutional.

Deportation As Punishment

The fiction that an alien's deportation is not punishment is the most patently unrealistic and false of all the confusions and

152. *Harisiades* and *Galvan* were decided when the only case on the books was Dennis v. United States, 341 U.S. 494 (1951), and they were in agreement with that case. *See* note 23 *supra*.

153. Herein "unknowing" is used in the sense of without knowledge of the party's subversiveness or illegality.

154. Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961).

155. Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 550 (1953).

156. The immigration statutes still subject to deportation aliens who are members of any subversive organization or affiliated with one, advocate or teach subversive doctrines or the doctrines of world communism, or write, publish or are affiliated with any group which writes or publishes subversive doctrines. 8 U.S.C. §§ 1182(a)(28)(A)-(H), 1251(a)(6)(A)-(H) (1970).

157. *See* Note, *Immigrant Aliens and the Constitution*, 49 NOTRE DAME LAW. 1075, 1096 (1974).

158. Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

159. *In re* Griffiths, 413 U.S. 717 (1973); Bell v. Burson, 402 U.S. 535 (1970).

160. Sugarman v. Dougall, 413 U.S. 634 (1973); Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1971).

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assertions in the immigration cases, but it is in keeping with the other theories. The traditional rationalization is that Congress, by way of its plenary power over aliens, fashions conditions to be met by aliens in order to enter, remain or be naturalized; if aliens do not satisfy the conditions, they are not penalized—they simply do not qualify and are returned from whence they came.[161] Punishment, in constitutional theory, is a concept which is discussed in the context of the prohibition against cruel and unusual punishment and the prohibition against ex post facto laws. In immigration cases, the theory that deportation is not punishment has been used to deny the applicability of these prohibitions and, in addition, to support the plenary power doctrine. Yet, deportation for resident aliens under many immigration statutes is clearly punishment by constitutional standards. There is pain and suffering for the alien which is more serious than the pain associated with the simple witholding of benefits; the alien is, in essence, deprived of "all that makes life worth living."[162] And there is a penal intent exhibited in the statutes, for they demand a standard of behavior arguably unrelated to the needs of immigration policy.

In focusing on the sovereign power, the Court has continually ignored the fact that it is the alien who is deported.[163] In realistic terms, a determination of whether some action is punishment depends not on the power of the perpetrator, but on the pain and suffering caused the victim.[164] Certainly, the pain and suffering attending deportation cannot be dismissed. As Justice Brewer said in his dissent in *Fong Yue Ting*:

> [I]t needs no citation of authorities to support the proposition that deportation is punish-

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161. A good summary of this position is found in *Fong Yue Ting*:

> The order of deportation is not punishment . . . . It is but a method of enforcing the return to his own country of an alien who had not complied with conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

149 U.S. at 730.

162. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

163. Justice Douglas, dissenting in *Harisiades*, commented on the incongruity of assuring aliens increasing opportunities in American society while asserting that forced abandonment of the realization of those same opportunities is not punishment. 342 U.S. at 599.

164. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

> ment. Everyone knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.[165]

In addition to the plenary power theory, the Court also bases its conclusion of the non-penal quality of deportation on the view that deportation is not a criminal proceeding.[166] This is usually put forth as a basis of denial of procedural due process rights which have been required in criminal proceedings. The observation, though, is also made in the context of ex post facto laws, and is in fact based on an early Supreme Court ex post facto law decision, *Calder v. Bull*.[167]

An ex post facto law is one which inflicts a retrospective punishment; it punishes that which when done was not subject to punishment or imposes a greater punishment than was deserved at the time of the act.[168] Thus, in *Marcello v. Bonds*,[169] an alien was convicted of a crime and served his sentence; the crime at the time of its commission did not subject him to deportation, but fifteen years later, by a new immigration statute, he became subject to deportation. The Court rejected the ex post facto law argument because they found that deportation was not punishment, relying on cases which had so concluded because there was no criminal proceeding.[170]

As the dissent points out in *Marcello*, however, there is another line of cases which found statutes which were not criminal in nature to be ex post facto laws. In *Cummings v. Missouri*[171] and *Ex parte Garland*,[172] statutes revoking licenses of lawyers and

165. 149 U.S. at 740. Many opinions have acknowledged the penal nature of deportation though its denial still remains the accepted view. *See* cases collected in: Aberson, *Deportation of Aliens for Criminal Convictions*, 2 PEPPERDINE L. REV. 52, 53 n.3 (1974).

166. Mahler v. Eby, 264 U.S. 32, 39 (1924).

167. 3 U.S. (3 Dall.) 386 (1798). *Calder*, though, did not directly rule on this point. It concerned a challenge by Connecticut citizens of a ruling made by their legislature sitting under its constitutional authority as a court of appeals. The assertion that the ex post facto challenge could only be made within a criminal setting was dicta. However, a complete reading of the case does not support this assertion. See Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 229 (1959).

168. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

169. 349 U.S. 302 (1955).

170. *Id*. at 314. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 581, 594-95 (1952).

171. 71 U.S. (4 Wall.) 277 (1867).

172. 71 U.S. (4 Wall.) 333 (1867).

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ministers on the basis of past allegiance in the Civil War were found to be punishment. The test employed in those cases was not whether it was a criminal proceeding, but whether there was an intent to punish. The same test was used in the expatriation cases, *Trop v. Dulles*[173] and *Kennedy v. Martinez-Mendoza*.[174] In those cases, the Court found that, despite the fact that the provisions in question were part of a regulatory scheme, they were penal because the legislative intent was to punish.

Under this analysis, if the past behavior could be construed as evidence of present unfitness, the statute in question may not be seen as an ex post facto law.[175] In other words, if there is a rational relationship between a legitimate aim and the means selected, the statute may not be construed as having a penal intent. Thus, in evaluating whether immigration statutes would be ex post facto laws, it would not be sufficient to say that deportation is regulatory; there would need to be a further inquiry as to whether the statute in question served a legitimate immigration aim, or whether its intent was to punish through deportation. It is here, of course, that the plenary power doctrine blocks this analysis from being applied to immigration cases, for the plenary power doctrine is essentially a pre-determined assumption that the aim is legitimate and the means are rational. Such is the distinction *Trop* makes between expatriation and deportation.[176]

However, notwithstanding the efficacy of the plenary power doctrine, it is apparent that the Court's view that deportation is not punishment is neither grounded on a realistic appraisal of its effect on the alien nor supported by the Court's present analysis of what is punishment. *Trop* and *Martinez-Mendoza* look to the penal or non-penal intent of the statute in question as found in the legislative history,[177] the purpose of the statute, and its predictable effect on those persons within its scope, both in terms of whether that effect serves the purpose of the statute and whether there is pain and suffering caused. Immigration statutes should be analyzed by this standard. If the view that deportation is not punishment were to suffer a demise, it would open a gate to

173. 356 U.S. 86 (1958).

