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The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens.

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ARTICLES

THE ANTITERRORISM ACT, THE IMMIGRATION REFORM ACT, AND IDEOLOGICAL REGULATION IN THE IMMIGRATION LAWS: IMPORTANT LESSONS FOR CITIZENS AND NONCITIZENS

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I. INTRODUCTION

From its early days, the United States has attempted to limit the number of politically undesirable persons coming to this country from foreign lands. The infamous Alien and Sedition Acts of the 1790s represent one of the first examples of such efforts.[1] Congress passed laws over the next two centuries that, among other things, penalized "alien"[2] anarchists, communists, and other politically unpopular persons. The federal government enforced these laws with special vigor at various times during the twentieth century.[3]

The efforts to exclude or deport political undesirables almost invariably have been linked to domestic tensions. Indeed, ideological exclusions in the immigration laws "mask[s] their true purpose: protection of particular social and economic values that are promoted by the American political system."[4] For example, through the Alien and Sedition Acts, the Federalists sought to cut off the burgeoning political support offered by immigrants to the Republicans,[5] in addition to responding to tensions with the new radical French government. In later turbulent times, the primary concern was that "foreigners" might infect the domestic populace with the disease of subversion, thereby resulting in labor turmoil and possibly even radical takeover.[6]

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1. *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 23 (1956) (pointing out that Naturalization Act of 1798 was Federalist political maneuver designed to limit growing support for Republican Party).

2. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 MIAMI INTER-AM. L. REV. (forthcoming 1997) (draft on file with the *St. Mary's Law Journal*) (analyzing negative, and often racial, imagery attached to "alien" terminology in legal and public discourse on immigration). For reasons articulated in that Article, I find the term "alien" less than satisfying and attempt to minimize its use.

3. *See* discussion *infra* Part II.

4. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1518 (1988).

5. *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 23 (1956).

6. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 55 (2d ed. 7th prtg. 1968) (emphasizing that, after Haymarket Square incident of 1886, "the dread of imported anarchy haunted the American consciousness"). This

In that vein, the U.S. government traditionally has employed the immigration laws, particularly the provisions pertaining to the deportation and exclusion of aliens, to attack perceived threats to the domestic status quo. The assassination of President McKinley by an anarchist with a foreign-sounding name, who was in fact a U.S. citizen, along with labor strife, culminated in congressional passage of a law in 1903 providing for the exclusion of anarchists.[7] Not long after the nationalistic frenzy of World War I and the Bolshevik rise to power in the fledgling Soviet Union, Attorney General Mitchell Palmer commenced the infamous "Palmer Raids" as part of his war on the Industrial Workers of the World, which, not coincidentally, resulted in the much-publicized deportation of noncitizens involved in the labor movement.[8] Later, the U.S. government employed the immigration law's ideological provisions to promote domestic ends in a prolonged effort spanning three decades to deport labor leader Harry Bridges.[9]

A critical facet of history is often glossed over in many studies. This history reveals a strong correlation between the severe treatment that politically subversive U.S. citizens received and the constriction of the immigration laws. For example, during McCarthyism's reign in the 1950s, citizens labelled as communists undoubtedly suffered.[10] However, the burdens fell even heavier upon noncitizens. Some were deported, including those who had lived in the United States for many years and, consequently, had deep ties to this nation.[11] For a variety of reasons, the antipathy

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view is not without its detractors, however. *See* JOHN C. HARLES, POLITICS IN THE LIFEBOAT: IMMIGRANTS IN THE AMERICAN DEMOCRATIC ORDER 73–132 (1993) (arguing that immigrants enhance political stability of United States because of their strong commitment to democratic ideals).

7. *See* discussion *infra* Part II.A.

8. *See infra* text accompanying notes 59–77.

9. *See* discussion *infra* Part II.C.2.

10. *See generally* MARTY JEZER, THE DARK AGES: LIFE IN THE UNITED STATES 1945-1960, at 77–106 (1982) (analyzing impact of anticommunist crusade on American life); STEPHEN J. WHITFIELD, THE CULTURE OF THE COLD WAR (1991) (analyzing cultural war on communism in United States during 1950s).

11. *See, e.g.*, Jay v. Boyd, 351 U.S. 345, 348 (1956) (permitting Attorney General to deport 65-year-old noncitizen who entered United States in 1921); Galvan v. Press, 347 U.S. 522, 523, 531–32 (1954) (upholding deportation of man who had lived in United States since 1918); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208 (1953) (refusing re-entry into country of lawful permanent resident who had lived in United States for 25 years).

for communists could be fully acted upon with respect to noncitizens because political and judicial restraints were not in place to prevent the harshest of treatment.

As the war on communism subsided, the persecution of *citizens* for their political views waned. Though ideological scrutiny has lessened to some degree in the immigration laws, noncitizens still are subjected to politically-motivated immigration enforcement. Until 1990, the law allowed the U.S. government to exclude noncitizens, even as temporary visitors, on account of their political ideology. Congress significantly narrowed the ideological exclusion and deportation grounds in 1990.[12] Nonetheless, some ideologically-based exclusion and deportation grounds exist to this day.[13] For example, noncitizens who provide nothing more than financial support for the peaceful activities of certain political organizations have been subject to vigorous deportation efforts by the U.S. government.[14]

In sum, the U.S. government historically has employed the immigration laws in an effort to protect the established political and social order, whether it be from domestic unrest or foreign threat. In John Scanlan's words,

> aliens, in their persons and in their conception of society, threaten the existing social order. Such a conception of the social order requires that the national government maintain broad restrictionist powers so that it can contain the external threat aliens pose. The alien threat can be either physical, ideological, or both. It can involve the advent of "vast hordes" of people ready to wrest away American wealth and jobs, or the actual or potential dissemination of suspect or dangerous ideas about such matters as marriage, religion, or politics. In either case, those inside have the right to protect themselves against outsiders. This general right of self-protection endows the government with the particular right to restrict the political speech of aliens by barring their entry or enjoining their continued residence.[15]

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12. *See* discussion *infra* Part II.D.1.

13. *See* discussion *infra* Part II.D.

14. *See infra* text accompanying notes 170–85 (discussing U.S. government efforts to deport supporters of Palestinian organization).

15. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1504–05 (1988) (footnotes omitted).

As this analysis suggests, U.S. foreign relations concerns have domestic consequences. For example, nativism toward noncitizens in the late 1800s co-existed comfortably with U.S. jingoism during the Spanish-American War.[16] More recently, tension between the U.S. and Iranian governments in the 1970s resulted in the imposition of special reporting requirements on certain Iranian noncitizens in the United States and had a significant impact on anti-Iranian public opinion.[17] These episodes demonstrate how the hostility toward foreigners *outside* the nation influences hate for the "foreigner" *inside* our borders.[18]

In protecting the status quo, political elites generally define the "social order" deserving protection as well as identify those noncitizens from whom protection is necessary.[19] The government, which enjoys a wealth of enforcement discretion under the immigration laws,[20] has shaped public opinion with respect to the exclusion and deportation of politically undesirable noncitizens.[21]

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16. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 75 (2d ed. 7th prtg. 1968) (discussing nationalistic tendencies in United States during 1890s).

17. *See* Narenji v. Civiletti, 617 F.2d 745, 746–47 (D.C. Cir. 1979) (upholding special procedures calling for all nonimmigrant Iranians attending post-secondary school to report to local Immigration and Naturalization Service office); *see also* 56 Fed. Reg. 1566 (1991) (codified at 8 C.F.R. pt. 264) (responding to Iraqi invasion of Kuwait by requiring fingerprinting and photographing of virtually all nonimmigrants bearing Iraqi and Kuwaiti travel documents).

18. *See* discussion *infra* Part III.C. (considering relationship between nativism and views of citizens similar to disfavored immigrants of day).

19. *See* KEITH FITZGERALD, THE FACE OF THE NATION: IMMIGRATION, THE STATE, AND THE NATIONAL IDENTITY 77–95 (1996) (analyzing interests of U.S. immigration bureaucracy on development of immigration law and policy).

20. *See* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 455–56 (1993) (analyzing impact of discretion bestowed by Immigration and Nationality Act on executive branch); *see also* Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 866–71 (1994) (examining need for judicial review of discretionary immigration decisions); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 801–06 (1997) (arguing for more scrutinizing review by agency courts when exercising discretion on immigration decisions).

21. The dynamics surrounding the exclusion and deportation of noncitizen political subversives may differ somewhat from the exclusion and deportation of noncitizens on other grounds. While public opinion may be overshadowed by the government's independent interests in excluding and deporting political subversives, this may not be the case with respect to efforts to exclude and deport the poor, criminals, and racial minorities, groups about whom the public may have stronger views.

Obviously, anarchists, communists, and supporters of certain foreign political organizations, have not been politically popular throughout U.S. history. Today, it is the supporters of certain foreign political organizations such as those advocating the rights of Palestinians in the Middle East, who are labelled as "terrorists" and suffer the consequences. With public opinion favorably inclined, political elites without impediment may pursue efforts to exclude or deport political subversives, as exemplified by the United States government's persistent efforts before 1990 to bar entry of Marxist intellectuals.[22]

With this historical backdrop, consider the Antiterrorism and Effective Death Penalty Act of 1996 (or Antiterrorism Act)[23] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (or Immigration Reform Act).[24] Though the Antiterrorism Act's name obviously suggests concerns with combatting "terrorism," the law is a political response to deeper uncertainty in the U.S. political order, a fact illustrated by the genesis of the law. After the much publicized bombing of the federal building in Oklahoma City, the media reported that the suspects were Middle Eastern-looking, thereby suggesting that international terrorists were responsible for the horrible loss of life.[25] Increased tension

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22. *See infra* text accompanying notes 140–148.

23. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132 (Apr. 24, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 1214) [hereinafter AEDPA]; *see also Final Anti-Terrorism Bill Contains Major Immigration Changes*, 73 INTERPRETER RELEASES 521, 522–30 (1996) (highlighting AEDPA's immigration provisions); Dan Kesselbrenner, *The "Anti-Terrorism" Law*, IMMIGR. NEWSL. (National Immigration Project of the National Lawyers Guild, Inc., Boston, Mass.), June 1996, at 1, 1 (analyzing AEDPA and concluding that law is part of trend by developed countries to harshly treat noncitizens). The AEDPA also modified habeas corpus review of criminal convictions in a number of important ways. *See* Felker v. Turpin, 116 S. Ct. 2333, 2334–35 (1996) (upholding certain provisions of Act dealing with habeas reform); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (analyzing habeas corpus provisions of AEDPA).

24. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208 (Sept. 30, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) [hereinafter IIRIRA]; *see also* Juan P. Osuna, *The 1996 Immigration Act: Criminal Aliens and Terrorists*, 73 INTERPRETER RELEASES 1713 (1996) (analyzing antiterrorism provisions of AEDPA as amended by IIRIRA).

25. *See* Emily M. Berstein, *Islam in Oklahoma: Fear About Retaliation Among Muslim Groups: Arab-American Groups Condemn Act*, N.Y. TIMES, Apr. 21, 1995, at A26 (expressing concern with possible negative public reaction toward Muslims residing in Oklahoma after bombing); Walter Goodman, *Wary Network Anchors Battle Dubious*

between the United States and various Middle East countries in recent years, caused by the Gulf War, the indictment and ultimate conviction of Middle Eastern immigrants for the World Trade Center bombing in New York City,[26] and various terrorist incidents abroad, made this suspicion plausible, if not probable, to the American public. In signing the Antiterrorism Act into law, President Clinton acknowledged that the law was enacted in response to the Oklahoma City bombing and emphasized that it would help combat international terrorism.[27] This recognition, however, ignores the fact that a homegrown group of *bona fide* American citizens, including a former U.S. Army officer, will stand trial for the bombing.[28] Far from simply aimed at "terrorism," the immigration provisions of the Antiterrorism Act sweep far afield of this goal and permit the deportation of many lawful permanent residents with family and friends in the United States who in no way were terrorists but have been convicted of certain criminal offenses.[29]

One is left to search for an explanation as to why Congress passed such a draconian immigration law in response to an act of domestic terrorism apparently attributable to U.S. citizens. Legal and political limits exist on a government's ability to throttle domestic dissent, whether it be from private militia on the right[30] or

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Scoops, N.Y. TIMES, Apr. 20, 1995, at B12 (reporting that U.S. Congressman Dave McCurdy identified Islamic terrorists as early prime suspects in Oklahoma City bombing).

26. *See* United States v. Rahman, 854 F. Supp. 254, 258 (S.D.N.Y. 1994) (summarizing indictment of Sheik Omar Abdel Rahman, blind Egyptian cleric, for seditious conspiracy in connection with World Trade Center bombing and other violent acts); Joseph P. Fried, *Sheik and Nine Followers Guilty of Conspiracy of Terrorism*, N.Y. TIMES, Oct. 2, 1995, at A1 (reporting that Rahman was convicted of conspiring to carry out terrorists acts).

27. *See* Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 17 WKLY. COMP. PRES. DOC. 719, 721 (Apr. 24, 1996) (calling legislation "a real step in the right direction" toward combatting international terrorism).

28. *See* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2074–75 & nn.3–4 (1996) (summarizing roots of AEDPA in Oklahoma City bombing).

29. *See* Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1 (offering examples of instances in which lawful permanent residents accused of relatively minor criminal offenses might be deported).

