California Law Review

Volume 73 | Issue 6 Article 4

December 1985

Immigration and the First Amendment

Steven J. Burr

Link to publisher version (DOI)
https://doi.org/10.15779/Z38FJ0K

Immigration and the First Amendment

In April 1985 at the Toronto International Airport, agents of the United States Immigration and Naturalization Service (INS) prevented Canadian author Farley Mowat from boarding a jet bound for Los Angeles.[1] Mowat, author of the book *Never Cry Wolf*, was barred from the flight because his name appeared in a "lookout book" of aliens the INS considers inadmissible to the United States.[2] Apparently, Mowat was included in the book because in 1968 a Canadian newspaper quoted him as saying he had fired a 22-caliber rifle at United States Strategic Air Command (SAC) planes.[3] Mowat claimed his statement was a joke meant to call attention to his objections to SAC flights over Canada, but the INS district director said that United States officials took the remark seriously.[4]

If Mowat were a citizen or resident of the United States and the government punished him or denied him a job on the basis of this statement, that government action probably would not survive a first amendment challenge.[5] But because the government action involved in Mowat's case was an immigration decision, any suit he might have brought in a federal court to challenge his exclusion on first amendment grounds would almost certainly have failed.[6]

The Supreme Court has adopted a series of special rules for first amendment challenges to immigration decisions. Under the Court's holdings, nonresident aliens possess no first amendment interests and therefore may never raise first amendment challenges to their exclusion from the United States. Citizens who show injury to their first amendment interests from the exclusion of aliens may obtain judicial review of exclusions, but the standard of review will be far more deferential to the government than is usual in first amendment cases.

---

1. Oakland Tribune, Apr. 27, 1985, at A-4, col. 1.
2. *Id.*
3. *Id.*
4. *Id.*
5. Mowat's statement was similar to that of the defendant in Watts v. United States, 394 U.S. 705 (1969), who at an antiwar demonstration said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The defendant was convicted under a statute prohibiting the making of any threat of physical violence against the President. *Id.* at 705-06. The Supreme Court construed the statute in accordance with first amendment principles to apply only to actual threats of action and not to political hyperbole. *See id.* at 708. Since the defendant's statement obviously was not an active threat of violence, the Court reversed his conviction. *See id.*
6. Instead of going to the courts, Mowat appealed directly to the executive. He at first demanded an apology delivered by Air Force One, but later scaled down his demand to "unencumbered rights to cross the American border." Oakland Tribune, April 27, 1985, at A-4, col. 1.

The Court has also shown deference to goverment decisions in deportation cases. These Supreme Court opinions, however, are ambiguous enough to leave open the possibility of a nondeference standard.[7]

This Comment argues that nonresident aliens possess first amendment interests, injury to which should trigger normal first amendment review; that there is no reason to show special deference to the government in cases involving exclusions that harm the first amendment interests of citizens; and that the Supreme Court should resolve the ambiguity in its deportation decisions in favor of applying ordinary first amendment principles to deportations that injure resident aliens' first amendment interests.

Part I of this Comment presents an overview of the immigration laws and discusses the types of first amendment interests implicated in immigration decisions. Part II describes the Court's response to first amendment challenges to exclusions and deportations. Part III criticizes this response. Part IV outlines the steps the Court and Congress should take to protect the first amendment values at stake in immigration decisions.

I
IMMIGRATION LAW AND ITS FIRST AMENDMENT IMPLICATIONS

The immigration laws are the government's means of regulating the presence of aliens in the United States. This regulation may take the form of excluding aliens from entry,[8] as in Mowat's case, or deporting aliens already present in the United States.[9] The immigration laws set forth numerous grounds for excluding and deporting aliens.[10] The immigration decisions[11] that most commonly raise first amendment concerns are those which base exclusion or deportation on the content of an alien's beliefs, expressions, or associations.[12] Those decisions violate the familiar first amendment principle that the government may not discriminate

7. The term "nondeference" is used in this Comment to denote any standard of justification that is imposed on the government stricter than "rational basis" or "rational relation." *See infra* text accompanying notes 44, 57-58.

8. 8 U.S.C. §§ 1151, 1153, 1182 (1982).

9. *Id.* § 1251.

10. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.1b, at 2-12 to -14 (rev. ed. 1985); 1A *id.* § 4.1b, at 4-6 to -7.

11. Throughout this Comment, "decisions" means both legislative decisions to exclude or deport certain aliens as expressed in the immigration statute and executive decisions to exclude or deport made in the course of enforcing the immigration laws.

12. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); Comment, *Opening the Floodgates to Dissident Aliens*, 6 HARV. C.R.-C.L. L. REV. 141 (1970).

on the basis of the content of speech.[13] But since even government regulations not directed at the content of expression or association may nonetheless injure first amendment interests,[14] discriminatory exclusions and deportations are not the only immigration decisions that raise first amendment concerns. In addition, aliens are not the only persons whose first amendment interests may be injured by exclusion and deportation. Citizens' interests may also be injured by immigration decisions and may, therefore, also be the basis for first amendment challenges.

A. Immigration Law and Procedure

The federal immigration statute[15] provides two methods of regulating immigration: exclusion and deportation. Which method applies to a particular alien depends on whether that alien has entered the United States.[16] Nonresident aliens, those who have not entered the United States, are subject to exclusion; resident aliens,[17] those who have made an entry,[18] are subject to deportation.