174. 372 U.S. 144 (1963).

175. United States v. Lovett, 328 U.S. 303, 313-14 (1946). *See also* Marcello v. Bonds, 349 U.S. 302, 321 & n.2 (1955) (Douglas, J., dissenting).

176. 356 U.S. at 98. It is acknowledged that this view of deportation "may be highly fictional." *Id*.

177. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 180-84 (1963).

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challenge deportation proceedings on procedural due process grounds, to challenge immigration statutes as ex post facto laws, to perhaps see deportation in certain cases as cruel and unusual punishment and to create a new awareness of the resident alien's substantial interest in his continued residency.

E. Resident Alien Status

The status of a resident alien differs within and without the immigration system. This disparity stems from two different sets of assumptions. The equal protection cases acknowledge that aliens who reside in the country for many years[178] may have fundamental allegiance to the Constitution, even though they are not citizens.[179] These cases assume a "general identity"[180] of aliens' and citizens' rights and obligations. Immigration cases, in contrast, imply that even long time resident aliens who fail to avail themselves of the opportunity to become naturalized (and therefore demonstrate their allegiance to the Constitution) are deserving of less constitutional protection than citizens and in fact form a special class of residents.

These contradicting views are understood, in part, by differing interpretations of the significance of naturalization and citizenship. Within the immigration system, naturalization is the last significant act; with naturalization, an alien passes out of the immigration system. Citizenship confers on an alien a secure and anonymous place in American society. Yet, this is true only because, at the point of naturalization, an alien is at last free from the threat of deportation. Citizenship, as conceived in the equal protection cases, confers only certain "political"[181] rights. The reciprocity model is achieved without naturalization; resident aliens, "like citizens pay taxes and may be called into the armed forces . . . . [A]liens may live within [the country] for many years, work [there] and contribute to [its] economic growth."[182] Therefore, like citizens, they are deserving of the government's protections.

178. Graham v. Richardson, 403 U.S. 365, 376 (1971); Sugarman v. Dougall, 413 U.S. 634, 645-46 (1973).

179. *In re* Griffiths, 413 U.S. 717, 726 n.18 (1973).

180. Sugarman v. Dougall, 413 U.S. 634, 646 (1973).

181. Those political rights include voting, eligibility for elective office and jury eligibility. The latter was upheld by the Maryland District Court in Perkins v. Smith, 42 U.S.L.W. 2406 (D. Md. 1974), *appeal filed*, 43 U.S.L.W. 3021 (U.S. June 21, 1974) (No. 1915).

182. Graham v. Richardson, 403 U.S. 365, 376 (1971).

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Because aliens are not citizens, they are unable to vote or to hold most public offices; they cannot ask for United States diplomatic protection. Many citizens do not vote; probably few feel that their vote is significant to their lives. The right to diplomatic protection is seldom exercised. But, the threat of deportation affects aliens in every phase of their lives. Naturalization for them serves primarily as a dividing line between who can be deported and who cannot. The form of the categories—"alien" and "citizen"—has been exalted over the substance in immigration cases; the fact of a person's alienage has allowed Congress to punish him for otherwise constitutionally protected behavior and to deport him for behavior shaped by American society.

An alien can be excluded on many grounds at entry,[183] and then once he has successfully entered he can still be deported for violation of entry requirements or conditions and for misconduct[184] while in the United States.[185] Since immigration statutes have retroactive effect,[186] and since there is no statute of limitations,[187] aliens are advised not to stray from the "norms" of community lifestyles.[188] However, no alien can be certain that behavior accepted at present will not subject him to deportation at some time in the future.

In terms of the Constitution, the most reprehensible requirements are the prohibitions against subversive activities.[189] There can be no better examples of laws which "chill" free speech. The alien is in effect perpetually restrained from engaging in any but the most innocuous political activities, for one does not know what will be deemed subversive in the future. Witness the fate of Masciatti, a petitioner in a companion case to *Harisiades*, who belonged to the communist party for six years, quit because

183. 8 U.S.C. § 1182 (1970).

184. *Id.* § 1251.

185. The statute by its language allows deportation for acts committed after entry. Those acts need not be committed within the jurisdiction of the United States. *See* Brice v. Pickett, 515 F.2d 153 (9th Cir. 1975).

186. 8 U.S.C. § 1251(d) (1970).

187. *See, e.g., id.* § 1251(a)(11). 8 U.S.C. § 1251(a)(4) is an exception. It provides that an alien can only be deported for crimes of moral turpitude committed within five years of entry. The President's Commission on Immigration and Naturalization recommended that there be no deportation of resident aliens or a ten year statute of limitations. H.R. Doc. No. 520, 82d Cong., 1st Sess. (1952).

188. "[T]he Immigration and Nationality Act requires of an alien a sexual morality proper to the late nineteenth century, political views proper to the early nineteenth century, and attitudes toward marijuana proper to the mid-twentieth century." Aberson, *supra* note 165, at 82.

189. *See* note 156 *supra*.

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"he lost sympathy with or interest in the party,"[190] and was deported for that association seventeen years later.

Other rights which have been invested with a constitutional gloss, such as family and marital rights and the right to travel, are also severely curtailed. Although an alien is no longer restricted in where he can travel,[191] the re-entry doctrine combined with the liberal allowances for the Attorney General's discretion make the resident alien's status precarious, and he may elect not to travel at all, rather than risk exclusion upon returning.

Though many laws affect marriage and family rights, immigration laws have always been specially involved with adjudicating those rights. The 1965 amendments to the Immigration and Naturalization Act have as their specific aim the protection of families. Yet, immigration statutes regulating deportation serve to break up families. The interest in the promotion and maintenance of the family is great and seems to have acquired a constitutional tinge,[192] though it has yet to be given specific constitutional protection. However, the interest of aliens in preserving their families has not been seen to outweigh any congressional determination of deportability.

If an alien is deported, the hardship that it can create is undeniable. Many of the immigration cases concern aliens with American citizen families, with American businesses and occupations, and with significant ties to their communities. Many come as children and have known no other homes. To be returned to the countries of their birth would be tantamount to exile to a foreign land where there would be no welcoming relatives or friends. For some, there is not even a country to return to since many aliens fled a foreign government or persecution. The alien may not be the only one who suffers pain and hardship; he may have a family—possibly a family of United States citizens. They must choose between remaining in the country of their birth, in a community they know, or living as exiles in a foreign land.[193]

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190. Harisiades v. Shaughnessy, 342 U.S. 580, 582 (1952).