30. This is not to suggest that government never violates the rights of citizens. Recent history suggests otherwise. *See* Randy E. Barnett, *Foreword: Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443, 454–57 (1995) (citing killings of Randy Weaver's family members in Ruby Ridge, Idaho and Branch Davidians in Waco, Texas, by federal law enforcement officers as examples); Malcolm Wallop, *Tyranny in America: Would Alexis de Toqueville Recognize This Place?*, 20 J. LEGIS. 37, 50–51 (1994) (describing from U.S. Senator's perspective incidents of federal government run amok, including killings by

environmental groups, such as Earth First!, on the left.[31] Importantly, the First Amendment of the Constitution offers much-cherished protections to citizens advocating unpopular political views.[32] In addition, citizens cannot forcibly be ejected from the country for any reason, including for engaging in political expression protected by the Constitution. Indeed, the very idea of deporting citizens is unthinkable in the established legal order. At the same time, restrictions on free expression and the deportation of noncitizens are sanctioned by law.

Contrary to the concrete legal protections offered citizens, the courts generally have been unwilling to protect the political rights of noncitizens. For example, the courts have permitted the deportation of aliens who engaged in expression that would have been constitutionally protected if uttered by U.S. citizens.[33] Limited judicial oversight embodied by the much maligned, yet still vital, plenary power doctrine[34] shields congressional action, thereby allowing political forces to lash out with ferocity at noncitizens. Consequently, congressional action has moved significantly further in stifling the free expression of noncitizens than of citizens.

This contribution to the Symposium on Immigration Law and Crime analyzes how the Antiterrorism Act and the Immigration

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federal officers in Waco, Texas and Ruby Ridge, Idaho); *see also* Joelle E. Polesky, Comment, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1612–20 (1996) (analyzing constitutional infirmities with state statutes regulating private militias).

31. *See* Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 459–60 (9th Cir. 1994) (explaining allegations that FBI agents and state and local law enforcement officers violated Earth First! members' constitutional rights).

32. *See* U.S. CONST. amend. I (guaranteeing freedom of speech and press); *see, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 137 (1992) (rejecting county ordinance imposing fee on public demonstration by Nationalist Movement, which sought to demonstrate in opposition to federal holiday commemorating birthday of Martin Luther King, Jr.); R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (invalidating hate crime statute in case in which defendant was convicted of burning cross on lawn of African-American family); United States v. Eichman, 496 U.S. 310, 318–19 (1990) (holding that criminal prosecution of citizen for burning of flag violated First Amendment); Texas v. Johnson, 491 U.S. 397, 420 (1989) (stating that First Amendment protects citizens with unpopular political views and explaining that burning of U.S. flag was form of political expression); Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (holding in case involving Ku Klux Klan that government may only criminalize speech when speaker intended to incite "imminent lawless action" and speech has clear and present danger of producing that result).

33. *See infra* text accompanying notes 48–192.

34. *See infra* text accompanying notes 193–228.

Reform Act reflect a larger historical dynamic that teaches much about the relationship between domestic subordination and immigration law. Congress has acted repeatedly to penalize foreign "subversives," in no small part because the Constitution imposes limits on the government's power to punish citizens on the political fringes. So long as the constitutional safeguards for political expression of noncitizens and citizens differ dramatically, recurring examples of punitive legislation like the Antiterrorism Act and the Immigration Reform Act can be expected. Although in agreement with much of the literature written about the need for abrogation of the plenary power doctrine, the central point of this Article differs from that body of work. It argues that the lack of constitutional protections for noncitizens helps to explain the recurrent backlash against them.

This dynamic further demonstrates how important the constitutional safeguards are for citizens. Although politically unpopular citizens have at times in U.S. history suffered from shabby treatment, noncitizens have been treated far worse. Indeed, the treatment of noncitizens suggests the extremes that the government might go in order to suppress domestic political dissent *by citizens* if the Constitution failed to offer protections, or alternatively, if courts minimized or limited the protections through constitutional interpretation. More generally, the U.S. government's treatment of noncitizens reveals much about this society's views towards citizens who share some of the same characteristics of the noncitizens that the government is punishing under color of law.

II. A HISTORY OF EXCLUSION AND DEPORTATION OF POLITICAL UNDESIRABLES

Many people in the United States trumpet the fact that the First Amendment's protection of free expression serves as the cornerstone of democracy.[35] As Justice Brandeis eloquently stated, the Framers of the Constitution

> believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be fu-

35. *See* U.S.CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech").

> tile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[36]

In a similar vein, Justice Holmes defended free speech on the grounds that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[37] Indeed, even those who advocate a narrow view of First Amendment protections would shield "political" speech from regulation.[38]

Oddly enough, for a nation that trumpets its deep commitment to political freedom, the United States has a long history of excluding and deporting political subversives.[39] In the earliest days of the republic, Congress, for partisan political reasons, passed two laws of dubious constitutionality: the Alien Enemy Act, which allowed the President to deport "alien enemies" and other noncitizens who were "natives, citizens, denizens, or subjects of a hostile nation or government,"[40] and the Alien Act, which authorized the President to deport aliens reasonably suspected of "treasonable or secret machinations against the government."[41] Though the acts were rarely invoked, the laws still may have resulted in "the mass exodus

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36. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (footnote omitted).

37. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

38. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (arguing that only "explicitly political" speech should be constitutionally-protected).

39. *See* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 61.04[2], at 61–58 to 61–63 (1996) (recounting history of exclusion of political subversives); EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 443–46 (1981) (describing use of deportation of political subversives); Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1, 53–57 (1987) (discussing history of ideological exclusion).

40. Alien Enemy Act of July 14, 1798, ch. 66, § 1, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–23 (1994)).

41. Alien Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 571 (expired 1800); *see* CLEMENT L. BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 51–55 (1912) (summarizing provisions of act and fact that "Jefferson, Madison and other jurists and statesmen . . . denounced the act, not only as being unconstitutional, but as opposed to recognized precepts of international law adopted and cherished by civilized nations.").

of frightened foreigners."[42] These acts marked the beginning of a pattern in which domestic political tensions provoked responses directed at "foreigners."

In the late nineteenth century, the United States Supreme Court facilitated passage of laws permitting the exclusion and deportation of political undesirables by embracing the plenary power doctrine.[43] The first major federal efforts to regulate immigration occurred in the late 1880s[44] with the infamous Chinese exclusion laws.[45] Designed to halt the immigration of persons from China to the United States, these laws were upheld by the Supreme Court.[46] This judicial hands-off approach to the federal immigration laws may well have encouraged, and surely did not discourage, Congress from passing later laws permitting the exclusion and deportation of noncitizens of certain political persuasions, including anarchists, organized labor leaders, and Communist Party members.[47]

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42. JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 175 (1956).

43. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (declaring that "[t]he right to exclude or expel all aliens, or any class of aliens [is] an inherent right of every sovereign and independent nation . . . ."); *The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581, 609 (1889) (holding that "[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the United States, as a part of these sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained by anyone.").

44. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–83 (1993) (analyzing history of state regulation of immigration before federal intervention into immigration arena). Before federal regulation of immigration, the states regulated immigration into their territories in a variety of ways. *See id.* at 1834.

45. *See* Act of May 5, 1892, ch. 60, 27 Stat. 25, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; Act. of Sept. 13, 1888, ch. 1015, 25 Stat. 476, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; Act of July 5, 1884, ch. 220, 23 Stat. 115, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600; *see generally* LUCY E. SALYER, LAWS HARSH AS TIGERS 1–116 (1995) (considering development and enforcement of Chinese exclusion laws).

46. *See Fong*, 149 U.S. at 711; *The Chinese Exclusion Case*, 130 U.S. at 609.

47. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 859 (1987) (stating that "[t]he *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension.").

A. *The Haymarket Riots*

Ahead of the times, organized labor in the 1880s pressed for an eight-hour work day. In support of that end, speakers, including some self-proclaimed anarchists, advocated labor solidarity at a rally in Chicago's Haymarket Square in 1886.[48] When police sought to disburse the crowd, a bomb exploded and the police fired on the crowd.[49] The Supreme Court upheld the convictions of several anarchists, including two foreign-born persons sentenced to death, for their involvement in the bombing.[50]

After the Haymarket incident, fears of foreign-fomented anarchy grew.[51] The assassination of President William McKinley in 1901 by anarchist Leon Czolgosz, who was a native-born citizen but was assumed by many to be an immigrant because of his surname, triggered immediate congressional action.[52] The Immigration Act of 1903 permitted the exclusion of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials."[53] The new law "reflected broader national concerns about radicals in the labor movement. A growing belief that the 'new immigrants' from Eastern and Central Europe held political values that threatened the existing social and political status quo helped fuel the attack on anarchism."[54]

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48. *See* PAUL AVRICH, THE HAYMARKET TRAGEDY 181–96 (1984) (discussing anarchists' rally in Haymarket Square); HENRY DAVID, THE HISTORY OF THE HAYMARKET AFFAIR 194, 198–204 (2d ed. 1958) (describing events surrounding Haymarket riots).

49. *See* HENRY DAVID, THE HISTORY OF THE HAYMARKET AFFAIR 204 (2d ed. 1958) (depicting police conduct after explosion in Haymarket Square).

50. Spies v. Illinois, 123 U.S. 131, 182 (1887).

51. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 54–63 (2d ed. 7th prtg. 1968) (analyzing rise of nativist sentiment during this period).

52. *See* SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, STAFF REP.: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 732 (1981) (linking passage of Immigration Act of 1903 to assassination of President McKinley).

53. Immigration Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214, *repealed by* Immigration Act of February 5, 1917, ch. 29, § 38, 39 Stat. 874, 897. The Immigration Act of February 20, 1907, for the most part carried forward the ideological exclusions of the 1903 law. *See* Immigration Act of February 20, 1907, ch. 1138, § 43, 34 Stat. 898, 899, *repealed by* Immigration Act of February 5, 1917, ch. 29, § 38, 39 Stat. 874, 897.

54. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1493 (1988).

Beginning a pattern that prevailed for most of the twentieth century, the Supreme Court in the landmark case of *United States* ex rel. *John Turner v. Williams*[55] rejected a challenge to the application of the Immigration Act of 1903.[56] The following is an excerpt from one of John Turner's speeches that resulted in his deportation:

> If no work was being done, if it were Sunday for a week or a fortnight, life in New York would be impossible, and the workers, gaining audacity, would refuse to recognize the authority of their employers and eventually take to themselves the handling of the industries. . . . All over Europe they are preparing for a general strike, which will spread over the entire industrial world. Everywhere the employers are organizing, and to me, at any rate, as an anarchist, as one who believes that the people should emancipate themselves, I look forward to this struggle as an opportunity for the workers to assert the power that is really theirs.[57]

Finding that the law permitted Turner's deportation, the Supreme Court emphasized that "as long as human governments endure they cannot be denied the power of self-preservation."[58]

The 1903 Act upheld in *Turner* represented an overreaction to tragic violence. Mere belief in anarchism by aliens did not cause the bombing in Chicago. Nor did anarchistic immigrants cause a citizen to assassinate the President. In important ways, the historical context surrounding the 1903 Act resembles that milieu in which Congress passed the Antiterrorism Act: a horrible event

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55. 194 U.S. 279 (1904).

56. *See Turner*, 194 U.S. at 293–95 (contemplating meaning of "anarchist" and concluding that Act's exclusion of anarchists was constitutional).

57. *Id.* at 283 (quoting one of John Turner's addresses).

58. *Id.* at 294; *see* John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1499–1505 (1988) (analyzing influence of sovereignty theory on development of case law on ideological exclusions in immigration laws). *But see* Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1096 (1996) (stating that human rights considerations place limits on sovereign power to exclude immigrants); James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 804–05 (1983) (challenging notion that sovereign powers of nations allows unlimited power to exclude); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1002–31 (arguing that nation's absolute sovereignty has lost intellectual force due to growing respect for human rights under international law).

wrongfully, at least initially, attributed to foreign radicals triggered congressional overreaction.

B. *The Wobblies and the Palmer Raids*

The rise and fall of the Industrial Workers of the World (IWW), popularly known as the "Wobblies," represents an infamous time in U.S. history.[59] In the early twentieth century, the IWW aggressively organized the industrial workers who had for the most part been ignored by the craft unions of the American Federation of Labor. "In nearly every state in the Union, Wobblies were clubbed, tarred and feathered, deported, shot, tortured, maimed, occasionally lynched, and universally despised."[60] The government, blaming foreign agitators for domestic labor unrest, began an all-out war on the IWW.[61] The impetus for this campaign was bolstered by World War I, which "gave to . . . employers and to others opposed to the I.W.W. a golden opportunity to associate the syndicalist philosophy and militant tactics of the Wobblies with violence, terrorism, lack of patriotism, pro-Germanism and, later, with radicalism and all the violent characteristics attributed to the Bolshevik Revolution."[62] During the same general time frame, antiforeigner, anti-anarchist sentiment was inflamed by the notorious murder trial of two Italian immigrant anarchists, Nicola Sacco and Bartolomeo Vanzetti.[63]

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59. *See* 4 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE INDUSTRIAL WORKERS OF THE WORLD, 1905–07, at 23–24 (1965) (listing factors that influenced creation of IWW, including existence of large numbers of disfranchised immigrants).

60. JOHN CLENDENIN TOWNSEND, RUNNING THE GAUNTLET: CULTURAL SOURCES OF VIOLENCE AGAINST THE I.W.W. 3 (1986).

61. *See* WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933, at 5–8 (2d ed. 1994) (explaining that IWW was "most feared radical association in the country").