The exclusion of aliens operates on two different levels. The first level, restrictions on the number of aliens who may enter the United States each year, applies only to immigrants, those aliens entering the United States with the intention of making it their permanent resi-

13. *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 581 (1978).

14. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968); L. TRIBE, *supra* note 13, § 12-2, at 580.

15. Immigration (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1982)).

16. Deportation proceedings are more favorable to aliens than exclusion proceedings. Aliens subject to deportation, unlike excludable aliens, can choose the country to which they will be removed, 8 U.S.C. § 1253(a) (1982), and may be allowed to depart the United States voluntarily, *id.* § 1254(e). *In re* Phelisna, 551 F. Supp. 960, 962 (E.D.N.Y. 1982). In addition, deportation proceedings, unlike exclusion proceedings, are subject to the requirements of procedural due process. *Compare* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (exclusion), *with* The Japanese Immigrant Case, 189 U.S. 86 (1903) (deportation).

17. The term "resident aliens," as used in this Comment, is a shorthand way of referring to those aliens who have effected an entry and are, therefore, subject to deportation. The term does not refer solely to aliens who intend to reside permanently in the United States, but also to aliens visiting temporarily.

18. *In re* Phelisna, 551 F. Supp. 960, 962; *see* Landon v. Plascencia, 459 U.S. 21, 25 (1982); 8 U.S.C. §§ 1226, 1251 (1982).

Although the immigration statute defines "entry" as "any coming of an alien into the United States from a foreign port or place," 8 U.S.C. § 1101(a)(13) (1982), physical presence within the United States is, without more, insufficient to establish "entry," *see Phelisna*, 551 F. Supp. at 962. Immigration inspection stations are located within United States borders, and aliens who report at those stations have not yet entered the United States. *Id.* at 962. In order to effect an entry, an alien must either pass through an inspection station or cross a United States border with the intent to evade inspection. *See id.* at 962-63; *see also* Thack v. Zurbrick, 51 F.2d 634, 635-36 (6th Cir. 1931). In effect the immigration system rewards those who enter the United States illegally by affording them the more favorable deportation procedures, while subjecting aliens who attempt to enter illegally at inspection stations to the less favorable exclusion proceedings.

dence.[19] This system sets a ceiling on the number of immigrants who may enter each year, exempts certain immigrants from the application of that ceiling, grants preferred status to certain classes of immigrants, and allows immigrants without preferred status to enter on a first come, first served basis.[20]

The second level of exclusion provisions are qualitative restrictions on those who may enter the United States. These provisions apply both to immigrants and to nonimmigrants seeking to enter the United States for only a temporary stay.[21] Neither iinmigrants who qualify for entry under the system of numerical restrictions nor nonimmigrants may enter the United States if they fall within any category of excludable aliens. The grounds for exclusion include physical or mental illness,[22] immorality,[23] criminal activity,[24] failure to comply with immigration procedures,[25] and inability to provide self-support.[26] In addition, several sections of the immigration statute require or allow exclusion on ideological grounds. An elaborate section requires the exclusion of, among others, aliens who are members of communist or "totalitarian" parties or who advocate or belong to any group that advocates the "doctrines of world communism" or the violent overthrow of the government.[27] The entry of aliens with beliefs objectionable to the government could be prohibited by other sections that vest wide discretion in executive officers responsible for enforcing the immigration laws. Most notably, one section of the statute provides for the exclusion of "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States . . . to engage in activities which would be preju-

19. 1 C. GORDON & H. ROSENFIELD, *supra* note 10, § 2.5b, at 2-42. All aliens are presumed to be immigrants unless they prove to the satisfaction of consular and immigration officers that they are entitled to nonimmigrant status. 8 U.S.C. § 1184(b) (1982).

20. *See* 8 U.S.C. §§ 1151, 1153 (1982).

21. *See id.* § 1182(a); 1 C. GORDON & H. ROSENFIELD, *supra* note 10, § 2.32, at 2-253.

22. The medical grounds of exclusion include psychopathic personality, *see* 8 U.S.C. § 1182(a)(4) (1982), mental retardation, *see id.* § 1182(a)(1), mental defect, *see id.* § 1182(a)(4), drug addiction, *see id.* § 1182 (a)(5), alcoholism, *see id.*, and affiiction with a contagious disease, *see id.* § 1182(a)(6).

23. The Supreme Court has interpreted the section excluding aliens afflicted with a psychopathic personality, *id.* § 1182(a)(4), to require the exclusion of all homosexuals, regardless of whether they meet any clinical test for mental disease. *See* Boutilier v. INS, 387 U.S. 118 (1967). In addition, the immigration statute requires the exclusion of polygamists, *see* 8 U.S.C. § 1182(a)(11) (1982), prostitutes, *see id.* § 1182(a)(12), and "[a]liens coming to the United States to engage in any immoral sexual act," *see id.* § 1182(a)(13).

24. The statute requires the exclusion of aliens who have committed a crime involving "moral turpitude," *see* 8 U.S.C. § 1182(a)(9) (1982), or the illicit possession of or traffic in narcotic drugs, *see id.* § 1182(a)(23), or two crimes of any nature, for which an aggregate sentenee of five years imprisonment or more was imposed, *see id.* § 1182(a)(10).

25. *See id.* § 1182(a)(19)-(21).

26. *See id.* § 1182(a)(7)-(8), (15).