191. 8 U.S.C. § 8210 was repealed in 1952. The re-entry doctrine has been frequently used to deport resident aliens for crimes committed many years after their original entry but either within the statutory five years after a re-entry or prior to re-entry. *See* Pimental-Navarro v. Del Guerico, 256 F.2d 877 (9th Cir. 1949); Schoeps v. Carmichael, 177 F.2d 391 (9th Cir. 1949); Stacher v. Rosenberg, 216 F. Supp. 511 (S.D. Cal. 1963).

192. Griswold v. Connecticut, 381 U.S. 479 (1965).

193. For articles detailing the aliens' plight and urging immigration reform see Schwartz, *American Immigration Policy*, 55 COLUM. L. REV. 311 (1955); Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309 (1956).

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Finally, looking at the deportation policy at its most basic level, it is apparent that it is often a way of being rid of people Congress has found undesirable. Expatriation of citizens is nearly impossible, but deportation of aliens is easy. An alien can, of course, be deported for criminal conduct. But even if a crime is not committed, an alien is subject to deportation for merely being "undesirable."[194] Often, the happenstance of a person's alienage allows the government to deport those whose crimes or behavior are the exclusive result of growing up in American society. When an alien has been a resident for most of his life, it cannot be denied that the crimes or transgressions he commits in the United States, which could never have been considered at the time of entry as grounds for exclusion, are our society's responsibility. His crimes, failures or unsavory character certainly cannot be attributed to the country of his birth.[195] Under such circumstances, the United States should assume its social obligations for the alien as it does for its citizens.

Here we return to the reciprocity model which is at the root of all these questions. The congressional attitude toward aliens within the immigration system—an attitude which the judiciary has accepted—is that the United States has minimal obligations to an alien until naturalization. Such an attitude exalts the form of naturalization and citizenship over the substance of a resident alien's status. He has chosen to live and work in this country; and he has been granted resident alien status after satisfaction of rigorous entry requirements. He has perhaps abandoned his former home and created a new one. To be forced to abandon this new home is certainly a hardship and a penalty; such forced abandonment should not be occasioned by congressional whim and should not occur without the full guarantees of available constitutional rights.

The status of the resident alien should be given its deserved recognition in immigration cases as it has impliedly been given in the equal protection cases. If the plenary power theory is concomitantly discredited to the extent that it blocks constitutional

194. *See, e.g.*, 8 U.S.C. § 1251(b), (9), (11), (17) (1970). The immigration statutes have notoriously been used to deal with undesirable residents when direct criminal prosecution has not been possible, much as internal revenue provisions have been used. *See, e.g.*, Costello v. United States, 365 U.S. 265 (1961); 1974 ANNUAL REPORT: IMMIGRATION & NATURALIZATION SERVICE 14 (1974).

195. Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205, 222 (1953).

challenges to immigration law and policy, the way is open to a better accommodation of government and alien interests in the immigration system.

III. CONSTITUTIONAL CHALLENGE TO IMMIGRATION STATUTES, REGULATIONS AND POLICIES

In this section a method of analyzing equal protection challenges to immigration statutes, regulations and policies will be proposed. This method will build on the conclusions reached above. Restated, these conclusions are: (1) that the plenary power theory should be abandoned in its present form, its substance being absorbed into the issues of justiciability and the foreign affairs prerogative; (2) that the intent of the equal protection cases outside the immigration field—to insure an equality between aliens and citizens—should be carried over into the immigration field; and (3) that distinctions should be acknowledged between exclusion and expulsion and between resident and non-resident aliens. The analysis will be presented within the context of four federal cases—examples of equal protection challenges already attempted. The facts of those cases will be presented first, and then the issues of justiciability and equal protection will be analyzed.

A. The Cases

In *Faustino v. Immigration & Naturalization Service*,[196] an eight-year-old native-born citizen, a child of non-resident aliens, challenged section 201(b)[197] of the Immigration and Nationality Act of 1952, as amended in 1965. That section defines "immediate relatives" of citizens, not subject to quota limitations, as children, spouses and parents, except as to parents a citizen must be 21 years of age. Thus, if the Faustino child were over 21, she could petition to have her non-immigrant parents reclassified as permanent resident aliens, but that opportunity was denied her because of her age. The Court of Appeals for the Second Circuit held that under previous federal cases, the plenary power doctrine barred such a challenge. The discrimination alleged was against citizen children under the age of 21; the purpose of the discrimination in the statute was to prevent precisely the situation which occurred in *Faustino*, *i.e.*, aliens' entrance to the country as

196. 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).
197. 8 U.S.C. § 1151(b) (1970).

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non-immigrants, having a child and then seeking to have their status adjusted to resident aliens and thus circumventing the entrance requirements.[198]

Buckley v. Gibney[199] concerned a non-resident alien from British Honduras who was petitioning for a sixth preference status.[200] He challenged his deportation on two equal protection grounds: (1) aliens qualifying for third preference status were granted a stay of deportation and voluntary deportation and allowed under Immigration and Naturalization Service Operation Instructions to remain in the country awaiting visas, but such relief from deportation was denied sixth preference aliens; and (2) aliens from independent states were subject to the general quota, but aliens from dependent countries were subject to a quota of one percent of the maximum quota of the mother country.[201] The court held the former classification to be reasonable and the latter to be part of congressional immigration policy decisions, immune from judicial review under the plenary power doctrine. The discriminations alleged in this case were against sixth preference aliens and aliens from dependent states. The policy as to deportation of sixth preference aliens follows from the system of preferences itself. As to the statute establishing quotas for dependent states, the congressional purpose there was to prevent an influx of immigrants from dependent states from swallowing up the quota of the mother country.[202]

In *Dunn v. Immigration & Naturalization Service*,[203] the petitioner challenged the constitutionality of section 245 of the Act,[204] which provides for relief from deportation in the form of an ad-

198. Faustino v. Immigration & Nat. Serv., 302 F. Supp. 212, 215-16 (S.D.N.Y. 1969), *aff'd per curiam*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Perdido v. Immigration & Nat. Serv., 420 F.2d 1179, 1181 (5th Cir. 1969).

199. 332 F. Supp. 790 (S.D.N.Y. 1971), *aff'd per curiam*, 449 F.2d 1305 (2nd Cir. 1971), *cert. denied*, 405 U.S. 919 (1971).