62. ELDRIDGE FOSTER DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 22–23 (1939) (footnotes omitted).

63. *See generally* PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND *passim* (1991) (discussing events leading up to trials of Sacco and Vanzetti); FRANCIS RUSSELL, SACCO & VANZETTI: THE CASE RESOLVED (1986) (asserting that Sacco and Vanzetti trials were conducted in atmosphere of antiradical and antiforeign prejudice).

In the Anarchist Act of 1918,[64] Congress clarified any doubts about the intent of the Immigration Act of 1903. The Anarchist Act permitted the exclusion or deportation of "aliens who *believe in* or advocate the overthrow by force or violence of the Government of the United States or of all forms of law."[65] By clarifying ambiguities about which noncitizens were deportable or excludable, Congress hoped to avoid "long and hurtful delays on appeal to the courts."[66] Similar concerns motivated Congress in 1996 to include provisions in the Antiterrorism Act and the Immigrant Reform Act that significantly limit judicial review.[67]

The end of World War I failed to quell the concerns. The stated purpose of Attorney General Alexander Mitchell Palmer's notorious Palmer Raids was to locate subversives responsible for a series of bombings.[68] In 1919 and 1920, the federal government rounded up, interrogated, and detained, often for lengthy periods, suspected anarchists. The government deported many aliens, including many Wobblies, and the courts generally upheld the deportations.[69] For example, under the watchful eye of Federal Bureau of Investigation Director J. Edgar Hoover,[70] a famous leftist rabble-rouser

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64. Anarchist Act of October 16, 1918, ch. 186, 40 Stat. 1012, *amended by* 8 U.S.C. § 137 (1925–26) (repealed 1952).

65. *Id.* § 1 (emphasis added).

66. H.R. REP. No. 65–645, at 1 (1918).

67. *See infra* text accompanying notes 183–89, 223–28 (discussing certain AEDPA provisions limiting judicial review of deportation orders).

68. *See* Robert D. Warth, *The Palmer Raids*, 48 S. ATLANTIC Q. 1, 2 (1949) (discussing raids as response to bombings); *see generally* EDWIN P. HOYT, THE PALMER RAIDS 1919–1920: AN ATTEMPT TO SUPPRESS DISSENT (1969) (describing history of Palmer Raids).

69. *See, e.g.*, United States *ex rel.* Diamond v. Uhl, 266 F. 34, 39–40 (2d Cir. 1920) (upholding deportation of Italian noncitizen for advocating assassination of public officials and unlawful destruction of property); United States *ex rel.* Rakics v. Uhl, 266 F. 646, 648, 652 (2d Cir. 1920) (affirming deportation of Hungarian immigrant belonging to IWW); Guiney v. Bonham, 261 F. 582, 583, 586 (9th Cir. 1919) (denying writ of habeas corpus to British Columbian native charged with advocating unlawful destruction of property). A refreshing exception to this pattern is *Ex parte* Jackson, 263 F. 110, 112 (D. Mont. 1920), in which Judge Bourquin granted a writ of habeas corpus and decried the unlawful conduct of the government raiders who "perpetrated a reign of terror, violence, and *crime against citizen and alien alike*." *Id.* (emphasis added).

70. *See* RICHARD DRINNON, REBEL IN PARADISE: A BIOGRAPHY OF EMMA GOLDMAN 222 (1961) (claiming that Hoover "worked long and hard" to ensure Goldman's deportation).

named Emma Goldman was deported to the Soviet Union on a ship dubbed the "Soviet Ark."[71]

Leading legal luminaries of the day, including Harvard Law School professors Zechariah Chafee, Jr., Felix Frankfurter, and Roscoe Pound, denounced the Palmer Raids.[72] In the scathing *Report upon the Illegal Practices of the United States Department of Justice*,[73] they recognized that "[p]unishments of the utmost cruelty, and heretofore unthinkable in America, have become usual. Great numbers of persons arrested, *both aliens and citizens*, have been threatened, beaten with blackjacks, struck with fists, jailed under abominable conditions, or actually tortured."[74] The damning conclusion of the report speaks for itself:

> Since these illegal acts have been committed by the highest legal powers in the United States, there is no final appeal from them except to the conscience and condemnation of the American people. American institutions have not in fact been protected by the Attorney General's ruthless suppression. On the contrary those institutions have been seriously undermined . . . . *No organizations of radicals acting through propaganda over the last six months could have created as much revolutionary sentiment in America as has been created by the acts of the Department of Justice itself.*[75]

Such stinging indictments had little impact on the political process. In 1920, Congress amended the Anarchist Act of 1918 to expand the ideological grounds upon which noncitizens could be excluded and deported.[76] The legislative history of the 1920 Act makes it clear that the executive branch promoted the amendment

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71. *See* EDWIN P. HOYT, THE PALMER RAIDS 1919–1920: AN ATTEMPT TO SUPPRESS DISSENT 73–82 (1969) (discussing Emma Goldman's imminent deportation on "Soviet Ark" and detailing Hoover's participation in activities surrounding deportations).

72. *See* MICHAEL R. BELKNAP, COLD WAR POLITICAL JUSTICE 16, 134 (1977) (noting opposition by Zechariah Chafee, Jr. and Felix Frankfurter to peacetime sedition laws and Palmer Raids); MILTON R. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 123 (Greenwood Press, Inc. 1977) (1953) (commenting on public condemnation of Palmer Raids by Roscoe Pound).

73. R.G. BROWN ET AL., REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1920).

74. *Id.* at 4 (emphasis added).

75. *Id.* at 7 (emphasis added).

76. *See* Anarchist Act of June 5, 1920, ch. 251, 41 Stat. 1008, *amended by* 8 U.S.C. § 137 (1925–26) (repealed 1952).

to facilitate the deportation of noncitizens, particularly IWW members.[77]

As it did with the 1903 Act, the Supreme Court upheld congressional efforts to penalize noncitizen anarchists in the 1918 and 1920 laws. In *United States* ex rel. *Tisi v. Tod*,[78] the Court affirmed a deportation order based on Catoni Tisi's distribution of material in English calling for the overthrow of the government even though he could neither understand English nor the nature of the leaflets.[79]

During this period, the U.S. government was ready and willing to suppress "radical" labor by cracking down both on citizens and especially noncitizens. Although repression of citizens occurred in schemes such as the Palmer Raids, more extreme measures, as the mass deportations on the "Soviet Ark" demonstrate, could lawfully be, and were taken against, noncitizens accused of the crime of radicalism. Political concerns with noncitizens surfaced in other areas as well. For example, states, which long had extended suffrage to certain noncitizens, began disenfranchising them, with disfranchisement the norm today.[80]

It is important to note that less than 1,250 aliens were deported between 1911 and 1940 due to their being labelled subversives or anarchists,[81] and fewer than 50 were excluded on ideological grounds.[82] Raw numbers, however, cannot reveal how many citi-

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77. *See* H.R. REP. No. 66-504, at 7 (1919) (stating "conclusion of the Committee" that "the joining of an organization such as the Industrial Workers of the World by an alien is of itself the overt act sufficient to warrant deportation").

78. 264 U.S. 131 (1924).

79. *See Tisi*, 264 U.S. at 133-34 (detailing facts surrounding deportation order); *see also* United States *ex rel.* Vajtauer v. Commissioner of Immigr., 273 U.S. 103, 113 (1927) (affirming deportation order based on 1918 Act, as amended in 1920, of Czechoslovakian newspaper editor who advocated overthrow of U.S. government by violence).

80. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1415-16 (1993) (discussing events culminating in end to alien suffrage).

81. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 166 (1996) (Table 66: Aliens Deported by Cause Fiscal Years 1908-80).

82. *See id.* at 162 (Table 61: Aliens Excluded by Cause Fiscal Years 1892-1984). However, State Department consular officers may have excluded many more noncitizens seeking visas in their native country. *Cf.* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 76 (1974) (Table XXII: Immigrant and Nonimmigrant Visas Refused) (reporting statistical data showing that, in final consular decisions, over 200 immigrant visas and over 350 nonimmigrant visas had been denied on ideological grounds in fiscal year 1974). Con-

zens and noncitizens might have been chilled from engaging in political activity because of the possibility that they would be penalized under law.

C. *The "Communist Threat"*

The treatment of citizens accused of communism during the McCarthy era was nothing less than horrendous. The treatment of noncitizens accused of similar political sympathies was even worse. Several stories of noncitizens who the government attempted to deport, and in some instances did deport, illustrate the truth of this assertion.

1. Some Chilling Tales

The prior section discussed a number of cases in which the courts deferred to the immigration judgments of Congress and the executive branch. A notable exception to this acquiescence is the United States Supreme Court's decision in *Kessler v. Strecker*,[83] a case decided well before the full blown war on communism in this country. Joseph Strecker, born an Austrian subject, immigrated to the United States in 1912 and later joined the Communist Party.[84] By the time the government instituted deportation proceedings against Strecker under the 1918 and 1920 Acts, Strecker was no longer a party member. The Court reversed the deportation order and held that there was no indication that Congress intended for the deportation of *former* members of the Communist Party.[85] Congress quickly responded by enacting the Alien Registration Act of 1940, which allowed for the deportation of former party members.[86] Among other things, the Act provided for the deportation of any alien convicted of a crime under the Act, which included distribut-

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sular decisions denying visas are not subject to judicial review. *See* James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991) (advocating judicial review of consular visa denials based on findings of study).

83. 307 U.S. 22 (1939).

84. *See Strecker*, 307 U.S. at 23–25 (detailing Strecker's activities after entry into United States).

85. *Id.* at 29–33.

86. *See* SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, STAFF REP.: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 737 (1981) (stating that Congress enacted Alien Registration Act in response to Supreme Court's decision in *Kessler v. Strecker*).

ing literature advocating the overthrow of the government or knowingly belonging to a group advocating this aim.[87]

During the McCarthy era, the U.S. government vigorously enforced the ideological exclusion and deportation grounds in the immigration laws.[88] Indeed, suspicion about a noncitizen's loyalties could have far-reaching consequences with respect to whether there would even be a hearing on the matter.[89] Important Supreme Court decisions of that period, such as *United States* ex rel. *Knauff v. Shaughnessy*[90] and *Shaughnessy v. United States* ex rel. *Mezei*,[91] stand to this day as landmarks that demonstrate the harshness with which noncitizens may be treated under the U.S. Constitution.[92]

In *Knauff*, the Court held that the United States could exclude without a hearing, based on confidential information, Ellen Knauff,

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87. *See* Alien Registration Act of 1940, ch. 439, §§ 1–4, 54 Stat. 670, 670–76 (1940) (current version at 18 U.S.C. §§ 2385–87 (1994)).

88. *See* Galvan v. Press, 347 U.S. 522, 529–30 (1954) (permitting deportation of noncitizen because of past membership in Communist Party); Carlson v. Landon, 342 U.S. 524, 544–46 (1952) (allowing detention of noncitizen without bail in order to prevent potential inculcation of "doctrines of force and violence into the political philosophy of the American people"); Ocon v. Guercio, 237 F.2d 177, 179–80 (9th Cir. 1956) (concluding that law making membership in Communist Party ground for deportation did not violate Constitution); United States *ex rel.* Avramovich v. Lehmann, 235 F.2d 260, 262–63 (6th Cir. 1956) (recognizing authority of Attorney General to label organizations as "communist" and that membership in such organizations may be grounds for deportation); *see also* Michael A. Scaperlanda, *The Paradox of a Title: Discrimination Within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1057 (noting that long-time permanent residents during McCarthy era were deported or excluded based solely on suspected communist involvement); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 939–42 (1987) (discussing government justification of ideological exclusions during McCarthy era).

89. *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 586–87 (1952) (asserting that presence of noncitizen may be revoked at will of government because noncitizen elects to "continue the ambiguity of his allegiance").

90. 338 U.S. 537 (1950).

91. 345 U.S. 206 (1953).

92. *Cf.* Skinner v. Railway Executives' Assoc., 489 U.S. 602, 635 (1989) (Marshall & Brennan, JJ., dissenting) (offering McCarthy era as reminder that "when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it"). One commentator has discussed in detail the human stories behind *Knauff* and *Mezei*. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954–85 (1995); *see also* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 984–91 (analyzing this period of development of plenary power doctrine through analysis of *Knauff*, *Mezei*, *Harisiades*, and *Galvan*).

the noncitizen wife of a citizen, as permitted by certain war-time laws and regulations, on the ground that her admission would be prejudicial to the national security of the United States.[93] The Court emphasized that the "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not from legislative power alone but is inherent in the executive power to control the foreign affairs of the nation."[94]

Mezei was perhaps even more egregious. Ignatz Mezei lawfully immigrated to the United States and lived without incident from 1923 to 1948.[95] Upon return from an attempt to visit his Italian mother in Rumania, the U.S. government denied him re-entry to the country and detained him on Ellis Island.[96] Like Ellen Knauff, Mezei was excluded without a hearing based on confidential information on the ground that his admission would have been prejudicial to the national security and that even revealing the information on which this conclusion was based would prejudice national security.[97] Because no other nation would accept Mezei once the United States classified him as an undesirable, he faced the prospect of indefinite detention.[98] Nonplussed by this potential, the Supreme Court upheld the exclusion and emphasized the importance of U.S. sovereignty: "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."[99]

Hearings for Ellen Knauff and Ignatz Mezei ultimately revealed the weakness of the government's cases against them.[100] Due to public support and a private bill pending in Congress, the Attorney

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93. *See Knauff*, 338 U.S. at 546–47.

94. *Id.* at 542 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

95. *Mezei*, 345 U.S. at 208.

96. *Id.*

97. *Id.*

98. *Id.* at 208–09.