27. *See id.* § 1182(a)(28).

dicial to the public interest, or endanger the welfare, safety, or security of the United States."[28]

Two government agencies enforce these exclusion provisions: consular offices and the INS. Consular officers are charged with issuing and denying visas to applicants for admission.[29] If a consular officer denies a visa, that decision is largely unreviewable, either administratively or judicially.[30] If, however, a consular officer decides to admit and issues a visa, INS officials are responsible for reviewing that decision at the border.[31] That review consists of an initial determination of admissibility by an INS officer and, if there is a finding of inadmissibiity, a hearing before an immigration judge.[32]

Deportation serves in part as an alternative means of enforcing the exclusion provisions. The immigration statute provides for the deportation of any improperly admitted alien.[33] In other words, any alien who should have been excluded under the qualitative restrictions on admission is deportable. Thus where the immigration system fails to exclude an inadmissible alien at the border, the government may rectify that failure through deportation.

Deportation is also a means of expelling from the United States aliens who, after entry, develop characteristics the government finds undesirable. In a section similar to that placing qualitative restrictions on entry, the immigration statute requires expulsion of aliens falling within certain categories. For example, an alien may be deported for committing certain crimes,[34] for failing to comply with immigration-reporting requirements,[35] and for becoming a "public charge" while within the United States.[36] The deportation provisions also require that

28. *See id.* § 1182(a)(27). In addition, the statute requires the exclusion of aliens the Attorney General knows or has reasonable grounds to believe probably would engage in espionage or subversive activities in the United States. *See id.* § 1182(a)(29).

Some of the sections cited earlier also provide executive officers with considerable discretion, which they could use to exclude politically unpalatable aliens. For example, the term "psychopathic personality," *see id.* § 1182(a)(4), is extremely vague and "may mean only an unpopular person." Boutilier v. INS, 387 U.S. 118, 125 (1967) (Douglas, J., dissenting). The application of the section requiring the exclusion of aliens coming to engage in any immoral sexual act, 8 U.S.C. § 1182(a)(13), could vary with what any given executive officer finds immoral.

29. *See* 8 U.S.C. § 1201(a) (1982); 1A C. GORDON & H. ROSENFIELD, *supra* note 10, § 3.8b, at 3-115, § 3.11a, at 3-131.

30. *See* 1A C. GORDON & H. ROSENFIELD, *supra* note 10, § 3.8a, at 3-116 to -118; *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1360 & n. 192 (1983) [hereinafter cited as *Developments*].

31. *See* 8 U.S.C. §§ 1201(h), 1225(a) (1982); 1A C. GORDON & H. ROSENFIELD, *supra* note 10, § 3.16a, at 3-158.

32. *See* 8 U.S.C. § 1225(b) (1982).

33. *See id.* § 1251(a)(1).

34. *See id.* § 1251(a)(4).

35. *See id.* § 1251(a)(15)-(16).

36. *See id.* § 1251(a)(8).

aliens be expelled for ideological reasons paralleling similar provisions in the exclusion sections.[37]

The INS is responsible for enforcing the deportation as well as exclusion provisions.[38] Once the government initiates deportation proceedings, the alien is entitled to a hearing before an immigration judge, where the government must prove that the alien should be deported.[39]

B. First Amendment Interests and Immigration Decisions

Courts and commentators have traditionally viewed the first amendment as serving certain fundamental democratic values.[40] First, freedom of expression is essential to the discovery of the truth, because only through unfettered exchange in the "marketplace of ideas" can the truth of any proposition be tested.[41] Second, freedom of expression and belief are essential to effective self-government;[42] people who do not think for themselves and speak their views cannot be said to govern themselves. Finally, first amendment freedoms are necessary to individual self-realization, the end of a democratic state.[43]

In order to protect these values, the Supreme Court has recognized various first amendment interests. When a government action is challenged as harming one of these interests, the Court imposes a duty on the government to justify its action under a strict standard.[44]

Immigration decisions may harm the first amendment interests of both aliens and citizens.[45] The most familiar and obvious first amendment interest is the freedom of individuals to choose and express their own set of beliefs. Freedom in this instance means freedom from government interference.[46] Any government imposition of a penalty or disabil-

37. *See id.* § 1251(a)(6)-(7).

38. The statute provides that the Attorney General shall order deportation, *see id.* § 1251(a), but the Attorney General has delegated this authority to enforce the immigration laws to the INS, *see id.* § 1103(a); 8 C.F.R. §§ 1.1(d), 2.1 (1985).

39. *See* 8 U.S.C. § 1252(b) (1982).

40. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970).

41. *See* Abrams v. United States, 250 U.S. 616, 630 (1919); T. EMERSON, *supra* note 40, at 6-7; L. TRIBE, *supra* note 13, § 12-1, at 576.

42. *See* T. EMERSON, *supra* note 40, at 7; L. TRIBE, *supra* note 13, § 12-1, at 577.

43. *See* T. EMERSON, *supra* note 40, at 6; L. TRIBE, *supra* note 13, § 12-1, at 578-79.

44. *See infra* text accompanying notes 59-63.

45. That resident aliens possess first amendment interests is uncontroversial, although the standard of review applicable to deportation is uncertain. *See infra* text accompanying notes 145-71. The Supreme Court has held that nonresident aliens do not possess first amendment interests. *See infra* text accompanying notes 91-102. If, however, as advocated in this Comment, *see infra* text accompanying notes 175-97, the first amendment interests of nonresident aliens are recognized, then the discussion in the text of the manner in which immigration decisions may harm first amendment interests applies equally to nonresident and resident aliens.