200. Aliens, other than Western Hemisphere natives or immediate relatives of United States citizens, are admitted under preference categories. 8 U.S.C. §§ 1153(a)(1)-(7) (1970). There are seven preference categories: (1) unmarried sons or daughters of citizens; (2) spouses or unmarried sons or daughters of permanent resident aliens; (3) members of professions, scientists or artists; (4) married sons or daughters of citizens; (5) brothers or sisters of citizens; (6) skilled or unskilled laborers; and (7) those fleeing persecution and certain refugees.

201. 8 U.S.C. § 1152(c) (1970). Section (a) provides that the maximum quota for each country is 20,000. Therefore, the maximum quota for each dependent country is 1% of 20,000 or 200.

202. 1965 S. Rep., *supra* note 9, at 21-22.

203. 499 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975).

204. 8 U.S.C. § 1255(c) (1970).

justment of status, but denies such relief of Western Hemisphere natives. The Court of Appeals for the Ninth Circuit held that: (1) the power of Congress to decide whom to deport is well-established; and (2) the distinction between Eastern and Western Hemisphere aliens was reasonable. The purpose of the discrimination against Western Hemisphere natives was to rectify the Service's problem of the influx of Western Hemisphere natives who entered as non-immigrants and then, once in the country, petitioned for an adjustment of status.[205]

Noel v. Chapman,[206] a Second Circuit opinion, presented a challenge to the Service's policy of allowing deportable aliens married to citizens to remain in the country awaiting a visa, but calling for the deportation of spouses of resident aliens in the same situation.[207] The court of appeals held that the distinction between spouses of resident aliens and spouses of citizens was reasonable under the plenary power doctrine and in light of the Service's needs. The purpose of the policy was to deter the "common practice" of Western Hemisphere aliens' "remaining illegally in the expectation of a marriage which would assure their continuing residence here."[208]

It is apparent that the equal protection arguments made in *Dunn*, *Noel* and *Buckley* could be read broadly to bring into question the whole preference system and the separate treatment of Western Hemisphere aliens.[209] However, here no such sweeping evaluation will be attempted. Implicit in the argument that the plenary power doctrine should be abandoned is the idea that the constitutional issues in the immigration laws should be evaluated

205. 1965 S. REP., *supra* note 9, at 24.

206. 508 F.2d 1023 (2d Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3585 (U.S. April 3, 1975) (No. 1257).

207. *Id.* at 1025.

208. *Id.* at 1029.

209. The main features of the immigration statutes quota and preference system are:

1) There is a world wide quota of 120,000. 8 U.S.C. § 1151(a) (1970). Western Hemisphere natives, not subject to the worldwide quota, are subject to a separate quota of 170,000. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 921.

2) Immediate relatives of citizens are excluded from quota requirements. 8 U.S.C. § 1151(a), (b) (1970). All other aliens subject to the worldwide quota are allowed entry under a preference system. *See* note 200 *supra*. For Western Hemisphere aliens, there is no preference system.

3) A work certificate is required for all third and sixth preference aliens and all Western Hemisphere aliens except immediate relatives of citizens and resident aliens. 8 U.S.C. § 1182(a) (14) (1970).

For a discussion of the quota and preference system see *The Immigration System: Need to Eliminate Discrimination and Delay*, 8 U.C. DAVIS L. REV. 191 (1975).

through a careful scrutiny of the actual interests and rights involved. Accordingly, the following analysis looks at the statutory context, weighing the governmental and individual interest in each situation.

B. JUSTICIABILITY

Even if the supremacy of the plenary power theory is denied, the elements which comprise that theory must be analyzed in light of their constitutionality. The most important element of the plenary power theory is the traditional judicial deference in foreign affairs. The Court's first opportunity to invoke this element occurs in the context of the concept of justiciability.[210] The notion of justiciability which has been used in the immigration cases has always depended on the perception of a close proximity between immigration policy and foreign policy. Most of these cases concern the relationship of the alien to the United States;[211] they concern conditions for entry and residency and aliens' personal eligibility for statutory relief from deportation. Only two of the immigration cases presented above concern statutes or policies which could arguably be based on foreign policy considerations. In both *Dunn* and *Buckley*, the classifications questioned were based on aliens' country of birth.

In *Dunn*, the classification of Western Hemisphere natives was based on the perceived problems of the influx of Western Hemisphere natives into the country. Though it could conceivably affect American relations with the countries of the Western Hemisphere, it is apparent that the purpose of the classification cannot be stretched to encompass its use as a "weapon of defense and reprisal;"[212] nor is there any evidence that Congress was anywhere concerned with the government's relations with Western Hemisphere nations when it formed its immigration policy as to Western Hemisphere natives.[213] Rather, the classification in section 245 was part of a policy intended to protect the domestic

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210. *See* Trujillo-Hernandez v. Farrell, 503 F.2d 955 (5th Cir. 1974).

211. That relationship is similar to one between citizen and government. Issues related to citizen-government relations are, of course, justiciable, even when foreign affairs are involved. Kent v. Dulles, 351 U.S. 116 (1958). The holding in Zemel v. Rusk, 381 U.S. 1 (1964), suggests that where the individual's rights at issue are merely the by-product of foreign relations between nation states, the Court will more readily defer to the congressional determination.

212. Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952).

213. 1965 S. REP., *supra* note 9, at 56-59.

labor market from an influx of large numbers of aliens into the labor force. In contrast, the classification in *Buckley* cannot be said to be motivated by any domestic policy concern.

The classification in *Buckley* rests on a decision of the federal government about how to treat the citizens of a nation state for purposes of immigration quotas. As such, it appears to be beyond the prerogative of the courts to criticize. A conclusion of non-justiciability in the *Buckley* case would be supported by *Baker v. Carr*,[214] the leading political question case. *Buckley* would appear to present issues which could not be resolved by the courts; how to treat nation states is a policy matter which concerns only the congressional and executive branches of the government, and the courts have no standards by which to evaluate those decisions. The decision to treat dependent states differently for the purpose of quota provisions is analogous to decisions about the recognition of states and the resolutions to disputed territorial claims.[215] Cases, cited with approval in *Baker v. Carr*,[216] have consistently found such issues to be non-justiciable.

Despite the familiar recital in immigration cases that there is a close proximity between immigration and foreign policy, there is almost no evidence in the statutes or their legislative history of congressional consideration of foreign policy questions. Since aliens have always been considered to be protected by the provisions of the Constitution,[217] their constitutional claims should be analyzed under the usual justiciability standards. Although their challenges can seldom be barred by the justiciability element of the plenary power theory, traditional judicial deference in foreign relations and immigration cases can play a role in evaluating aliens' constitutional challenges, as will be seen in the following equal protection analysis.