99. *Id.* at 210 (citing, *inter alia*, *The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581 (1889); *see* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Harisiades v. Shaughnessy, 342 U.S. 580 (1952)). *But see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391–96 (1953) (criticizing "brutal conclusions" of *Knauff* and *Mezei*).

100. *See* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 237 (1983) (observing that government's evidence against Ellen Knauff was deemed insufficient by BIA to justify exclusion).

General held a hearing for Ellen Knauff.[101] Rejecting the government's claims, the Board of Immigration Appeals concluded that there was neither substantial evidence that Knauff gave secret information to foreign authorities nor that she would engage in subversive activities if admitted into the United States.[102] Similarly, the Attorney General granted Mezei an exclusion hearing, which revealed that he was a former member of the Hungarian Working Sick Benefit and Education Society in New York City.[103] Later, this group became a Hungarian Lodge of the International Workers Order, which the United States government classified as a communist organization.[104] Although a former secretary and president of the lodge, Mezei denied having ever been a member of the Communist Party.[105] The Board of Special Inquiry found Mezei excludable from the United States but, because of his minor role in the Communist Party, recommended to the Attorney General that Mezei be paroled into the country.[106]

Other noncitizens charged with communist sympathies were not nearly as lucky as Knauff and Mezei. In *Harisiades v. Shaughnessy*,[107] the Supreme Court upheld the deportation of three former Communist Party members under the Alien Registration Act of 1940.[108] In so doing, the Court elaborated on its fears and the need for a limited judicial role in reviewing the laws passed by Congress attacking communism:

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101. *See* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 56–57 (1985) (contending that Elizabeth Knauff was granted hearing amid growing national attention); MILTON R. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 49 (Greenwood Press, Inc. 1977) (1953) (explaining that Knauff was granted hearing because of public concern).

102. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 963–64 (1995) (describing Knauff's hearing before Board of Immigration Appeals).

103. *Id.* at 971–72.

104. *See id.* at 972–73 (reiterating facts of *Mezei*). The U.S. government had previously ordered some members of the International Workers Order (IWO) to be deported. *See In re* D, 4 I. & N. Dec. 578, 579, 588 (B.I.A. 1951) (sustaining deportation of Ukrainian immigrant who was IWO national committee member); *In re* L, 1 I. & N. Dec. 450, 458 (B.I.A. 1943) (finding that noncitizen was inadmissible because of IWO membership).

105. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 974–75 (1995).

106. *Id.* at 983–84.

107. 342 U.S. 580 (1952).

108. *Harisiades*, 342 U.S. at 593–96.

> *Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. . . .* [W]e have an Act of one Congress which, for a decade, subsequent Congresses have never repealed but have strengthened and extended. We, in our private opinions, need not concur in Congress'[s] policies to hold its enactments constitutional. *Judicially we must tolerate what personally we may regard as legislative mistake.*[109]

In a concurring opinion, Justice Frankfurter put an exclamation point on the Court's statement about limited judicial review: "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[110]

With the Cold War escalating, Congress passed the Internal Security Act of 1950, which listed Communist Party members and affiliates as persons who could be excluded.[111] In describing the necessity for the legislation, Congress stated that

> *[t]he Communist network in the United States is inspired and controlled in large part by foreign agents . . . .* There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of who are free to roam the country at will . . . . One device for infiltration by Communists is by procuring naturaliza-

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109. *Id.* at 590 (emphasis added); *see* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 988 & n.102 (describing extreme hardships of deportation faced by former Communist Party members in *Harisiades*). In *Harisiades*, the Court arguably applied the same narrow interpretation of First Amendment protections then applicable to citizens at the time. *See Harisiades*, 342 U.S. at 591–92 (stating in conclusory fashion that First Amendment does not protect citizens who advocate change by force and violence); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 87 (1992) (suggesting that *Harisiades* applied ordinary First Amendment standards in evaluating deportation ground); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989) (arguing to same effect); American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1077–82 (C.D. Cal. 1989) (reasoning that *Harisiades* held that same First Amendment standards apply to both noncitizens and U.S. citizens), *rev'd on other grounds*, 940 F.2d 445 (9th Cir. 1991).

110. *Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring).

111. Pub. L. No. 81–831, § 22, 64 Stat. 987, 1006–07 (1950); *see Carlson*, 342 U.S. at 537–47 (upholding various portions of Act in face of constitutional challenge); *see generally* Charles Gordon, *The Immigration Process and National Security*, 24 TEMP. L.Q. 302 (1950) (describing provisions and procedures of Internal Security Act of 1950).

> tion for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.[112]

In *Galvan v. Press*, the Supreme Court upheld, under section 22 of the Internal Security Act, the deportation of Robert Galvan, an immigrant from Mexico who entered the United States in 1918.[113] Galvan had been a member and officer of the Spanish Speaking Club, which the U.S. government classified as a Communist Party organization.[114] The Court reiterated the rationale for limited judicial oversight:

> any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government, and such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[115]

The harshness of the result is apparent from Justice Black's dissent:

> Petitioner has lived in this country thirty-six years, having come here from Mexico in 1918 when only seven years of age. He has an American wife to whom he has been married for twenty years, four children all born here, and a stepson who served his country as a paratrooper. Since 1940 petitioner has been a laborer at the Van Camp Sea Food Company in San Diego, California. In 1944 petitioner became a member of the Communist Party. Deciding that he no longer wanted to belong to that party, he got out sometime around 1946 or 1947. . . . [D]uring this period of his membership the Communist Party functioned "as a distinct and active political organ-

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112. Internal Security Act of 1950, Pub. L. No. 81–831, § 2(12)–(14), 64 Stat. 987, 988–89 (1950) (emphasis added); *see* H.R. REP. NO. 81–2980 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3886, 3886–90 (echoing similar concerns with communist infiltration by foreigners in describing necessity for legislation).

113. Galvan v. Press, 347 U.S. 522, 523, 532 (1954).

114. *Galvan*, 347 U.S. at 524. Neither the Court's decision nor the record is clear on the precise nature of the "Spanish Speaking Club." It is possible that the organization was a mutual aid society ("mutualista") organized by Mexican-Americans and Mexican immigrants common in the Southwest during this era. *See* JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN-AMERICAN PEOPLE 173–75 (1993) (discussing rise of social and fraternal groups among Mexican Americans). Some mutualistas designed to improve working conditions—the precise type of activity targeted for inquisition during the Cold War—bore names similar to the Spanish Speaking Club. *See* RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION 216–18 (1972) (offering examples).

115. *Galvan*, 347 U.S. at 531.

> ization." . . . Party candidates appeared on California election ballots, and no Federal law then frowned on Communist Party political activities. Now in 1954, however, petitioner is to be deported from this country solely for his lawful membership in that party . . . . [T]here is strong evidence that he was a good, law-abiding man, a steady worker and a devoted husband and father loyal to this country and its form of Government.[116]

The McCarran-Walters Act, also known as the Immigration and Nationality Act of 1952, carried forward many provisions of the Internal Security Act.[117] The trend of judicial deference toward ideological regulation continued in *Jay v. Boyd*, in which the Supreme Court, based on confidential information, upheld the deportation under the Immigration and Nationality Act of a sixty-five-year-old noncitizen who entered the United States in 1921 and had been a member of the Communist Party from 1935 through 1940 *before* membership could serve as the basis for deportation.[118] For reasons similar to those stated in *Galvan v. Press*, namely that communist party membership was entirely legal at the time of Cecil Jay's membership, Justice Black dissented and observed that "[t]his is a strange case in a country dedicated by its founders to the maintenance of liberty under law."[119]

As this case law suggests, the ideological exclusion and deportation grounds were at their zenith during the Cold War. About 230 noncitizens were deported on ideological grounds from 1951 to 1960; this number fell precipitously to fifteen for the 1961 to 1970 time period.[120] Many more political undesirables were excluded, nearly 1100 from 1951 to 1960, before falling to 128 for the 1961 to 1970 time period.[121] These figures do not include noncitizens de-

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116. *Id.* at 532–33 (citation omitted).

117. Immigration & Nationality Act, Pub. L. No. 82–414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (1994 & Supp. I 1995)) [hereinafter INA], 8 U.S.C. §§ 1101–1555; *see generally* Jack Wasserman, *The Immigration and Nationality Act of 1952: Our New Alien and Sedition Act*, 27 TEMP. L.Q. 62, 77–89 (1953) (criticizing various provisions of Immigration and Nationality Act of 1952).

118. Jay v. Boyd, 351 U.S. 345, 360–61 (1956).

119. *Jay*, 351 U.S. at 362 (Black, J., dissenting). Justice Black criticized the majority for upholding Jay's deportation based on his Communist Party membership; ten years *after* Jay left the party, membership was made a deportation ground. *Id.* at 362–63.

120. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 166 (Table 66: Aliens Deported by Cause Fiscal Years 1908–80).

121. *Id.* at 162 (Table 61: Aliens Excluded by Cause Fiscal Years 1892–1984).

nied visas by consular officers outside the United States, which in all likelihood were much greater in number.[122]

During the McCarthy era, while many citizens accused of communist sympathies had their lives ruined,[123] noncitizens suffered even more. Noncitizens accused of holding similar political beliefs as citizens were subject to banishment from a country where they had deep and lasting ties.[124] Put differently, while citizens were punished on account of their political views, noncitizens with the same alleged sympathies were also disadvantaged by their alienage status. The underlying theory of the Supreme Court decisions during this period, like their anarchist antecedents, is that "foreign propaganda will overtake native resolve. . . . [S]ubversive aliens pose a danger that does not derive from any acts of espionage, terrorism, or revolution. Instead, the danger lies in their propensity to foment civil disorder through misrepresentations and lies, and in our propensity to be misled."[125]

2. The War Against Harry Bridges

The ordeal of Harry Bridges spanned three decades from the New Deal to the Cold War. His experience exemplifies the extent that the U.S. government has gone to deport alleged subversives and further demonstrates how domestic political concerns shape immigration law and enforcement.

"Harry Bridges was a colorful labor leader whose accomplishments on behalf of his followers were enormous. Under his leadership, the West Coast longshoremen rose from near-peonage to a respectable level of working conditions and wages."[126] Bridges im-

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122. *See supra* note 82 (explaining that consular visa decisions are not reviewable by courts).

123. *See generally* STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR (1982) (documenting harms to citizens and noncitizens whose political allegiances were challenged by government).

124. *See* Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840, 841 (1989) (noting that long-time resident aliens were deported during McCarthy era for having been Communist Party members).

125. John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1504 (1988).

126. STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 149 (1982).

migrated to the United States from Australia in 1920.[127] Responding to political pressures from shipping interests and their allies, the U.S. government instituted deportation proceedings against him in 1938 on the ground that he had been a member of, or was affiliated with, the Communist Party.[128] The hearing examiner, James Landis, Dean of the Harvard Law School, concluded that the evidence failed to support the charge.[129]

In response to the *Kessler* decision, Congress amended the immigration laws in 1940 to allow the deportation of an alien who *at any time* was a member of the Communist Party or affiliated with the Communist Party.[130] Bolstered by this congressional action, the United States again sought to deport Bridges. The hearing officer found that the Marine Workers' Industrial Union was affiliated with the Communist Party, and that Harry Bridges had been a member of both organizations.[131] Rejecting that finding, the Board of Immigration Appeals ruled that Bridges had not been a member of, or affiliated with, the Communist Party.[132] The Attorney General disagreed and ordered Bridges deported.[133]

The Supreme Court, in a refreshing divergence from earlier and later decisions, reversed.[134] The Court recognized that Bridges had been active in union work[135] and acknowledged that, although the Marine Workers' Industrial Union, with which Bridges had worked, had the "illegitimate objective of overthrowing the government by force," it also had "the [legitimate] objective of im-

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127. *Id.* at 119; *see generally* CHARLES P. LARROWE, HARRY BRIDGES: THE RISE AND FALL OF RADICAL LABOR IN THE UNITED STATES (1972) (describing Bridges's labor career).

128. *See* Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 711–16 (1984) (describing growing political pressure to deport Bridges).

129. *See* U.S. DEP'T OF LABOR, IN THE MATTER OF HARRY R. BRIDGES, FINDINGS AND CONCLUSIONS OF THE TRIAL EXAMINER 132–34 (1939) (on file with the *St. Mary's Law Journal*) (finding that opposition to "red-baiting" was not equivalent to proof of membership in Communist Party).

130. *See supra* text accompanying notes 86–87 (explaining congressional response to Supreme Court's decision in *Kessler*).

131. *See* Bridges v. Wixon, 326 U.S. 135, 140–41 (1945) (detailing Harry Bridges's participation in unions and dealings with Communist Party).

132. *Id.* at 139–40.

133. *Id.* at 140.

134. *See id.* at 156–57 (reversing deportation order).

135. *Id.* at 140–41.

proving the lot of its members in the normal trade union sense."[136] The Court emphasized that

> *[i]t is clear that Congress desired to have the country rid of those aliens who embraced the political faith of force and violence.* But we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence. *Freedom of speech and of press is accorded aliens residing in this country.*[137]

Note the inconsistency between the first and last sentence of the quotation. It can be explained, at least in part, by the limited protections offered politically-unpopular speech during this period.

In a surprisingly candid concurring opinion, Justice Murphy captured the essence of the government's persistent efforts to deport Bridges:

> The record in this case will stand forever as a monument to man's intolerance of man. *Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that . . . is guaranteed to him by the Constitution. . . . For more than a decade powerful economic and social forces have combined with public and private agencies to seek the deportation of Harry Bridges. . . .*[138]

Despite this setback, the United States unsuccessfully pursued further deportation proceedings against Harry Bridges and later fought tooth-and-nail to defeat his petition for naturalization.[139]

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136. *Bridges*, 362 U.S. at 147.