46. Government can augment the ability of individuals to rationally choose their beliefs by, for example, promoting education, *cf.* Shelton v. Tucker, 364 U.S. 479, 487 (1960) (freedom of expression is especially important in the schools, because of the relation of education to the effective

ity based on the content of an individual's expression or belief injures this interest.[47] This interest is injured by the exclusion or deportation of aliens on ideological grounds.

The first amendment also embraces an interest in access to an audience,[48] because none of the values underlying the first amendment are served if individuals do not communicate with one another. There can be no marketplace of ideas without an exchange of views, no political participation without communication among participants, and no individual self-realization through expression without the validation of an audience. When the government excludes or deports aliens from the United States, regardless of whether it does so on ideological grounds,[49] it denies them the opportunity to communicate with an American audience and thus injures their first amendment interests.

Similarly, because first amendment values require an interest in communication, the Court has recognized a first amendment interest in receiving information.[50] The government, in excluding or deporting aliens, impinges on the ability of citizens to receive aliens' information and ideas. Therefore, exclusion and deportation may injure the first amendment interests not only of aliens, but also of citizens.[51]

Another first amendment interest of citizens that immigration decisions may harm is an interest in political association. The value of promoting effective self-government would be ill-served if citizens could participate in political debate only as atomized individuals. The Supreme Court, therefore, has recognized a first amendment interest in associating to advance shared beliefs and programs.[52] The exclusion or deportation

exercise of rights safeguarded by the Bill of Rights), but the first amendment does not impose a duty on government to do so, *cf.* Board of Educ. v. Pico, 457 U.S. 853, 871-72 (1982) (plurality opinion) (first amendment limit on discretion of school officials to remove books from school library does not affect discretion of officials to add books); *id.* at 887-88 (Burger, C.J., dissenting) (government has no obligation under first amendment to supply information).

47. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).

48. In one case, for example, the Supreme Court recognized the interest of a religious organization in access to the patrons of a state fair. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981). The Court upheld a state fair rule confining the distribution of literature to booths, not on the basis that the rule inflicted no first amendment injury, but on the basis that the rule was a valid "time, place, and manner" restriction and the injury was therefore justified. *See id.* at 647-56. In another case, the Court recognized the first amendment interest of the Jehovah's Witnesses in distributing literature door-to-door. *See* Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

49. In both Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981) and Martin v. City of Struthers, 319 U.S. 141, 142 (1943), the challenged government regulation was content-neutral.

50. *See, e.g.*, Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); *Martin*, 319 U.S. at 143, 146-47.

51. *See* Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972); Comment, *supra* note 12, at 143-51.

52. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

of aliens holding proscribed beliefs harms this interest, because the effect of those decisions is to deny American groups who share the same beliefs access to a source of new members open to more orthodox groups. Ideological exclusions and deportations, in other words, dilute the political power of unconventional groups and thereby reduce those groups' political effectiveness.[53] The injury to associational interests is especially acute when the exclusion or deportation is of immigrants, because the effect is to deny unorthodox groups the chance to add voters to their ranks from among naturalized citizens. As in the ballot-access cases,[54] the government favors one group and burdens another in their pursuit of an ultimate end of political association: becoming the political majority.

Under normal first amendment principles, then, immigration decisions may injure a variety of first amendment interests, including those of citizens. In the immigration context, however, the Supreme Court has not applied the normal standard for redress of such injuries. Part II analyzes the Court's unique treatment of first amendment issues in immigration cases.

II
THE SUPREME COURT'S APPROACH

In immigration cases, the Supreme Court has abandoned its usual approach to first amendment issues. Normally, with first amendment challenges to government action the Court performs a two-step analysis. First, the Court determines whether the challenged government action harms a first amendment interest.[55] If the action does not harm a first amendment interest, then the challenge fails.[56] But if the action does harm a first amendment interest, the Court goes on to the second step of subjecting the action to a nondeference, as opposed to a deference, standard of review.[57] Deference cases are typified by equal protection challenges to government actions that are not based on suspect classifications and do not iinpinge on fundamental individual interests. In those cases, the Court asks only whether the government action is rationally related to a legitimate government purpose,[58] while in nondeference cases the

53. For example, suppose group *X* represents 40%, group *Y* 45%, and group *Z* 5% of a total population of 100 million which remains constant except for the effects of immigration. If aliens enter at a rate of 500,000 per year and aliens in group *Z* are excluded, at the end of 20 years group *Z*'s share of the population, assuming no conversions from one group to another, will have shrunk to 4.5%.

54. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 31 (1968).

55. *See, e.g.,* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-63 (1958); Dennis v. United States, 341 U.S. 494, 502-03 (1951).

56. *See* Laird v. Tatum, 408 U.S. 1, 10-14 (1972).

57. *See NAACP,* 357 U.S. at 460-61.

58. *See* L. TRIBE, *supra* note 13, § 16-2, at 994-96.

Court subjects government action to more exacting scrutiny.