C. Equal Protection

The approach which the Court presently takes in evaluating

214. 369 U.S. 186 (1962). *See* note 66 *supra* for the *Baker* criteria.

215. See cases discussed in Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451, 453-69 (1956). It could be argued that what is really at issue in *Buckley* is a discrimination between two classes of aliens determined by their countries of origin; such discrimination has not been held to be beyond the purview of the courts. *See* Oyama v. California, 332 U.S. 633 (1948). However, discrimination alleged in national origin cases has been akin to racial discrimination; here, it stems from the political status of the alien's national government.

216. 369 U.S. at 212.

217. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

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equal protection questions is termed the two-tier approach,[218] referring to the two standards used—that of rational basis and strict scrutiny. Thus, the threshold question is which test should be used. Many commentators have observed that the outcome is really determined by the answer to this question; the subsequent analysis is a foregone conclusion. The strict scrutiny test requires the government to show a compelling governmental interest to justify discriminatory classification; compelling governmental interests have seldom been found. On the other hand, the rational basis test calls for only a showing of a rational relationship between the legislative purpose and the discriminatory classification. A rational relationship is often found, as has been seen in the cases applying this same test to substantive due process challenges.

The two-tier approach is accepted here despite a question of whether the strict scrutiny test is compelled by the fifth amendment,[219] and despite the fact that the Court has expressed dissatisfaction with a mechanical application of the approach.[220] It is not the purpose of this article to evaluate in depth the present state or probable future of the two-tier approach, nor to expound on the fifth amendment's relationship to the fourteenth. The purpose in making an equal protection analysis is to demonstrate that such an analysis would not lead to the discrediting of all immigration statutes; even when the analysis proceeds from a highly interventionist stance, the essential statutory scheme will remain intact. The two-tier approach is a convenient and, at this time,

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218. For a good overview of the two-tier approach see *Developments in the Law–Equal Protection*, 82 HARV. L. REV. 1065 (1969).

219. The Supreme Court has nowhere held the equal protection guarantees under the fifth and fourteenth amendments to be identical. Bolling v. Sharpe, 347 U.S. 497 (1954); *cf.* Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948); Henderson v. United States, 231 F. Supp. 177 (N.D. Cal. 1964). Federal cases have been divided as to whether strict scrutiny has a role in the fifth amendment's equal protection. *Compare* Taylor v. United States, 320 F.2d 843 (9th Cir. 1963), United States v. First National Bank of Cincinnati, 329 F. Supp. 1251 (S.D. Ohio 1971) *and* Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *with* Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972) *and* Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972). *See also* note 106 *supra*.

Since the strict scrutiny test is neither compelled by the language of the fifth nor the fourteenth amendments and since equal protection guarantees involve personal rights and not those economic rights which meant the discredit of a strict test under the fifth amendment's substantive due process, there appears to be no reason to bar a strict scrutiny test under the fifth amendment.

220. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court; Model for Equal Protection, The Supreme Court–1971 Term*, 86 HARV. L. REV. 1 (1972).

viable method to evaluate equal protection issues. Yet, because of some indications that the Court may eventually seek to employ a more flexible test falling somewhere in between strict scrutiny and rational basis, those cases implying a more interventionist rational basis test will be noted and their possible applicability to immigration issues discussed.

Strict Scrutiny

The strict scrutiny test is applied if either the classification is "inherently suspect" or if there is a fundamental interest involved in the discriminatory legislation. The strict scrutiny test grew out of the Court's concern for insuring racial equality which was also the motivation for the fourteenth amendment. Racial classifications were the original suspect categories, and the more recent classifications held to be suspect are those similar to racial ones.[221] The most obvious one is national origin, for, like race, national origin is an unalterable characteristic, an indication of a suspect class.[222] However, not all unalterable characteristics have been deemed to invoke the suspect category label; for instance, sex has not yet been accorded suspect category status.[223] The obvious analogy between race and national origin, though, has been long recognized,[224] and it is clear that under the strict scrutiny test classifications based on national origin would be inherently suspect.

The status of alienage, in contrast to national origin status, is not an unalterable characteristic; aliens can become citizens. Yet, the *Graham-Sugarman-Griffiths* trilogy, reasoning from Justice Stone's famous footnote in *United States v. Carolene Products*

221. Though the Court has been sensitive to the overtones of racial discrimination against aliens in the equal protection cases, the immigration system itself has traditionally discriminated on the basis of race and the courts have upheld it under the plenary power theory. *See* Vieira, *Racial Imbalance, Black Separatism and Permissible Classifications*, 67 MICH. L. REV. 1553, 1571-77 (1969) for a review of the federal legislation and Supreme Court cases. *See also* Hitai v. Immigration & Nat. Serv., 343 F.2d 466 (2d Cir. 1965), which flatly upheld under the pre-1965 quota provisions the assignment to a Brazilian native of a Japanese quota number because of his Japanese ancestry.

222. *Developments in the Law–Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

223. Frontiero v. Richardson, 411 U.S. 677 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975). Justices Brennan, Marshall and White, joined at times by Justice Douglas, have consistently maintained that sex-based classifications are inherently suspect. *See* Frontiero v. Richardson, *supra* at 688 (Brennan, J., plurality opinion); Kahn v. Shevin, *supra* at 357 (Brennan, J., dissenting); Schlesinger v. Ballard, *supra* at 511 (Brennan, J., dissenting).

224. Oyama v. California, 332 U.S. 633, 646 (1948); Korematsu v. United States, 323 U.S. 214 (1945).

Co.,[225] found alienage to be inherently suspect. *Graham* says aliens are an example of an insular minority, deserving of special protection;[226] they cannot vote and therefore have no ability to influence the legislature as a class. In that sense, they are even more disadvantaged than racial minorities and women.

Two of the immigration cases present examples of classifications that could qualify as inherently suspect. The discrimination alleged in *Noel* was against resident aliens and that in *Dunn* was against Western Hemisphere aliens; both are analogous to discrimination based on national origin.

In *Noel*, the petitioner argued that *Graham* and *Sugarman* should apply to his case, for the objects of the discrimination were resident aliens as a class. In *Noel* a deportable alien's wife challenged the policy of deporting Western Hemisphere spouses of resident aliens while allowing Western Hemisphere spouses of citizens and Eastern Hemisphere spouses of resident aliens[227] to remain awaiting permanent resident alien status. The court in *Noel* found that the strict scrutiny test would not apply because: (1) in the immigration context the plenary power theory indicates a much wider latitude given Congress than given the states in *Graham* and *Sugarman*; and (2) the discrimination follows the scheme of the statutes enacted by Congress which exempt spouses of citizens but not of resident aliens from the quota provisions and which denied Western Hemisphere alien spouses preference within the Western Hemisphere quota.