137. *Id.* at 148 (citation omitted) (emphasis added).

138. *Id.* at 157 (Murphy, J., concurring) (emphasis added). For a similarly refreshing condemnation by Justice Murphy of the anti-Japanese campaign culminating in the passage by initiative of California's "alien land law," see his concurring opinion in Oyama v. California, 332 U.S. 633, 650–74 (1948) (Murphy, J., concurring).

139. *See* United States v. Bridges, 87 F. Supp. 14 (N.D. Cal. 1949) (detailing evidentiary battle in one action brought by U.S. government against Bridges). The U.S. government later successfully prosecuted Bridges for conspiring to fraudulently secure naturalization based on his statement that he had never been a member of the Communist Party. This conviction was subsequently reversed. Bridges v. United States, 199 F.2d 811, 815 (9th Cir. 1952), *rev'd and remanded*, 346 U.S. 209 (1953). The United States government later attempted unsuccessfully to denaturalize Bridges because of his alleged Communist Party membership. *See* United States v. Bridges, 133 F. Supp. 638, 643 (N.D. Cal. 1955) (holding that government failed to establish by clear and convincing evidence that Bridges had been member of Communist Party at time of naturalization or at any time during preceding 10 years). A chronology of the efforts of the U.S. government to rid itself

Perhaps such attacks would have occurred even if Bridges had been a citizen because of his labor organizing activities. However, the mere fact that he was a noncitizen and not a full-fledged member of the national community under the law gave the government a larger arsenal of weapons with which to attack him. The government employed every weapon provided by the immigration and nationality laws in the attempt to banish and otherwise punish Harry Bridges.

D. *Modern Efforts to Monitor Political Ideology*

Governmental efforts to exclude subversives continue today to some degree.[140] However, the world has changed and the focal point no longer is the so-called "communist threat." Changes to the immigration laws reflect this change.

Until 1990, the ideological exclusions remained part and parcel of the laws, though Congress temporarily suspended them in the late 1980s.[141] Under those laws, the U.S. government excluded many foreign nationals seeking to visit the United States, such as Hortensia Allende, widow of the former Chilean president,[142] a member of the Palestine Liberation Organization,[143] a high-ranking member of the Nicaraguan government under Sandinista leadership,[144] and others.[145] As two observers have noted, "the list of

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of Bridges can be found in Appendix A to *United States v. Bridges*, 133 F. Supp. 638, 644 (N.D. Cal. 1955).

140. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 726 (1996) (stating that, "[d]uring the 'red scare' of McCarthyism, Congress wielded [plenary] power to deport long time resident aliens for their thoughts and associations. Today it continues to stand as a sentry at our gates, allowing the political branches to formulate immigration policy without the restrictions that would otherwise be required by our constitutional traditions.") (footnotes omitted).

141. *See* Foreign Relations Authorization Act, Pub. L. No. 100-204 § 901(a)(d), 101 Stat. 1331, 1399-1400 (1987) (suspending Congress's ability to deny visa petitions because of political beliefs that would be constitutionally protected if held by U.S. citizen).

142. *See* Allende v. Shultz, 605 F. Supp. 1220, 1226-27 (D. Mass. 1985) (addressing case challenging denial of nonimmigrant visa to Allende on ideological grounds).

143. *See* Harvard Law Sch. Forum v. Shultz, 633 F. Supp. 525, 531-32 (D. Mass. 1986) (enjoining Secretary of State from refusing to grant visa that would permit Palestine Liberation Organization member to participate in political debate on Middle Eastern politics), *vacated without opinion*, 852 F.2d 563 (1st Cir. 1980); *see also* Allende v. Shultz, 845 F.2d 1111 (1st. Cir. 1988) (affirming summary judgment for plaintiffs in case).

144. *See* Abourezk v. Reagan, 592 F. Supp. 880, 888 (D.D.C. 1984) (deciding challenge to denial of visa to Tomas Borge, Interior Minister of Nicaragua), *vacated and remanded*, 785 F.2d 1043 (D.C. Cir. 1986).

those excluded [under those laws] . . . reads like an intellectual and cultural honor role, including Pablo Neruda, Carlos Fuentes, Gabriel Garcia Marquez, Regis Debray, Ernst Mandel, Dario Fo, and even Pierre Trudeau."[146]

The Supreme Court characteristically has upheld these ideological restrictions. For example, in *Kleindienst v. Mandel*,[147] the Supreme Court refused to overrule the Attorney General's decision to exclude a Belgian citizen who was the editor of a socialist weekly from entering the United States to lecture at an academic conference.[148]

Despite the fact that ideological exclusions were permitted by law, such exclusions slowly declined from over thirty in 1971 to 1980 to next to nothing in 1981 to 1984.[149] There also were relatively few deportations on ideological grounds from 1971 to 1980 and so few thereafter that the INS no longer reports the data.[150] The decline of the ideological exclusion and deportation grounds unquestionably represented progress. At the same time, however, the government has retained powers to attack noncitizens deemed to be ideologically unfit to remain in the United States.

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145. *See, e.g.*, Arthur C. Helton, *Reconciling the Power to Bar or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals*, 11 FORDHAM INT'L L.J. 467, 467 (1988) (giving examples); Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 749–51 (1985) (discussing cases in which visa denials to foreign lecturers were upheld); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 935–36 (1987) (offering example of exclusion of former four-star general in Italian Air Force as speaker denied visa for ideological reasons); *see also* Randall v. Meese, 854 F.2d 472, 472–73 (D.C. Cir. 1988) (reviewing procedural history in case in which Immigration & Naturalization Service sought to bar award of lawful permanent resident status to noted writer and photographer Margaret Randall on ground that her work reflected communist beliefs).

146. Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 723 (1985) (footnote omitted).

147. 408 U.S. 753 (1972).

148. *See Mandel*, 408 U.S. at 770 (affirming Attorney General's decision to exclude Belgian journalist and Marxian theoretician because Attorney General proffered "facially legitimate and bona fide reason" that Mandel had violated terms of earlier admissions).

149. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 162 (1996) (Table 61: Aliens Excluded By Cause Fiscal Years 1892–1984 and Table 62: Aliens Excluded By Cause Fiscal Years 1985–94).

150. *See id.* at 166.

1. The 1990 Act: Limits on and Opportunities for Censorship

Ultimately, the consistent, persuasive criticism of the ideological exclusions and their incompatibility with the Constitution convinced Congress to drastically narrow them.[151] The Immigration Act of 1990 modernized the exclusion grounds for membership in a totalitarian party, eliminated the exclusion for nonimmigrants, and narrowed the ideological exclusion grounds.[152] Importantly, noncitizens who were involuntary members or who terminated membership in a totalitarian party at least two years previously, or five if the party controlled the foreign state, before applying for a visa or admission, could not be excluded so long as they were not a threat to the security of the United States.[153] As amended, the law states that "an alien . . . shall not be excludable . . . because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States."[154] A caveat is that such exclusions are permissible if "the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest."[155]

Despite the revamping of the laws, the government maintains the power to exclude aliens who seek to enter in order to engage in "espionage or sabotage," "any other unlawful activity," or "any activity [in opposition to the U.S. government] by force, violence, or

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151. *See, e.g.*, John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1490 (1988) (stating that McCarran-Walter Act allowed for exclusion of noncitizens who merely belonged to subversive organizations); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930, 939 (1987) (stating that Congress showed little enthusiasm for reaffirming McCarran-Walter Act's ideological exclusion provisions); *see also* SELECT COMM'N ON IMMIGR. AND REFUGEE POL'Y, STAFF REP.: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 751 (1981) (mentioning criticism of ideological exclusions heard by Select Commission).

152. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.); *see* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE 61.01[4], at 61-11, 61.04[3][d], at 61-67 to 61-68 (1996) (commenting on Immigration Act of 1990's modification of exclusion grounds).

153. *See* INA, *supra* note 117, § 212(a)(3)(D)(iii), 8 U.S.C. § 1182 (a)(3)(D)(iii) (1994).

154. INA, *supra* note 117, § 212(a)(3)(C)(iii), 8 U.S.C. § 1182(a)(3)(C)(iii) (1994).

155. *Id.*; *see also* H. CONF. REP. NO. 101-955, at 129 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6794 (explaining "intent of the conference committee that [Secretary of State's] authority [be] used sparingly and not merely because there is a likelihood that an alien will make critical remarks about the United States or its policies").

other unlawful means."[156] The government also can exclude: (1) "aliens engaged in a terrorist activity," which as defined allows exclusion of aliens who provide financial support to "terrorist organizations";[157] (2) aliens whose admission would have "potentially serious adverse foreign policy consequences for the United States";[158] and (3) participants in Nazi persecution or genocide.[159] The Antiterrorism Act later expanded the ideological exclusions by deeming excludable any alien who "is a representative of a foreign terrorist organization" or "is a member of a foreign terrorist organization."[160] Under the new law, the Secretary of State designates a "foreign terrorist organization" after finding that the foreign organization engages in "terrorist activity," as broadly defined, that threatens U.S. national security or the security of U.S. nationals.[161] One might reasonably be concerned that foreign policy and other political considerations might influence the State Department's designation.[162]

The 1990 Act also restricted deportation on ideological grounds, with membership in a totalitarian party no longer a ground for de-

156. INA, *supra* note 117, § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A) (1994).

157. *See* INA *supra* note 117, § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(ii) (1994); *infra* Part II.D.2 (analyzing application of this provision to Los Angeles Eight).

158. INA, *supra* note 117, § 212(a)(3)(C)(i), 8 U.S.C. § 1182(a)(3)(C)(i) (1994); *see also* Massieu v. Reno, 915 F. Supp. 681, 710–11 (D.N.J. 1996) (holding that provision cannot constitutionally be applied to deport former Attorney General of Mexico), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996).

159. INA, *supra* note 117, § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (1994).

160. AEDPA, *supra* note 23, § 411, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1268 (amending section 212(a)(3)(B)(iii), (iv) of INA, 8 U.S.C. § 1182(a)(3)(B)(iii), (iv)). Congress previously had provided that "[a]n alien who is an officer, official representative, or spokesman of the Palestinian Liberation Organization is considered . . . to be engaged in a terrorist activity." INA, *supra* note 117, § 212(a)(3)(B)(i)(II), 8 U.S.C. § 1182(a)(3)(B)(i)(II).

161. AEDPA, *supra* note 23, § 302, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1250 (adding section 219 of INA, 8 U.S.C. § 1189). In adding the provision, Congress found that "the power of the United States over immigration and naturalization permits the exclusion from the United States of persons belonging to international terrorist organizations." AEDPA, *supra* note 23, § 301, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1247. This statement demonstrates the impact of the lack of judicial review on congressional action. *See* discussion *infra* Part III.A.

162. *See* David L. Marcus, *Many Thorny Questions Arise As U.S. Compiles Terrorist List*, BOSTON GLOBE, Feb. 4, 1997, at A1 (noting difficulties inherent in designation of "terrorist organizations," including changing status of Irish Republican Army in eyes of Department of State, and quoting State Department official as saying "'[o]ne man's terrorist is another man's freedom fighter'").

portation, and focused instead on "terrorist activities" or actions with serious foreign policy consequences.[163] The changes wrought by the 1990 Act unquestionably represent progress. The political views of noncitizens remain relevant, however, to a number of other immigration and nationality decisions. For example, "[a]lthough the 1990 Immigration Act cut back sharply on ideological grounds for exclusion and deportation from the United States, it maintained the McCarthy-era ideological qualifications for naturalization."[164] The naturalization statute has long required that a noncitizen be "attached to constitutional principles,"[165] a requirement that has been invoked to bar naturalization of lawful permanent residents who are conscientious objectors to military service[166] and Jehovah's Witnesses who object to voting, participating in politics, and serving on juries.[167] There are a number of related ideological bars to naturalization, including those related to anarchists, Communist Party members or those who advocate world communism, those who advocate overthrow by force of the United States government or killing or assaulting governmental officers, and those who knowingly write or circulate publications advocating any

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163. INA, *supra* note 117, § 241(a)(4)(D), 8 U.S.C. § 1251(a)(4) (1994).

164. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 255 (1994) (footnote omitted); *see id.* at 253–55 (analyzing ideological qualifications for naturalization through liberal, republican, and "thick" communitarian theories).

165. INA, *supra* note 117, § 316(a), 8 U.S.C. § 1427(a) (1994); *see generally* Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 253–63 (1994) (analyzing ideological qualifications for naturalization).

166. *See* United States v. Schwimmer, 279 U.S. 644, 652–53 (1929) (finding that conscientious objector was not attached to constitutional principles). *But see* Girouard v. United States, 328 U.S. 61, 70 (1946) (holding that noncitizen conscientious objector based on religious reasons may be sufficiently attached to constitutional principles).