In first amendment cases, this scrutiny consists of a determination of whether a substantial government interest justifies the harm to first amendment interests. Generally, the Court subjects government actions that harm first amendment interests to one of two justification standards. The first standard is an inquiry into whether on the particular facts of the case the behavior of the challenger actually harmed an important government interest and whether preventing that harm justified the first amendment injury.[59] The second standard asks whether the government action furthers a compelling interest unrelated to the suppression of speech and whether there is no less restrictive alternative to the action.[60] The Court has indicated that the first standard applies to direct regulations of expression[61] and that the second standard applies to indirect or incidental restrictions on speech and to "time, place, and manner" limitations on first amendment activities.[62] An alternative explanation of the Court's decisions is that the first standard applies to all government actions harming first amendment interests except those in which the government has an interest in the equal application of its regulation to all individuals, in which case the second standard applies.[63]

The Court departs from this pattern in cases raising first amendment challenges to immigration decisions. The exact approach the Court takes depends on what decision is challenged (exclusion or deportation), who the challenger is (alien or citizen), and which branch's authority is in question (the legislature's or the executive's).

In exclusion cases, the Court has held that nonresident aliens possess no first amendment interests.[64] Any challenge based on the contention that an exclusion discourages a nonresident alien's exercise of first amendment freedoms or denies a nonresident alien access to an American audience, therefore, automatically fails. When citizens challenge an exclusion that deprives them of access to an alien's ideas or beliefs, the

59. *See, e.g., Dennis*, 341 U.S. at 494-99, 508-11

60. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

61. *See, e.g., Dennis*, 341 U.S. at 510, 513.

62. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981) (time, place, and manner restrictions); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (incidental restrictions).

63. For example, in Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981), the state's interest was in the orderly functioning of a state fair. 452 U.S. at 650-51. To achieve this goal, the state implemented regulations requiring those wishing to distribute literature and solicit funds at the fair to confine their activities to booths. *See id.* at 643-44. The state's interest was not in preventing any single distribution or solicitation outside of a booth, but in confining all distributions and solicitations to booths in order to maintain clear pathways and the reasonably free movement of the fair's patrons. *See id.* at 653-54. Similarly, in United States v. O'Brien, 391 U.S. 367 (1968), Congress's statute banning draft-card burning was aimed at maintaining the draft registration system, not at preventing any particular burning. *See* 391 U.S. at 378-80.

64. *See infra* text accompanying notes 191-202.

Court adopts a different approach. Citizens obviously possess first amendment interests, but the Court nevertheless has held that injury to those interests from immigration decisions does not trigger normal nondeference review.[65] Rather, the Court will subject the challenged government action to one of two deference standards. If citizens challenge the enforcement of a congressionally mandated exclusion provision, the Court will only ask whether there is a rational relationship between the congressional decision to exclude and a legitimate interest.[66] If the citizens challenge the exercise of executive discretion in enforcing the exclusion provisions, the Court will require the executive to articulate a facially legitimate and bona fide reason for its decision.[67] In either case, the Court's approach amounts to applying a deference standard of review.

In deportation cases, the Court's approach has been more ambiguous. It has recognized that resident aliens, unlike nonresident aliens, possess first amendment interests.[68] But whether government immigration decisions that injure resident aliens' interests are subject to nondeference review or deference review similar to that applied in citizens' challenges to exclusion decisions is an open question.[69]

A. Congressional Power over Immigration

The Court's reluctance to subject immigration decisions to a nondeference standard of review stems in part from its conception of the nature and source of congressional power over immigration. The Court has held that congressional power over immigration is by nature plenary, and it has determined that the source of congressional power over immigration lies not in the Constitution but in the national sovereignty of the United States. The cases indicating that first amendment challenges to immigration decisions are subject to only a deference standard of review rely on these principles.[70]

As used to describe congressional power to regulate in an area, the term "plenary" ordinarily means that Congress has the power to regulate in that area for its own purposes, without reference to any outside justification, but subject to the specific prohibitions of the Constitution.[71]

65. *See infra* text accompanying notes 103-44.

66. *See infra* text accompanying notes 120-28.

67. *See infra* text accompanying note 115.

68. *See infra* note 145 and accompanying text.

69. *See infra* text accompanying notes 146-71.

70. *See infra* text accompanying notes 110-13.

71. The Supreme Court's interpretation of the commerce clause provides an example. In upholding a federal statute prohibiting the shipment in interstate commerce of goods produced by child labor, United States v. Darby, 312 U.S. 100 (1941), established that Congress's power to regulate interstate commerce was plenary. In doing so, the case overruled the prior Supreme Court

Early Supreme Court decisions establishing Congress's plenary power over immigration adhered to the first part of this definition, but were sometimes less clear about whether the latter limitation applied. Those cases seemed to indicate that congressional immigration decisions might not be subject to the limits imposed by the Bill of Rights. These cases have formed part of the basis for the Court's refusal to apply ordinary first amendment principles to immigration decisions.[72]

A leading case on the subject of the nature of Congress's power over immigration is *Oceanic Steam Navigation Co. v. Stranahan*,[73] decided in 1909, where the Court upheld against a procedural due process challenge an immigration statute allowing immigration officers to impose a civil fine on steamships that brought aliens afflicted with communicable diseases to the United States. In giving the statute effect, the Court relied on the broad authority of Congress to restrict immigration, which the Court characterized as plenary.[74] The concluding section of the opinion suggested that by plenary the Court meant in this instance that congressional power was absolute and not limited by the affirmative prohibitions of the Constitution. According to the Court, "all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over [immigration]."[75] This langnage suggests that the due process clause is irrelevant to the validity of immigration decisions.[76]