Even if the reliance on the plenary power theory in *Noel* were abandoned two questions would remain: (1) whether alienage is a suspect category for purposes of the immigration quota system; and (2) even if not for the quota system, could it be a suspect category for purposes of deportation of the spouses?

A challenge to the statute exempting citizens' spouses from the quota provisions and a companion assertion that resident aliens' spouses be treated differently strikes at the very foundation of the immigration system—Congress' right to determine which aliens can enter. Such a position can be maintained, however, if the view of aliens implied in equal protection cases, which find aliens and citizens to enjoy substantially the same rights, is

225. 304 U.S. 144, 152-53 n.4 (1938).

226. 403 U.S. at 372.

227. An equal protection challenge based on the different treatment of Eastern and Western Hemisphere natives, though alluded to in *Noel*, was not made.

followed. And, the reciprocity theory would support a congressional responsibility to promote family unity for resident aliens as for citizens. There are many instances in the immigration statutes where Congress has provided relief equally for resident aliens and citizens. For instance, immediate relatives of resident aliens as well as citizens are exempt from the work certification requirement.[228] However, the non-racial overtones to the treatment of resident aliens[229] and the traditional congressional freedom to design categories for entry would indicate that a strict scrutiny analysis may not be compelled.

It still may be argued that once aliens have been determined eligible for entry by virtue of being spouses of resident aliens or citizens, they should not be subject to deportation inequally. Here also, however, it seems that, due to the close tie between the Service's policy with the entrance quota statutes,[230] there is no greater imperative for the application of a strict scrutiny test than in a case challenging the statute. This is not to say that the policy satisfies equal protection. As will be shown subsequently, this would appear to be an ideal situation for a test which weighs the interests and investigates the discrimination's necessary relationship to the policy's purpose.

In *Dunn*, the only persons affected by the statute were aliens; the discrimination alleged was against Western Hemisphere natives as a class. This discrimination is similar to the national origin discrimination, long held to be an impermissible classification. The motivating force behind the limitations on Western Hemisphere natives, as in *Dunn*, appears to be a fear of a great influx from Central and South America.[231] It is strikingly similar to the "yellow horde" view behind the previous limitations on Asian immigration.[232] In that sense, there is a great similarity between

228. 8 U.S.C. § 1182(a)(14) (1970).

229. *Graham* shows, of course, that strict scrutiny can be applied even in the absence of racial discrimination. But, it is here that the plenary power theory may have a valid place in calling for broad congressional power where entrance requirements are at issue and where there is no racial discrimination.

230. The policy was based on the fact that Western Hemisphere spouses, subject to a quota with no hope of preferential treatment would have to wait much longer for a quota number than spouses of citizens who were exempt from quota provisions or Eastern Hemisphere spouses of resident aliens who were afforded preference within their quota limitations. *See* note 209 *supra*.

231. 1965 S. REP., *supra* note 9, at 56-58.

232. *See* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889); Oyama v. California, 332 U.S. 633, 651-62 (1948) (Murphy, J., concurring); Hitai v. Immigration & Nat. Serv., 343 F.2d 466 (2d Cir. 1965).

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classifications by hemisphere and classifications by nationality.

It is equally apparent that the Western Hemisphere classification, by including many diverse countries and ethnic groups, does not sound the same reverberation of racial discrimination which was emphatically present in the national origin discrimination cases. The most familiar of these cases, *Oyama* and *Takahashi*, concerned discrimination against Japanese, which closely resembles racial discrimination. Therefore, it appears that special treatment of Western Hemisphere aliens may not be termed "inherently suspect" as readily as similar treatment of natives of an individual country or even a cluster of countries.[233]

To turn from the inherently suspect classification to the alternative prerequisite for strict scrutiny—the presence of a fundamental right—is to move from an area of somewhat well-understood boundaries to an area of unchartered byways. The Supreme Court has proceeded in the past to identify fundamental rights on an ad hoc basis. The fundamental rights clearly identified[234] so far are the right to travel,[235] the right to vote,[236] and the right to pursue criminal appeals.[237] Among those rejected by the Court are the right to welfare benefits,[238] to housing,[239] and to education.[240]

The immigration cases raise two possible fundamental rights: (1) the preservation of the family; and (2) a resident alien's interest in maintaining his residence and being secure from deportation. The former would be raised in *Faustino* by the citizen child who was forced to choose between exile and her parents, and in *Noel* where the Service's policy served to separate husband and wife. The Court's interest in the preservation of the family and

233. For instance, if the statutory category were Latin American or even Caribbean, there would be a greater similarity to racial discrimination.

234. However, there is no complete agreement on the Court as to which rights have been identified as fundamental. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting).

235. Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972).

236. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist. 395 U.S. 621 (1969).

237. Douglas v. California, 372 U.S. 353 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Williams v. Illinois, 399 U.S. 235 (1970).

238. Richardson v. Belcher, 404 U.S. 78 (1971); Jefferson v. Hackney, 406 U.S. 535 (1972).

239. Lindsey v. Normet, 405 U.S. 56 (1972).

240. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

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family privacy is evidenced in the contraceptive[241] and illegitimacy cases.[242] This argument of family preservation has been made frequently in the federal courts to prevent the deportation of alien parents of citizen children, but it has consistently been rejected by those federal courts which have dealt with it.[243] Considering the Supreme Court's reluctance[244] to raise the right of family privacy to specific constitutional status despite its suggestion in *Griswold v. Connecticut*,[245] it would be surprising if the Court reversed the current stand of the federal courts of appeals.

The equal protection decisions suggest that a fundamental interest is present if: (1) there is a severe personal detriment; and (2) there is a relation to the due process clause.[246] The latter criterion really means that the Court is unwilling to create what it sees as a novel fundamental interest. The family preservation interest is akin to the other social concerns—housing, food and shelter—which have not been accorded fundamental interest protection. A resident alien's interest in maintaining his residency and not being deported, though similar to the family preservation interest, can be seen in a light which shows it to be related to the due process clause. However, it depends on how the interest is described. If it is characterized as an interest in maintaining residency, raising a family and earning a living in the United States, it looks more like those interests rejected as non-fundamental, but when it is seen within the context of the deportation proceedings, an alien's interest in not being deported has some kinship to the idea of mobility inherent in the right to travel.[247] And, more importantly, there is a similarity between the alien's opportunity for statutory relief from deportation and the criminal's right to appeal.[248]

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241. Griswold v. Connecticut, 381 U.S. 479 (1965).

242. Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

243. Perdido v. Immigration & Nat. Serv., 420 F.2d 1179 (5th Cir. 1969); Faustino v. Immigration & Nat. Serv., 432 F.2d 429 (2d Cir. 1970); Robles v. Immigration & Nat. Serv., 485 F.2d 100 (10th Cir. 1973); Cervantes v. Immigration & Nat. Serv., 510 F.2d 89 (10th Cir. 1975); Application of Amoury, 307 F. Supp. 213 (S.D.N.Y. 1969).

244. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7; *cf.* Roe v. Wade, 410 U.S. 113, 156 (1973).

245. 381 U.S. 479 (1965).

246. *Developments in the Law–Equal Protection*, 82 HARV. L. REV. 1065, 1130 (1969).

247. Strictly speaking, an alien's interest in deportation proceedings is not to be able to travel, but to be free from forced travel (out of the country).

248. The comparison would, of course, be greatly strengthened if it were acknowledged that deportation is punishment. *See* notes 161-65 *supra* and accompanying text.

There is little chance, though, that the Court would elevate the resident alien's interest into a fundamental right. Although there may be similarities between the rights traditionally encompassed by the due process clause and the resident alien's interest, the whole thrust of the plenary power theory and the Court's treatment of aliens' rights in the past militate against any contention that such an interest could be seen as traditionally encompassed under the due process clause.

The finding of an inherently suspect category or a fundamental right does not automatically render a classification unconstitutional. The strict scrutiny test means exactly what the words imply—that the classification is subject to a very stringent requirement of rationality. It is phrased in terms of the requirement of a "compelling governmental interest." The rational basis test demands that there be a showing of a governmental interest; what the requirement of a compelling governmental interest adds is: (1) a greater degree of necessity; and (2) that in the balance the necessity would outweigh the fact of an inherently suspect classification or of a fundamental interest.

The compelling governmental interest standard has only been met in a few instances, most notably in the Japanese internment cases.[249] There, the impermissible and imprecise classifications were upheld only because the Court found that there was a state of emergency and that severe national consequences could result from failure to act. Clearly, there is no such urgency in immigration cases like *Dunn* and *Noel*, even if the plenary power theory is acknowledged to the fullest extent.[250] In immigration cases, the oft-reiterated view that the battle is won against the classification when the strict scrutiny test is deemed applicable would not be without foundation.

Rational Basis

The rational basis test is the familiar test by which the judiciary has reviewed much legislation.[251] That test raises only

249. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1945).

250. The purpose of the statutes in *Dunn* and *Noel* is to insure the integrity of the immigration entrance requirements. Even assuming the plenary power of Congress to form entrance requirements, that power is no greater than the power to wage war. Yet, in the Japanese internment cases, more than the war power was needed to justify the "suspect" classification.

251. Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward The End of Irresponsible Judicial Review and The Establishment of a Viable Theory of the Equal Protection*

the question of whether there is a rational relationship between the legislative purpose and the statute in question. Generally, the courts can find such a relationship. Thus, under the commerce clause, almost any relationship to interstate commerce suffices to invoke congressional power.[252] In present substantive due process challenges to economic legislation, the Court has continually deferred to Congress.[253]

In equal protection cases, the test of rational basis is invoked when the Court can find no basis for strict scrutiny. In economic cases, this means that there is virtually no judicial scrutiny,[254] just as in the substantive due process cases. However, in evaluating equal protection questions concerning personal rights, the Court has shown a reluctance to allow the result of an all or nothing approach. Unwilling to increase the number of instances which call for strict scrutiny, and unwilling to let all other discrimination be given judicial approval, the Court has invested the rational basis test with more bite than it has had in a substantive due process evaluation.

The traditional rational basis test is by no means abandoned. It seems apparent, though, that the degree of scrutiny with which the Court chooses to look at the classification depends on its evaluation of the importance of the interests concerned, and it appears that the Court often invokes some sort of balancing test in the process. The two factors which seem determinative as to how vigorous a scrutiny the Court will make are: (1) whether the governmental power involved is one traditionally deemed expansive;[255] and (2) how close the classification is to being inherently suspect, or the right abridged to being fundamental.[256] In *Village of Belle Terre v. Boraas*,[257] Justice Douglas discussed at great length the traditional latitude allowed communities to govern the quality of life through zoning. In immigration cases, a similar argument could be made—that the traditional plenary power accorded Congress over immigration should compel only a minimal scrutiny by the courts. This argument is especially persuasive where the classification involved neither a fundamental interest,

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Clause, 2 Hastings Const. L.Q. 153 (1975).

252. Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942).

253. Olsen v. Nebraska *ex rel.* Western Ref. & Bond Ass'n, 313 U.S. 236 (1941); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

254. Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); *cf.* Morey v. Doud, 354 U.S. 457 (1957).

255. Village of Belle Terre v. Boraas 416 U.S. 1 (1974).

256. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973).

257. 416 U.S. 1 (1974).

nor approached suspect status. In *Buckley*, for instance, where the alleged discrimination was between third and sixth preference category aliens, it was undoubtedly not irrational for Congress to prefer professional aliens over laborer aliens. And, considering the long history of Congress' role in determining alien entrance requirements, it would seem to be beyond the courts' expertise to challenge Congress' judgment.

The courts in *Dunn* and *Noel* used precisely such reasoning based on the plenary power theory to justify the use of a rational basis test. Yet, even if the classifications in *Dunn* and *Noel* are not deemed inherently suspect, it would seem that their close proximity to that sort of category would compel at least a more intense scrutiny than the rational basis test. This appears to be the result in the sex discrimination cases.[258] Reluctant to elevate sex to a suspect category,[259] the Court's very careful scrutiny of the reasonableness of distinctions by sex has resulted in finding many such distinctions unconstitutional. This more interventionist rational basis test could have applicability in cases such as *Noel* and *Dunn*. A rational basis test which allows a weighing of interests and investigation of statutory functions is the most ideal test for immigration cases. The traditional plenary power over aliens can be given its due in situations where it clearly deserves it. But, where questions of the rights of long-time resident aliens are at issue or where important constitutional rights are asserted, its applicability and importance in the exact statutory context can be weighed against the other interests involved.

A more interventionist rational basis test looks to the legislative purpose first and then to whether the classification is related to the purpose, as does the most minimal test. The classic rational basis test requires neither that the purpose proposed by the Court to justify the classification be the actual legislative purpose, nor that the legislation be designed to achieve that specific purpose. As stated by Justice Harlan in *Flemming v. Nestor*,[260]

> it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the

258. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684-88 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

259. The Court is perhaps fearful that if it were to raise sex to a suspect category, they would be forced to strike down "beneficial" sex discrimination. *See* Schlesinger v. Ballard, 419 U.S. 498, 505-10 (1975).