167. *See, e.g.*, *In re* Clavijo de Bellis, 493 F. Supp. 534, 536 (E.D. Pa. 1980) (denying naturalization petition because petitioner failed to take prescribed oath of allegiance due to religious reasons); *In re* Williams, 474 F. Supp. 384, 387 (D. Ariz. 1979) (denying naturalization petition because of petitioner's refusal to vote, participate actively in politics, serve on juries, bear arms, or serve in service on account of religious reasons); *In re* Matz, 296 F. Supp. 927, 933 (E.D. Cal. 1969) (refusing petitions for naturalization by two lawful permanent residents who, as Jehovah's Witnesses, refused to take portion of allegiance oath regarding bearing arms or engaging in noncombatant service in times of war). *But see In re* Del Olmo, 682 F. Supp. 489, 491 (D. Or. 1988) (holding that similar religious objections failed to demonstrate lack of attachment to constitutional principles); *In re* Battle, 379 F. Supp. 334, 337 (E.D.N.Y. 1974) (reasoning that petitioner demonstrated "awareness and an appreciation" of her First Amendment rights to free exercise of speech and religion); *In re* Pisciattano, 308 F. Supp. 818, 821 (D. Conn. 1970) (granting naturalization petition even though petitioner refused to vote, engage in politics, or serve on jury).

of these ideas.[168] In the past, the government has attempted to bar naturalization of noncitizens involved in the International Workers Order because, as members of the communist party, they lacked attachment to constitutional principles.[169]

The ideological restrictions on naturalization take on greater importance in light of the ever expanding deportation grounds. A noncitizen barred from naturalization runs the risk of deportation through an act or omission, such as a crime. Consequently, the ideological prerequisites in the naturalization laws may have indirect, perhaps unintended, consequences.

2. The Los Angeles Eight

Government concerns with political subversives, often framed as a need to combat terrorism, were revived in the 1990s by a number of much publicized events, including the World Trade Center bombing in New York City.[170] Concerns with terrorism, however, predate these events. Beginning in the 1980s and well into the 1990s, for example, the United States government attempted to deport certain members or affiliates of the Popular Front for the Liberation of Palestine (PFLP).[171] The government commenced

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168. *See* INA, *supra* note 117, §§ 313(a)(1)–(6), 8 U.S.C. §§ 1424(a)(1)–(6) (1994).

169. *See* Stasiukevich v. Nicolls, 168 F.2d 474, 480 (1st Cir. 1948) (vacating district court's order denying petition for naturalization because of lack of findings as to character and objectives of Communist Party or International Workers Order); *see also In re* Thompson, 209 F. Supp. 494, 499 (N.D. Ill. 1962) (denying petition of naturalization of Industrial Workers of World member).

170. *See supra* text accompanying notes 25–29 (acknowledging influence of World Trade Center and Oklahoma City bombings on passage of AEDPA).

171. *See* Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831, 833–36 (1989) (reviewing various efforts aimed at excluding members of Palestinian Liberation Organization). The differential treatment afforded citizens and lawful permanent residents who attended a conference in Syria sponsored by the Palestinian Youth Organization demonstrates the real-life difference that alienage makes. *See* Rafeedie v. INS, 688 F. Supp. 729, 744, 752 (D.D.C. 1988) (distinguishing constitutional protection afforded citizens and lawful permanent residents from protection furnished to other aliens), *aff'd in part, rev'd in part*, 880 F.2d 506 (D.C. Cir. 1989). In 1986, a citizen was permitted to return after the conference while two lawful permanent residents were placed in exclusion proceedings. *See id.*

The influence of race on public opinion, inflamed by violence, see *supra* text accompanying notes 25–29 (noting congressional response to World Trade Center and Oklahoma City bombings), may have facilitated the crackdown on persons of Middle Eastern descent labelled as "terrorists," such as the Los Angeles Eight. *Cf.* Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 108 (1996) (stating that, "if we think of racism in its common usage—to mean any prejudice

deportation and exclusion proceedings in 1987 against the eight members of the PFLP, who became known as the Los Angeles Eight.[172] Members of the group were charged with being deportable and excludable on ideological and nonideological grounds.[173] However, in testimony to Congress, the former director of the Federal Bureau of Investigation (FBI) and the regional counsel for the Immigration and Naturalization Service (INS) made it clear that the government's efforts were based on the group's PFLP membership.[174] The FBI apparently targeted the Los Angeles Eight because of the leadership abilities of some group members and their "anti-U.S." speeches and pamphlets.[175]

In 1991, after a change in the law narrowed the ideological exclusions, the INS instituted new proceedings seeking to deport, among others, lawful permanent residents under the terrorist activity provisions that were added to the Immigration and Nationality Act by the Immigration Act of 1990, which renders deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity . . . ."[176] Terrorist activity is defined broadly as "to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows or reasonably should know, *affords material support to any individual, organization, or government in conducting a terrorist activity at any time. . . .*"[177] This interpretation allows the INS

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toward particular races or ethnic groups—then it seems undeniable that racism is a substantial part of today's anti-immigrant sentiment.").

172. *See* American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1063 (C.D. Cal. 1989), *rev'd on other grounds*, American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1991); *see also* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1133–34 (1994) (discussing arguments of parties in case including government's assertion that aliens do not have First Amendment rights).

173. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1052–53 (9th Cir. 1995) (chronicling history of charges filed against members of PFLP).

174. *See Nomination of William H. Webster: Hearings on Nomination of William H. Webster to Be Director of Central Intelligence Before the Select Comm. on Intelligence*, 100th Cong. 94–95 (1987) (statement of William H. Webster) (testifying that Los Angeles Eight were targeted for deportation because of membership in subversive organizations); *see also American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1053 (referring to Mr. Webster's testimony).

175. *See* David Cole, *License for a Witch Hunt*, WASH. POST, May 19, 1996, at C9.

176. INA, *supra* note 117, § 241(a)(4)(B), 8 U.S.C. § 1251(a)(4)(B) (1994).

177. INA, *supra* note 117, § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (1994) (emphasis added).

> to deport individual aliens who have ever supported the lawful and legitimate activities of organizations that are themselves deemed to have engaged in terrorist activity. For example, an alien can be deported for "raising money for a hospital, clinic, daycare center run by groups like the Salvadoran FMLN" or the African National Congress, even "without any allegation that the alien supported any unlawful or terrorist acts of the organization."[178]

The government's case against the Los Angeles Eight centered on fund-raising and related political activities that would have been constitutionally protected if the activity was engaged in by citizens.[179] The group resisted deportation and filed suit alleging "selective enforcement of the immigration laws based on the impermissible motive of retaliation" for engaging in constitutionally protected activity.[180] Contrary to what one might expect given the precedent, the United States Court of Appeals for the Ninth Circuit held that noncitizens in deportation proceedings are entitled to First Amendment protections and remanded the case to the district court.[181] The case has not ended yet, however. Since the Ninth Circuit's decision, the government has moved to dismiss the case based on limitations to judicial review in the Immigration Reform Act.[182]

Some provisions of the Antiterrorism Act, as well as the Immigration Reform Act, represent a response to the legal challenges to

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178. Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 n.347 (1994) (quoting immigration law professors' letter to Janet Reno, Attorney General, U.S. Dep't of Justice (Sept. 20, 1993)).

179. *See American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1063 (summarizing district court finding that deportation charge against aliens was improperly motivated because citizens would be protected by Constitution for same conduct). The court found that citizens and aliens share the same First Amendment freedom of association. *Id.* at 1066; *see also* Jane Hunter, *Critics Call Clinton's Ban on Funding to Middle East Groups Biased, Illegal*, 31 NAT'L CATH. REP. 7, 9 (1995) (criticizing efforts to deport Los Angeles Eight); Alexander Cockburn, *Why Israel Says U.S. Is Terror Central*, SAN FRANCISCO EXAMINER, Mar. 11, 1993, at A13 (discussing charges brought by government against Los Angeles Eight).

180. *American-Arab Anti-Discrimination Comm.*, 70 F.3d at 1054.

181. *Id.*

182. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 49–50 (3d ed. 1997 Supp.) (mentioning that INS moved to dismiss on grounds that section 306(a) of IIRIRA amended section 242 of INA so as to bar action).

deportation mounted by the Los Angeles Eight.[183] The legislative history to the Antiterrorist Act states that "alien terrorists . . . are able to exploit many of the substantive and procedural provisions available to deportable aliens in order to delay their removal from the U.S." and that the reforms target "the statutory and administrative protections given to such aliens . . . that enable alien terrorists to delay their removal from the U.S."[184]

> In addition, alien terrorists, including representatives and members of terrorist organizations, often are able to enter the U.S. under a legitimate guise, despite the fact that their entry is inimical to the national interests . . . . In several noteworthy cases, the Department of Justice has consumed years of time and hundreds of thousands (if not millions) of dollars seeking to secure the removal of such aliens from the U.S.[185]

To avoid such delays, the Antiterrorist Act includes special removal procedures for "alien terrorists."[186] The procedures include a removal court that would expeditiously consider removal of a noncitizen physically present in the country if the Attorney General certified the person to be an "alien terrorist" and that removal through ordinary deportation procedures would pose a risk to the national security.[187] Reminiscent of the laws applied in the notorious cases of *Knauff* and *Mezei*,[188] the removal court may consider, without full disclosure to the noncitizen, classified information that in the government's judgment might endanger national security if disclosed.[189]

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183. *See* Benjamin Wittes, *Will 'Removal Court' Remove Due Process? Anti-Terrorism Bill Creates Secretive Deportation Tribunal*, LEGAL TIMES, Apr. 22, 1996, at 1, 16 (noting that many observers believe this assertion to be true).

184. H.R. CONF. REP. NO. 104-518, at 116 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 949.

185. *Id.* at 115, *reprinted in* 1996 U.S.C.C.A.N. at 948.

186. *See* AEDPA, *supra* note 23, § 401, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1258 (adding Title V to INA at sections 501–07); *see also* Juan P. Osuna, *The 1996 Immigration Act: Criminal Aliens and Terrorists*, 73 INTERPRETER RELEASES 1713, 1721–22 (1996) (describing removal procedures); Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23, 25–27 (1996) (analyzing special removal procedures in predecessor bill).

187. *See* AEDPA, *supra* note 23, § 401, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1259–60 (adding sections 502 and 503 to INA).

188. *See supra* text accompanying notes 90–106 (analyzing cases).

189. *See* AEDPA, *supra* note 23, § 401, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1262–63 (adding section 504(e)(3) to INA).

Though extreme, the government's efforts to deport the Los Angeles Eight should not be viewed as an isolated incident. For example, the INS sought to exclude in summary proceedings a lawful permanent resident from Jordan who the INS claimed, based on confidential information, was a high-ranking member of the Popular Front for the Liberation of Palestine.[190] Similarly, there have been sporadic efforts to return noncitizens to their native countries because of foreign policy reasons. The U.S. government, for example, has vigorously used both extradition and deportation procedures to ensure the return of members of the Provisional Irish Republican Army (PIRA) to the United Kingdom.[191] While the British government claims that many of the PIRA members were criminals, the political dimension to their alleged crimes cannot be ignored.[192]

III. THE DYNAMIC AT WORK AND ITS IMPLICATIONS

The history of ideological regulation in the U.S. immigration laws reflects intolerance of political difference, if not paranoia, about certain political views. This history contains many lessons about this nation's self-image and offers hints about the lengths to which the government might go to protect the status quo. The efforts to exclude and deport disfavored noncitizens offer valuable insight into how dominant society views citizens in these disfavored groups. Importantly, the government's treatment of *noncitizens*, who are immune from judicial scrutiny, suggests the extent to which the majority might proceed if the constitutional and other legal protections for *citizens* are ever diluted.

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190. *See* Rafeedie v. INS, 795 F. Supp. 13, 15–22 (D.D.C. 1992).

191. *See* INS v. Doherty, 502 U.S. 314, 318–22 (1992) (describing how government successfully sought to deport former Provisional Irish Republican Army member after courts rejected extradition request and denied his asylum claim in part because it was in U.S. foreign policy interests to deport him to United Kingdom); *In re* McMullen, 989 F.2d 603, 609–11 (2d Cir. 1993) (explaining proceedings in which U.S. first sought to deport and later extradite former Provisional Irish Republican Army member).

192. *See* James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 319–29 (1992) (summarizing background of conflict in Northern Ireland and U.S. government's position with respect to return of noncitizens associated with Provisional Irish Republican Army to United Kingdom); *see also In re* Doherty, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) (refusing to extradite Provisional Irish Republican Army member to United Kingdom because crime on which extradition was requested was "political offense" that under applicable treaty was exception to extradition).

A. *The Plenary Power Doctrine: A Shield for Governmental Action*

As Gerald Neuman succinctly observed, noncitizens have been "strangers to the Constitution" because immigration laws and their application generally have been immune from constitutional scrutiny.[193] A great deal of commentary has focused on the primary culprit for this phenomenon, namely, the plenary power doctrine, and its demise, dilution, or continued vitality.[194] To paraphrase Mark Twain, any claims of the doctrine's death have been greatly exaggerated. Though perhaps not as potent as in days past, the plenary power doctrine survives to this day and resurfaces frequently in Supreme Court[195] and lower court[196] decisions.

In recent years, the courts have applied the plenary power doctrine in a variety of forms. In *Sale v. Haitian Centers Council,*

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193. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

194. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power* (contending that Court should abandon special deference given to Congress in field of immigration), *in* 1984 SUP. CT. REV. 255, 255 (Philip B. Kurland et al. eds., 1985); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 930–37 (1995) (summarizing recent judicial treatment of plenary power doctrine); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1631 (1992) (asserting that "plenary power doctrine has eroded significantly in the past few decades" as result of "evolution of procedural due process as an exception to plenary power" doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (suggesting that gradual demise of plenary power doctrine resulted from liberal statutory interpretation); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1028 (proposing that Court apply Constitution to laws implicating rights of noncitizens); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 81–85 (1984) (predicting gradual demise of doctrine and expansion of judicial review in immigration law).

195. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (rejecting constitutional challenge to provision of immigration laws discriminating against father of illegitimate child); Mathews v. Diaz, 426 U.S. 67, 80 (1976) (upholding discrimination against lawful permanent residents in federal public benefit program); Galvan v. Press, 347 U.S. 522, 530 (1954) (discussing congressional power over admission of aliens).

196. *See* Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996) (rejecting constitutional challenge to section 440(c) of AEDPA, which bars judicial review of final orders of deportation of noncitizens convicted of certain criminal offenses); Rahman v. McElroy, 884 F. Supp. 782, 785 (S.D.N.Y. 1995) (dismissing constitutional challenge to diversity visa lottery provisions and citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952), for principle of limited judicial review).

Inc.,[197] the Supreme Court obliquely relied on a version of the doctrine in upholding the interdiction and repatriation of Haitians seeking refuge from violence in their native land.[198] In *Reno v. Flores*,[199] the Court expressly relied on the doctrine in upholding an INS regulation providing release of detained noncitizen minors only to parents, close relatives, or legal guardians, except in unusual or compelling circumstances.[200] In so doing, the Court emphasized the narrow judicial role:

> [i]f we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles . . . who are aliens. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." . . . "*[O]ver no conceivable subject is the legislative power of Congress more complete.*" . . . *Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"*[201]

Lower courts have echoed *Flores*'s invocation of the plenary power doctrine.[202]

As decisions like *Sale* and *Flores* demonstrate, noncitizens and citizens enjoy vastly different legal protections. In membership

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197. 509 U.S. 155 (1993).

198. *See Sale*, 509 U.S. at 188 (refusing to disturb executive branch's Haitian interdiction and repatriation policy and emphasizing that "we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility") (citing United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936)).

199. 507 U.S. 292 (1993). For criticism of the Court's decision, see Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 450–53 (1996).

200. *See Flores*, 507 U.S. at 295.

201. *Id.* at 305–06 (citing, *inter alia*, Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

202. *See, e.g.*, Kolster v. INS, 101 F.3d 785, 790–91 (1st Cir. 1996) (citing *Flores* and upholding AEDPA limitation on judicial review); Ali v. Reno, 22 F.3d 442, 448 (2d Cir. 1994) (citing *Flores* and upholding rescission of noncitizen's permanent resident status); Chan v. Reno, 916 F. Supp. 1289, 1296 (S.D.N.Y. 1996) (citing *Flores* for proposition that "judicial review in immigration matters is narrowly circumscribed" and dismissing complaint by Chinese nationals seeking adjustment of status under Chinese Student Protection Act). *But see* Romero-Morales v. INS, 25 F.3d 125, 128 (2d Cir. 1994) (relying on *Flores* for proposition that "scope of judicial review in immigration matters is narrowly circumscribed" but granting petition of review of deportation order).

parlance,[203] we afford citizens full political and civil rights while bestowing far fewer rights on lawful permanent residents, even those who have significant ties with the country. In effect, they are entitled to only "partial membership" in the community.[204] For the most part, citizens generally are free to believe what they want to believe and can only be punished if they cross the line into committing criminal acts. Noncitizens, however, may be subject to deportation or exclusion for holding certain beliefs and engaging in expressive conduct that, at least for citizens, would be constitutionally protected.[205]

In demarcating the limits of the plenary power doctrine, the "inside" of immigration law is where the doctrine operates with full force, while ordinary legal principles apply "outside" immigration law.[206] Commentators have observed, however, that the line between "inside" and "outside" immigration law is at best fuzzy.[207] The plenary power doctrine often influences decisions "outside" immigration law, as exemplified by the cases upholding congressional limits on benefit eligibility for lawful permanent residents.[208]

Ideological *exclusion* grounds clearly fall inside immigration law and ordinarily would be reviewed by courts under the plenary

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203. *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution* (contending "that current constitutional norms defining the federal immigration power are shaped by a membership model of citizenship and alienage"), *in* 7 CONST. COMMENTARY 9 (1990); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1068–87 (1994) (using membership analysis of immigration law in analyzing work of political theorist Michael Walzer).

204. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 758–59 (1996) (employing this partial membership analysis).

205. *See* discussion *supra* Part II.D.2 (analyzing case of Los Angeles Eight).

206. *See* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059–65 (1994) (describing and criticizing "inside/outside" distinction in immigration law).

207. *See id.* at 1063–65; *see also* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1155–56 (1995) (noting that border between where plenary power doctrine applies and where it does not is "porous" so that doctrine has "polluting effect . . . *outside* the immigration law realm," with detention of noncitizens as example) (emphasis in original).

208. *See Mathews*, 426 U.S. at 80 (reasoning that just because Congress provides benefits to citizens does not mean that Congress is required to provide similar benefits to "*all aliens*") (emphasis added); *see also* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 994–1002 (analyzing case law involving challenges to limiting lawful permanent residents' access to public benefits).

power doctrine.[209] However, applying the inside/outside dichotomy to ideological *deportation* grounds is more difficult. Deportation in an important sense is "inside" immigration law because it relates to the power to eject noncitizens from the country.[210] This is how it ordinarily is treated, as the chilling string of 1950s deportation cases suggests.[211] At the same time, the political deportation grounds regulate conduct after a noncitizen has lawfully been admitted to the country.[212] In that sense, one might claim that they are "outside" immigration law. This helps explain why the ideological exclusions remained intact much longer than comparable deportation grounds. Regulation of free expression of lawful permanent residents, at least intuitively, is more "outside" immigration law than ideological restrictions on those who seek entry. Put differently, disparate treatment between citizens and lawful permanent residents is more difficult to justify than that between citizens and noncitizens who have not entered the country.

There is a pragmatic way to look at the differing ideological prerequisites. It is one thing to exclude persons from entering the country because of their political views. Their "stake" in the country might be seen as limited and more strings on their admission might seem justified.[213] It is an entirely different matter to deport

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209. *See* John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1499–1500 (1988) (discussing how government's plenary power dictates level of judicial inquiry into immigration law issues).

210. *See* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1064–65 (1994) (analyzing traditional distinction between immigration and alienage law). *But cf.* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994) (indicating that "'immigration' rules may be surrogates for 'alienage' rules").

211. *See supra* text accompanying notes 107–19 (analyzing *Harisiades*, *Galvan*, and related cases).

212. *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994) (asserting that "the intended and actual effect of deportation grounds is to regulate the everyday lives of aliens in the United States").

213. *Cf.* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 629–38 (3d ed. 1995) (explaining levels of membership in community based on individual's stake in community). This is not always the case, however, because some persons who seek to re-enter the country may have developed deep community ties in the United States. *See* Landon v. Plasencia, 459 U.S. 21, 23 (1982) (summarizing situation in which noncitizen who lived in United States five years was denied entry by INS after briefly leaving country); *see also supra* text accompanying notes 95–106 (discussing case of Ignatz Mezei, who had lived in United States for 25 years, but was denied re-entry after leaving country to visit ailing mother).

noncitizens for engaging in activity while in this country that citizens have a constitutional right to do. Unfairness generally is much greater in deporting persons who have lived in the country than in barring admission to noncitizens seeking entry.

In reviewing the ideological restrictions in the immigration laws, the courts have not carefully analyzed distinctions such as those outlined here. As Hiroshi Motomura has observed, various courts have employed sophisticated techniques to avoid invoking the plenary power doctrine in reviewing substantive immigration laws.[214] This avoidance, however, has not always been true with respect to the judicial review of ideological exclusion and deportation grounds. During the heights of McCarthyism, for example, the Supreme Court zealously excluded lawful permanent residents seeking re-entry[215] and deported those labelled as communists.[216] Later, the Court upheld the denial of entry to a Marxist seeking to temporarily visit the country to attend an academic conference.[217]

As the case law reveals, noncitizens have been the easiest group in society on which to impose the most drastic solutions.[218] Citizens generally cannot be penalized for their beliefs or for membership in certain political groups. Unlike politically unpopular citizens, noncitizens can be deported and excluded if they violate the political litmus tests imposed on them.[219] Consequently, one

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214. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1646–50 (1992) (analyzing how Supreme Court has enforced procedural constitutional safeguards to avoid harshness of plenary power doctrine's protection of substantive immigration law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–75 (1990) (analyzing how courts have employed "phantom constitutional norms" to evade invocation of plenary power doctrine).

215. *See supra* text accompanying notes 90–106 (discussing *Knauff* and *Mezei*).

216. *See supra* text accompanying notes 107–16 (discussing *Harisiades* and *Galvan*).

217. *See supra* text accompanying notes 147–48 (discussing *Mandel*).

218. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972) (permitting exclusion of noncitizen seeking nonimmigrant visa because of his Marxist beliefs); *Galvan*, 347 U.S. at 523, 532 (upholding as constitutional statute that provided for deportation of resident aliens found to be members of Communist Party); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–11 (1953) (granting Attorney General permission for indefinite detention of noncitizen based on confidential information); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 541 (1950) (holding that Attorney General may exclude noncitizen from entry if "such entry would be prejudicial to the interests of the United States").

219. *See, e.g. Galvan*, 347 U.S. at 523, 532; *Harisiades*, 342 U.S. at 593–96.

should not be surprised by the sporadic outbursts against noncitizens who fall within disfavored political groups.

Without the constitutional protections that protect citizens, noncitizens have been susceptible to the harsh measures imposed by government in its attempt to stifle political dissent. The cyclical nature of the dynamic reflects recurring, yet changing, national tensions. In the late 1800s and early 1900s, the economic and social tensions that accompanied industrialization and labor organization caused turmoil.[220] Fueled by World Wars I and II and combined with the fear of anarchy, nationalism brought harsh changes to immigration laws.[221] Though the precise nature of the social tensions varied, social pressure has consistently prompted action by the political branches.[222] The public demanded answers to the pressing social questions of the day. Pressured to take action, the government had to solve problems, thereby relieving public anxiety. Laws were passed and enforced with a vengeance. The government acted in ways that were unfortunate and, at times, shameful.

The fact that the Antiterrorism Act makes it much easier to deport many noncitizens, not only those who can even colorably be classified as "terrorists,"[223] reflects the understanding of Congress that immigration legislation receives minimal judicial review.[224] There is effectively no judicial check on the executive branch's immigration policy.[225] Indeed, Congress acted to completely eliminate the judicial review of certain immigration decisions in both

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220. *See* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 953–54 (1995) (discussing how anti-immigrant sentiment of industrialization era led to passage of immigration laws aimed at protecting U.S. citizens' jobs); *see also supra* text accompanying notes 59–80 (analyzing influence of labor unrest on ideological regulations in immigration laws in early 1900s).

221. *See supra* text accompanying notes 59–80 (analyzing this history).

222. *See* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1162–63 (analyzing significance of recurring nativism in U.S. immigration history).

223. *See* AEDPA, *supra* note 23, §§ 438, 440, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1275, 1277 (providing that individuals committing common criminal yet nonterrorist acts may be deported).

224. *See supra* text accompanying note 161 (mentioning congressional finding, in justifying various antiterrorist provisions of AEDPA, that Congress had power to regulate immigration and naturalization).

225. *See* T. Alexander Aleinikoff, *Non-Judicial Checks on Agency Actions*, 49 ADMIN. L. REV. 193, 194 (1997) (stating that, "[t]raditionally, the courts have been wary of stepping into the immigration area. Congress, well aware of such judicial hesitance, appears willing to make the most of it.") (footnote omitted).

the Antiterrorism Act and the Immigrant Reform Act.[226] For example, section 440(a)(10) of the Antiterrorism Act provides that a final deportation order based on certain criminal deportation grounds is not subject to judicial review.[227] In rejecting a constitutional challenge to this section, the United States Court of Appeals for the Ninth Circuit cited the familiar litany of plenary power cases, including *Flores v. Reno*, *Harisiades*, *Mathews v. Diaz*, *Mezei*, and *Galvan v. Press*.[228] The historical dynamic continues.

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226. *See* IIRIRA, *supra* note 24, § 306(a)(2), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1666–75 (limiting judicial review of certain immigration decisions); *see also* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245 (1997) (describing IIRIRA's various restrictions on judicial review). In addition, the Immigration Reform Act provides for summary exclusion of certain noncitizens seeking to apply for asylum, with limited administrative and no judicial review. *See* IIRIRA, *supra* note 24, § 302, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1620–29 (amending section 235 of INA); *see also* Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal: What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1571–79 (1996) (analyzing provisions and suggesting how they should be implemented).

227. *See* AEDPA, *supra* note 23, § 440(a)(10), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1276–77 (stating that, "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered . . . shall not be subject to review by any court.").