Similarly, in its 1893 decision in *Fong Yue Ting v. United States*,[77] the Court characterized the power to deport as "absolute and unqualified."[78] This language could be taken to mean that immigration is not subject to constitutional limits, but need not be read that way. "Absolute and unqualified" is not necessarily synonomous with "free from constitutional controls."[79] Other language in the opinion in fact suggests that the

---

decision in Hammer v. Dagenhart, 247 U.S. 251 (1918), which had held that the same type of regulation was not within Congress's authority under the commerce clause, because it had as its goal the regulation of intrastate activity. *Darby*, 312 U.S. at 115-17. The Court in *Darby* stated that Congress could regulate interstate commerce according to its own conception of public policy and that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.* at 115.

72. *See infra* text accompanying notes 110-13.

73. 214 U.S. 320 (1909).

74. *See id.* at 343.

75. *Id.*

76. The Court could not have meant that deportation is not subject to the requirements of procedural due process, since it had already held that those requirements do apply. *See* The Japanese Immigrant Case, 189 U.S. 86 (1903). The Court may have meant that *exclusion* decisions are not subject to due process requirements. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950).

77. 149 U.S. 698, 707 (1893).

78. *Id.* at 707.

79. Professor Tribe has defined plenary power as "absolute within its sphere, subject only to

Court regarded the power to deport as plenary in the usual sense: requiring no extrinsic justification, but limited by the express prohibitions of the Constitution.[80]

In addition to establishing that the immigration power is plenary, the Supreme Court's early immigration opinions held that the power is not enumerated in the Constitution, but rather is inherent in national sovereignty. The earliest decisions were not entirely clear on this point,[81] but in the 1936 *United States v. Curtiss-Wright Export Corp.*[82] decision, the Court stated in dicta that the power to deport aliens was not expressed by the Constitution but existed as inherently inseparable from the concept of nationality.[83] The Court has reaffirmed this view of the source of the immigration power in cases dealing with both exclusion[84] and deportation.[85]

The logical conclusion from the *Curtiss-Wright* dictum might have been that both Congress and the President, as elected representatives of the sovereign people, possess plenary power to determine what classes of aliens may be excluded and deported. The courts have not held, however, that the executive branch possesses independent authority to determine the grounds for exclusion and deportation. Although the Supreme Court, in *United States ex rel. Knauff v. Shaughnessy*,[86] stated that the power to exclude "is inherent in the executive power to control the foreign affairs of the nation,"[87] the Court only concluded from that principle that Congress may vest extraordinarily broad discretion in the executive to make immigration decisions.[88] When the executive exercises broad discretionary authority under the immigration statute, it does so as an agent of Congress, not as an entity with independent authority.[89]

---

the Constitution's affirmative prohibitions on the exercise of federal authority." L. TRIBE, *supra* note 13, § 5-4, at 232.

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

See Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (emphasis added).

81. In The Chinese Exclusion Case, 130 U.S. 581 (1889), the Supreme Court referred to the power of exclusion as inherent in sovereignty, *see id.* at 603-04, but also indicated that the power was "part of those sovereign powers delegated by the Constitution," *id.* at 609. In United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904), the Court indicated uncertainty about whether the power to regulate immigration rested on the theory that it is inherent in sovereignty or on the foreign commerce clause. *Id.* at 290.

82. 299 U.S. 304 (1936).

83. *See id.* at 318.

84. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

85. *See* Carlson v. Landon, 342 U.S. 524, 537 (1952).

86. 338 U.S. 537 (1950).

87. *Id.* at 542.

88. *See id.* at 542-43.

89. *See* Jean v. Nelson, 727 F.2d 957, 965-66 (11th Cir. 1984) (en banc).

B. Exclusion

Whether the exclusion of an alien is subject to first amendment objection depends on whose first amendment interests have been injured. The Supreme Court's current position is that nonresident aliens possess no first amendment interests and therefore may not challenge exclusion on the basis that it abridges their freedom of expression.[90] On the other hand, citizens asserting that the exclusion of an alien harms their first amendment interests may object to the constitutionality of exclusion under the first amendment, but they will obtain only very limited judicial review.

1. *The Interests of Nonresident Aliens*

The Supreme Court has explicitly addressed first amendment challenges to the exclusion of aliens in two cases, *United States ex rel. Turner v. Williams*,[91] decided in 1904, and *Kleindienst v. Mandel*,[92] decided sixty-eight years later. In *Turner*, the Court's treatment of aliens' constitutional rights was ambiguous enough to allow for different interpretations. In *Turner*, an alien excluded for being an anarchist challenged his exclusion on the ground that it violated the first amendment.[93] The Court denied the challenge,[94] but the opinion was obscure as to the basis for the denial. The opinion could be read as holding either that aliens possess no first amendment interests or that the government had met the applicable justification standard. The Court began by questioning the applicability of the first amendment to exclusion.