260. 363 U.S. 603 (1960).

> section [of the statute] does not extend to all to whom the postulated rationale might in logic apply.[261]

However, where a more intense scrutiny has been made by the Court, it has attempted to determine the actual purpose of the legislation[262] and whether the statute was carefully drawn to realize its purpose without unnecessary discrimination.[263]

Neither *Dunn*, *Noel* nor *Faustino* present any difficulty in ascertaining legislative purpose. Each statute or policy aims at reducing the amount of aliens who can bypass the entry quota requirements. However, only the statute in *Faustino* achieves that purpose on its face. The statute in *Dunn* is both overinclusive and underinclusive.[264] It denies statutory relief to all Western Hemisphere aliens, regardless of whether they entered first as non-immigrants or are now deportable for some other reason. Dunn, himself, is an example of someone who fell outside of the class of aliens intended to be regulated by the statute.[265] He had been admitted as a child as a permanent resident. At the time of his deportation, he had a citizen wife and child and hardly resembled those who came "to the United States as non-immigrant visitors and promptly sought permanent residence under section 245 of the Act."[266] The statute is also underinclusive for it denies adjustment of status to Western Hemisphere natives, but allows it for Eastern Hemisphere aliens, even if they come as non-immigrant visitors. Though, as explained in *Dunn*, it was rational for the Service to restrict Western Hemisphere natives because it perceived them to provide the largest problem, it would appear that the gratuitous overinclusion of the classification and its proximity to a national origin classification would call for a finding of unconstitutionality under an interventionist rational scrutiny test.

Noel presents an example of underinclusion. By subjecting

261. *Id.* at 612.

262. Eisenstadt v. Baird, 405 U.S. 438, 442-43 (1972).

263. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

264. For an explication of the theories of underinclusion and overinclusion, see *Developments in the Law–Equal Protection*, 82 Harv. L. Rev. 1065, 1119-20 (1969); Faruki v. Rogers, 349 F. Supp. 723, 727, 731 (D.D.C. 1971).

265. It is unclear why *Dunn* did not choose to petition for his adjustment of status under 8 U.S.C § 1254(a)(2) (1970). He appears to fulfill the statutory requirements: (1) deportable under 8 U.S.C. § 1251(a)(11); (2) residency of ten years; (3) good moral character; and (4) hardship to citizen spouse, child or parent.

266. Dunn v. Immigration & Nat. Serv., 499 F.2d 856, 859 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975).

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only spouses of resident aliens to deportation and not spouses of citizens, the policy fails to reach all those who marry to evade the quota requirements. There are alternative policies[267] which could have been effected which would have more precisely achieved the purpose. The policy of deportation could have been applied to: (1) all deportable alien spouses whether married to citizens or to resident aliens; (2) all deportable aliens entering into a sham marriage; or (3) all aliens who contracted a marriage after being deemed deportable.[268] The choice to deport only spouses of resident aliens seems to be an arbitrary classification made for its administrative efficiency[269] and perhaps from some sense that either spouses of resident aliens are less deserving or that more deportable aliens marry resident aliens rather than citizens.

In *Faustino*, in contrast to *Dunn* and *Noel*, the situation presented is one where the statute effectively prevented the evil legislated against. To insure that aliens could not come to this country as visitors, have a child and then claim eligibility for resident alien status, the ability to petition for resident alien status was limited to citizens over 21. The specificity of this statute, combined with the traditional existence of classifications based on age, would insure the finding of reasonableness to satisfy its constitutionality under the equal protection clause of the fifth amendment.

It is apparent then, that if the plenary power theory was abandoned to allow constitutional challenge, the whole edifice of the immigration laws would not collapse. The plenary power theory under a new guise of justiciability and judicial deference would serve to bar judicial review of classifications stemming from considerations of international relations and insure expansive power to Congress in forming entrance requirements. However, where the statutes or policies were clearly based on inherently suspect classifications or suppressed fundamental rights, and where the classifications were deemed arbitrary in light of the congressional purpose, they could be struck down. Thus, allowing the equal protection challenge would mean congressional

267. *In re* Griffiths, 413 U.S. 717, 725-26 (1973); Faruki v. Rogers, 349 F. Supp. 723, 731 (D.D.C. 1971).

268. This last category provides an easier regulation to administer than the sham marriage category and at the same time would provide a greater presumption of evasion of the immigration laws than the categories used in *Noel*.

269. Administrative efficiency has not proven to be a sufficient governmental interest to prevail under an interventionist rational basis standard. Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

power would not be seriously curtailed, but the inequities traditionally glaring in the immigration laws could be eliminated.

CONCLUSION

It is clear that the present Supreme Court is not ready to reverse the traditional assumptions in immigration cases. *Kleindienst v. Mandel*,[270] if anything, signaled a further retrenchment of the plenary power theory in constitutional doctrine. Yet, the Supreme Court could choose to abandon the plenary power theory without offending stare decisis or judicial policy considerations.[271] Significant alterations in constitutional theory, congressional policy and social history all point to the obsolescence of the plenary power theory.

The plenary power theory was conceived in an era which accepted as fact the non-assimilability of the Chinese,[272] the unworthiness of non-white aliens to become citizens[273] and the wisdom of an isolationist position for the United States in world affairs. However, these attitudes no longer prevail. In the last two decades the nation has committed itself to a course of vigorously insuring equality to all its people. Aliens have benefited from that commitment. In 1965, Congress made a long overdue reform of the immigration quota entrance requirements, and in the alien equal protection cases the Supreme Court has insured that at least outside the immigration system, aliens will be treated substantially on a parity with citizens.

The plenary power theory, in its sweeping application to all aliens, is contrary to the process of careful identification and weighing of competing interests which has characterized modern Supreme Court constitutional adjudication. As has been shown in the preceding equal protection analysis, such a process as applied to an evaluation of immigration statutes would scarcely disturb the major components of the congressional scheme of immigration. An abandonment of the plenary power theory would not mean a significant invasion of the congressional prerogative in immigration. It would mean a significant recognition of the resident alien status and could lead to the elimination of the remaining inequities in immigration laws and procedures.

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270. 408 U.S. 753 (1972).

271. Note, *Constitutional Limitation on the Naturalization Power*, 80 YALE L.J. 769, 809-10 (1971).

272. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889).

273. *See* note 38 *supra*.

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