228. *See Duldulao*, 90 F.3d at 399 (reiterating that power to exclude belongs to Congress); *see, e.g.*, Figueroa-Rubio v. INS, No. 90–3415, 1997 U.S. App. LEXIS 3790, at *4 (6th Cir. Mar. 5, 1997) (holding that section 440(a) of AEDPA does not violate Constitution and prohibits judicial review); Boston-Bollers v. INS, No. 96–2506, 1997 U.S. App. LEXIS 1858, at *4–7 (11th Cir. Feb. 5, 1997) (holding to same effect and citing plenary power cases); Pichardo v. INS, 104 F.3d 756, 758 (5th Cir. 1997) (same holding); Kolster v. INS, 101 F.3d 785, 790–91 (1st Cir. 1996) (upholding section 440(a) of AEDPA, citing, *inter alia*, *Reno v. Flores*, and dismissing appeal); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996) (rejecting challenge to section 440(a) of AEDPA and citing Fiallo v. Bell, 430 U.S. 787 (1977)); Hincapie-Nieto v. INS, 92 F.3d 27, 29–30 (2d Cir. 1996) (holding that section 440(a) of AEDPA removed court's jurisdiction to hear appeal of deportation order); *see also* Sourovova v. INS, No. 96–C–5991, 1996 Dist. LEXIS 13964, at *3 (N.D. Ill. Sept. 20, 1996) (rejecting challenge to detention of noncitizen and citing Fiallo v. Bell, 430 U.S. 787 (1977), Kleindienst v. Mandel, 408 U.S. 753 (1972), Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953)); United States v. Lopez-Flores, 63 F.3d 1468, 1473 (9th Cir. 1995) (upholding federal criminal law making alienage classifications and citing plenary power cases including, Mathews v. Diaz, 426 U.S. 67 (1976) and Harisiades v. Shaughnessy, 342 U.S. 580 (1952)). The Ninth Circuit emphasized that it was not addressing whether habeas corpus review of the decision was available. *See Duldulao*, 90 F.3d at 400; *see also Kolster*, 101 F.3d at 790–91 n.4; *see also* Duldulao v. Reno, No. 97–00163, 1997 U.S. Dist. LEXIS 3250, at *13 (D. Haw. Mar. 18, 1997) (denying petition for habeas corpus).

One probably unintended consequence of one provision of the AEDPA is worth mentioning. The Act amended 8 U.S.C. § 1252(h) to permit the Attorney General to deport certain noncitizens convicted of crimes before completion of their sentence. AEDPA, *supra* note 23, § 438(a), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1275–76. The new

B. *Politics Pure and Simple*

History reveals that the United States has taken some rather extreme measures against noncitizens based on political ideology that could not have been directed at citizens. Harsh reactions by the government against aliens face few legal constraints and limited judicial scrutiny. The cure-all of blaming the "foreigner" for domestic troubles has been available to, and acted upon by, generation after generation in the United States.[229] Though the precise "foreigner" feared has changed with the times, the general phenomenon and its cyclical nature has remained a constant throughout U.S. history.

Limited judicial review combines with the vulnerability of noncitizens in the political process to increase the likelihood that Congress will legislate harshly against politically unpopular aliens.[230] In an election year, for example, it was difficult for any member of Congress to vote against a bill entitled the "Antiterrorism and Effective Death Penalty Act of 1996"—whatever its provisions and regardless of the fact that the Act penalizes many noncitizens who had nothing remotely to do with terrorism. A bipartisan coalition in the Senate and the House of Representatives passed the Antiterrorism Act.[231] The same holds true for the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996."[232] With a

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provision resulted in a number of noncitizens in prison filing suit seeking to compel immediate deportation. *See, e.g.*, United States v. Lopez, 938 F. Supp. 481, 482 (N.D. Ill. 1996) (holding that court has no jurisdiction to enter order for immediate deportation); United States v. Velasquez, 930 F. Supp. 1267, 1269 (N.D. Ill. 1996) (refusing motion for immediate deportation); United States v. Maimaje, 930 F. Supp. 1331, 1332 (D. Minn. 1996) (denying petitioner's motion for immediate deportation for failure to exhaust administrative remedies). This provision was later repealed in § 306 of the Immigration Reform Act. IIRIRA, *supra* note 24, section 306, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1667–68.

229. *See* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) (compiling essays analyzing most recent outburst of anti-immigrant sentiment).

230. *See generally* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1149–81 (analyzing relative weakness of noncitizens in political process).

231. Vote Report, LEXIS, 1996 Senate Vote No. 71, 104th Cong., 2d Sess. (Apr. 17, 1996) (passing AEDPA by vote of 91–8); Vote Report, LEXIS, 1996 House Roll No. 126, 104th Cong., 2d Sess. (Apr. 18, 1996) (passing AEDPA by vote of 293–133).

232. *See* 142 CONG. REC. S10572 (daily ed. Sept. 16, 1996) (statement of Sen. Simpson) (noting that House passed IIRIRA by vote of 333 to 87 and Senate passed it by 97 to

public outcry against undocumented immigration, politicians found it difficult not to vote for a bill with this name in an election year.

The Antiterrorism Act and the Immigrant Reform Act are simply the latest examples of a long historical dynamic. Ostensibly a reaction to the threat of terrorism, the Antiterrorism Act went much further. The law severely penalizes aliens who have been convicted of crimes, no matter how long that person has been in the country or whatever the person's ties with the nation and other equities favoring the noncitizen.[233] President Clinton candidly acknowledged the overinclusiveness of the Antiterrorism Act and stated that it "*makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.* These provisions eliminate most remedial relief for long-term legal residents and restrict a key protection for battered spouses and children."[234] Despite the shortcomings, the President signed the bill into law, thereby sacrificing many noncitizens in the name of fighting terrorism.[235]

In light of the judiciary's hands-off approach to review of immigration legislation, one should expect extreme responses like the Antiterrorism Act, as well as the Immigrant Reform Act, by the political branches of government in dealing with unpopular noncitizens. The absence of dialogue between the Congress and the courts contributes to the extremity of the policy choices.[236] These laws, passed in the wake of anti-immigrant measures such as Cali-

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3); *see also* 142 CONG. REC. D1026, 1028 (daily ed. Sept. 28, 1996) (passing Defense Appropriations bill, including IIRIRA, by 370–37 margin).

233. *See* AEDPA, *supra* note 23, § 440(d), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1277 (barring relief from deportation to noncitizens convicted of certain crimes). Similarly, section 304 of the IIRIRA narrowed relief from deportation by repealing section 212(c); section 240A of the IIRIRA replaced section 212(c) relief with a new and narrower form of relief called "cancellation of removal." IIRIRA, *supra* note 24, §§ 240A, 304, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1644, 1650.

234. *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 32 WKLY. COMP. PRES. DOC. 721 (Apr. 24, 1996) (emphasis added).

235. *See* cases cited *supra* note 228 (applying section 440(a) of AEDPA to deny judicial review of deportation orders).

236. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 607–13 (1990) (analyzing significance of lack of dialogue between courts and Congress about validity of immigration laws).

fornia's Proposition 187,[237] reveal the political vulnerability of noncitizens. Consequently, the political branches can act out their worst fantasies in treating noncitizens with minimal risk of political repercussion and meaningful judicial review.

C. *The Implications for Noncitizens and Citizens*

Though focusing on how the immigration laws treat *noncitizens*, the historical dynamic sketched in this Article indirectly demonstrates the importance of constitutional protections for *citizens*. By looking at the harsh treatment of immigrants, valuable insight is gained into how the government would act toward particular groups of citizens if legal constraints were not in place to protect politically undesirable citizens. Without legal protections, politically undesirable citizens could be subject to similar unsavory treatment as that suffered by similarly situated noncitizens. Consider the McCarthy era. As constitutional protections reached a low ebb for citizens, the government attacked "Reds" with a vengeance. Its attacks on noncitizens were even harsher and more vengeful. One is left to wonder how politically unpopular citizens might be treated without the shield of the Constitution.

The relationship between the treatment of citizens and noncitizens that share certain characteristics can be seen in a number of areas. The slow deterioration of criminal rights and the implementation of increasingly harsh penalties imposed on *citizens*, such as the ever-popular "Three Strikes" laws,[238] pale in comparison to the ever-increasingly harsh treatment of criminal *noncitizens*. The Antiterrorism and the Immigrant Reform Act, which together greatly expand criminal deportation grounds and significantly narrow relief from deportation of aliens convicted of a crime, are the latest examples.[239]

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237. *See* State of California Proposition 187, Nov. 8, 1994, 1994 Cal. Legis. Srv. Prop. 187 (Deering) (codified as amended in scattered sections of CAL. PENAL CODE, CAL. WELF. & INST. CODE, CAL. HEALTH & SAFETY CODE, CAL. EDUC. CODE, and CAL. GOV'T CODE).

238. *See* J. Anthony Kline, Comment, *The Politicization of Crime*, 46 HASTINGS L.J. 1087, 1088–94 (1995) (analyzing politicization of crime from perspective of judge applying California's "Three Strikes" law).

239. *See* IIRIRA, *supra* note 24, § 321, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1701–02 (expanding definition of aggravated felony making noncitizen eligible for various forms of relief from exclusion and deportation); *id.* § 322, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1703 (expanding definition of criminal "conviction" to increase

Immigration law is a vista for seeing how bad things could be for domestic minorities, political or otherwise. The immigration laws offer a glimpse at how this society views racial minorities, the poor, criminals, gays and lesbians, and others. The series of laws designed to exclude the Chinese from entering the United States in the 1800s, for example, reveals volumes about how American society viewed Chinese persons already in this country.[240] Similar efforts to halt the flow of Haitians to our shores teach much about dominant society's perceptions of blacks, as well as the poor and persons culturally different from the Anglo-Saxon norm.[241] In addition, sustained efforts over the last part of the twentieth century to implement extreme measures against undocumented Mexicans suggest how society views citizens of Mexican ancestry in this country.[242] Efforts to exclude noncitizens likely to become "public charges" reflect the nation's collective consciousness about the domestic poor.[243] In that vein, it is no coincidence that welfare "reform," which reduced benefits to citizens and lawful immigrants,[244] was passed by the same Congress that bulked up the exclusion

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number of noncitizens who are deportable); AEDPA, *supra* note 23, § 435, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1274–75 (expanding definition of crime of "moral turpitude" as deportation ground); *id.* § 440(e), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1277–78 (expanding definition of aggravated felony); *see also* Lee Teran, *Defending Foreign Nationals Convicted for Illegal Re-Entry: The "Aggravated Felony" Issue*, 8 FED. SENT. R. 270 (1996) (tracing expansion of definition of "aggravated felony" in recent legislation through AEDPA).

240. *See* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 81–131 (1989) (detailing anti-Chinese sentiment, particularly in California, during this period).

241. *See* Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 688–89 (1993) (arguing that racism influenced U.S. government's treatment of Haitians fleeing political violence).

242. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–61 (1995) (analyzing anti-Mexican, not simply anti-illegal alien, sentiment underlying campaign over Proposition 187 in California); *see also* Dan Kesselbrenner, *The "Anti-Terrorism" Law*, IMMIGR. NEWSL. (National Immigration Project of the National Lawyers Guild, Inc., Boston, Mass.), June 1996, at 1, 3 (contending that AEDPA, by facilitating deportation of noncitizens who entered without inspection, would have disparate impact on Mexican nationals).

243. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519–28 (1995) (summarizing historical fear of immigration of poor to United States).

244. *See* Charles Wheeler, *The New Alien Restrictions on Public Benefits: The Full Impact Remains Uncertain*, 73 INTERPRETER RELEASES 1245 (1996) (summarizing impact of 1996 Welfare Reform bill on benefit eligibility of lawful permanent residents).

ground allowing denial of entry to noncitizens likely to become "public charges."[245] Finally, the long time classification of homosexuals as "psychopathic personalities," and therefore excludable, reflects mainstream U.S. society's traditional views toward members of the lesbian and gay community.[246]

IV. CONCLUSION

Many lessons can be learned from U.S. immigration history. History speaks volumes not just about immigration law, but about how this nation sees itself. Suppression of foreign ideas among citizens is limited by the First Amendment of the Constitution. Through a constitutional sleight-of-hand, however, the Supreme Court consistently has held that few substantive constitutional protections apply to noncitizens. Consequently, although attacks on domestic subversives who were citizens at times have been harsh, the attacks on noncitizens who have held unpopular political views have been even harsher. These attacks indirectly suggest how the government might act to stifle domestic dissent if the Constitution did not offer protections to citizens.

Congress admittedly has removed some of the more onerous litmus tests from the immigration laws. Notions of the meaning of free speech have expanded with the times, and constitutional protections for citizens have as well. For similar reasons, grounds for excluding and deporting noncitizens based on their political views have been narrowed. Nonetheless, persons outside the political mainstream are disfavored generally and noncitizen ones even more so. The Antiterrorism and Effective Death Penalty Act of 1996 is simply the latest chapter in this long saga. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 fits into a similar mold. So long as noncitizens are denied the constitu-

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245. *See* IIRIRA, *supra* note 24, § 531, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 179–80 (amending 8 U.S.C. § 212(a)(4) to expand public charge exclusion); *id.* § 551, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1781 (making affidavits of support filed by sponsors of immigrant to be legally enforceable).

246. *See* Boutilier v. INS, 387 U.S. 118, 122 (1967) (accepting "psychopathic personality" as term of art intended by Congress to exclude homosexuals from entering United States); *see also* Rosenberg v. Fleuti, 374 U.S. 449, 451 (1963) (thwarting governmental effort to deport noncitizen because he had been excludable at time of entry due to his "psychopathic personality," that is, he was homosexual). Section 212(a)(4) of the Immigration and Nationality Act of 1952 was not repealed until the Immigration Act of 1990. *See* Immigration Act of 1990, Pub. L. No. 101–649 § 601, 104 Stat. 4978, 5067.

tional protections afforded citizens, one can expect the political process to penalize them. Unlike other discrete and insular minorities,[247] noncitizens lack the vigilant oversight of the judiciary. Consequently, it should be no surprise that they are the first victims in the war on political dissent.

The lessons from the exclusion and deportation of political minorities unfortunately are more far-reaching than might appear at first glance. The United States immigration laws historically have reflected a striving for national homogeneity, favoring immigrants who are not poor, not criminals, not racial or ethnic minorities, and not homosexual. When the day's immigrants are different from the mainstream as they have been in recent years, a majority of the public has reacted negatively and, not infrequently, ferociously. This offers a frightening insight into the American consciousness about domestic as well as foreign minorities of all types.

247. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (recognizing that "[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").