> We are at a loss to understand in what way the act is obnoxious to [the first amendment]. . . . It is, of course, true that if an alien is not permitted to enter this country . . . he is in fact cut off from . . . speaking [here] . . . but that is merely because of his exclusion . . . . [T]hose who are excluded cannot assert rights in general obtaining in a land to which they do not belong . . . .[95]

The Court proceeded to evaluate the alien's specific contention that exclusion for being an anarchist was unconstitutional. It concluded that the exclusion was valid even if the alien's anarchism was only a philosophical belief and not a program for action.[96]

One interpretation of this treatment of the first amendment chal-

90. Resident aliens, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886), as well as citizens outside the United States, *see* Reid v. Covert, 354 U.S. 1 (1957), possess judicially cognizable interests under the Constitution. Only those who are both non-citizens and outside the United States do not.

91. 194 U.S. 279 (1904).

92. 408 U.S. 753 (1972).

93. *Turner*, 194 U.S. at 292.

94. *Id.* at 293-94.

95. *Id.* at 292.

96. *See id.* at 292-95.

lenge is that the Court was denying that aliens possess first amendment interests.[97] Under this interpretation, when the Court said, "[T]hose who are excluded cannot assert rights in general obtaining in a land to which they do not belong,"[98] it meant that because nonresident aliens in no sense "belong" to the United States, they do not have first amendment interests under the United States Constitution. Under this interpretation, when the Court discussed the validity of excluding anarchists and concluded that even the exclusion of philosophical anarchists was valid, it did so only to demonstrate the inapplicability of any first amendment justification standard.

An equally plausible interpretation is that the Court acknowledged that nonresident aliens were entitled to first amendment protection, but decided that under the particular facts of the case government suppression of expression was justified. Under this interpretation, the first part of the opinion means that an exclusion's incidental effect of denying an alien the opportunity to speak in the United States does not by itself violate the first amendment.[99] In the second part of the opinion, validating the exclusion of anarchists, the Court, under this view, acknowledged that exclusion based on the content of expression harms an alien's first amendment interests but found that the government interest in "self-preservation"[100] justifies the harm.[101]

Despite this ambiguity in the *Turner* opinion, the Court in *Mandel* treated as well-settled the conclusion that aliens seeking entry into the United States have no first amendment interests.[102]

---

97. This was the interpretation adopted by the Court in *Mandel*. *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

98. *See supra* text accompanying note 95.

99. This could be what the Court meant when it said that the act is not "obnoxious" to the first amendment in prohibiting an alien from speaking in the United States "merely because of his exclusion." *See supra* text accompanying note 95. Under modern first amendment doctrine, however, incidental effects on expression may constitute harm to first amendment interests. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

100. *Turner*, 194 U.S. at 294.

101. Under modern doctrine, punishing the expression of a philosophical belief would certainly violate the first amendment. *Cf.* Yates v. United States, 354 U.S. 298, 312-27 (1957) (construing the Smith Act, which prohibits advocacy of violent overthrow of the government, to prohibit only advocacy of action and not merely the teaching of abstract doctrine).

102. "It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." Kleindienst v. Mandel, 408 U.S. 753, 762 (1972). This language is inexact, but the Court almost certainly meant that nonresident aliens possess no first amendment interests. The Court cannot have meant that because aliens have no constitutional right of entry, a speech-based denial of the privilege of entry does not harm their first amendment interests. Advancing that argument would have constituted reliance on the right/privilege distinction, which the Court had abandoned by the time *Mandel* was decided. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1458 (1968). The Court would be unlikely to have dismissed Mandel's claim with this single sentence and without reference to the justifications for the government's action unless Mandel possessed no first amendment interests.

2. *The Interests of Citizens*

Mandel involved the exclusion of a nonresident alien under the section of the immigration law prohibiting the entry into the United States of any alien who advocates the "doctrines of world communism."[103] Ernest Mandel was a self-described "revolutionary Marxist" who had visited the United States twice before.[104] On his previous visits he had been found ineligible for a visa, but the Attorney General had waived exclusion.[105] On application for a third visa, Mandel was again found ineligible, but this time the Attorney General refused a waiver, assertedly because Mandel had violated conditions attached to his previous visas.[106] Mandel and those who had invited him to the United States brought suit to enjoin the Attorney General from denying Mandel entry. They successfully argued in the district court that Mandel's exclusion unjustifiably burdened his American audience's first amendment interest in hearing his views.[107]

The Supreme Court accepted the argument that Mandel's exclusion harmed the first amendment interests of citizens. The Court recognized that the first amendment protects an interest in receiving new ideas and information and that the exclusion of Mandel harmed this interest by denying his American audience the opportunity to engage in face-to-face discussion with him.[108] The Court nevertheless denied relief from the Attorney General's action.[109]

The Court gave effect both to the statutory requirement of exclusion of aliens espousing communist doctrines and to the Attorney General's decision not to waive exclusion in Mandel's case, but the Court applied different standards to each of these decisions. Congress's decision, according to the Court, was not subject to judicial scrutiny under the first amendment.[110] The Court noted that a long line of cases, including

---

103. 8 U.S.C. § 1182(a)(28) (1982).

104. Kleindienst v. Mandel, 408 U.S. 753, 756 (1972).

105. *Id.* The immigration statute affords the Attorney General discretion to waive most grounds of exclusion in the case of nonimmigrants. *See* 8 U.S.C. § 1182(d)(3) (1982).

106. *Mandel*, 408 U.S. at 756-59.

107. *Id.* at 760.

108. *See id.* at 762-65.

109. *See id.* at 769.

110. *See id.* at 767. The language to this effect may be dicta. After quoting cases indicating that congressional power to deport is plenary and inherent in national sovereignty, and that exclusion is a political question, the Court stated:

> We are not inclined in the present context to reconsider this line of cases. Indeed, the appellees, in contrast to the *amicus*, do not ask that we do so. The appellees recognize the force of these many precedents. In seeking to sustain the decision below, they concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by §§ 212(a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision.

Mandel, 408 U.S. at 767. The opinion here suggests that precedent compels the conclusion that congressionally mandated exclusions are not subject to judicial review under the first amendment.

Oceanic Steam Navigation Co. v. Stranahan,[111] held Congress's authority to be plenary.[112] The Court also relied on decisions holding that Congress's authority was inherent in sovereignty and not enumerated in the Constitution.[113] Finally, the Court suggested at various points that exclusion was a political question.[114]

The Attorney General's denial of waiver received a different treatment. The Court held that the Attorney General had justified the harm to the first amendment interests of Mandel's audience by articulating a "facially legitimate and bona fide" reason for the denial of waiver.[115] The Court, thus, declined to hold that executive discretion in making immigration decisions is, like congressionally mandated exclusions, immune from judicial review.

The Court, however, also refused to subject executive waiver denials to ordinary nondeference first amendment review. Rather, the Court required only a limited showing of justification for the denial of waiver, and in doing so manifested unusual views on the nature of first amendment review of executive decisions. The Court felt it would be undesirable to require anything more than a "facially legitimate and bona fide reason."[116] This weighing process would force the courts to consider factors they are not competent to evaluate, such as "the size of the audience or the probity of the speaker's ideas."[117] According to the Court, "it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive."[118]

The opinion also suggests, however, that that question was not before the Court because appellees failed to contest the issue in their brief. The dissenting opinion argues that appellees conceded the point merely for the sake of argument in order to introduce their additional contention that the denial of waiver was unconstitutional. *See id.* at 779 n.4.

111. 214 U.S. 320, 339 (1909); *see supra* text accompanying notes 73-76.

112. *See Mandel*, 408 U.S. at 765-66.

113. *See id.* at 765.

114. For example, the Court approvingly quoted from the government's brief, which stated that the power to exclude was " 'necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—*a power to be exercised exclusively by the political branches of government.*' " *Id.* at 765 (emphasis added) (quoting from Brief for Appellants at 20). The Court also quoted from Galvan v. Press, 347 U.S. 522 (1954), in which Justice Frankfurter stated, " 'Policies pertaining to the entry of aliens . . . are peculiarly concerned with the political conduct of government.' " *Mandel*, 408 U.S. at 766-67 (quoting *Galvan*, 347 U.S. at 531). *Galvan* was a deportation case. Its implications for the right of resident aliens to challenge deportation under the first amendment are discussed *infra* at text accompanying notes 166-69.

115. *Mandel*, 408 U.S. at 769.

116. *Id.*

117. *Id.*

118. *Id.* In dissent, Justice Marshall argued that the Court's earlier immigration opinions were questionable and that, in any case, those opinions did not need to be reconsidered, since they did not involve citizens' first amendment interests. *See id.* at 782-83 (Marshall, J., dissenting). He maintained that ordinary nondeference first amendment review should be applied to immigration decisions which harm citizens' first amendment interests. *See id.* at 783-84. In a separate dissent, Justice Douglas argued that the statutory exclusion provisions should be construed in accordance

The Court, thus, seems to have believed that first amendment review of executive decisions requires an evaluation of the worth of the speaker's expression and that the executive is more competent to make this determination than the courts.[119] In a later case, the Court modified *Mandel* to extend limited judicial review to legislative as well as executive decisions to exclude.

In *Fiallo v. Bell*,[120] United States citizens challenged immigration preference provisions that prevented their fathers or children from obtaining immigrant visas.[121] A situation parallel to that in *Mandel* faced the Court: citizens challenged congressionally mandated exclusions that harmed their interests, and the interests harmed would have elicited heightened judicial scrutiny from the Court in a nonimmigration case. The challenged provisions in *Fiallo* made distinctions based on both sex and legitimacy. Unwed mothers of citizens and illegitimate children of female citizens could obtain special-preference immigration status, but unwed fathers of citizens and illegitimate children of male citizens could not.[122] Legitimate children of citizens and parents of legitimate citizens could obtain preferential status regardless of the sex of the parent.[123] The Court, nevertheless, specifically refused to forego judicial scrutiny as *Mandel* would seem to have required.[124] Rather, the Court subjected the preference provisions to "limited judicial review."[125]

The Court did not state in *Fiallo* precisely what standard it would

---

with first amendment principles to allow admission of aliens who seek to enter the United States only to engage in the "propagation of ideas" and not to engage in illegal activities. *See id.* at 772-74 (Douglas, J., dissenting).

119. This view of the first amendment justification standard finds little support in the case law. In determining whether harm to a first amendment interest is justified, courts do not attempt to determine the value of expression suppressed. *See* Cohen v. California, 403 U.S. 15, 25 (1971). The Supreme Court's contention that courts are not competent to evaluate the probity of ideas is irrelevant, since such a task is never called for under normal first amendment review.

A deference standard of review might be justified if the executive acts as Congress's surrogate in discretionary decisions to exclude. Under this view, a discretionary exclusion is the equivalent of a congressionally mandated exclusion and should be shown the same deference. If, however, as argued below, *see infra* text accompanying notes 198-241, congressional decisions to exclude are not entitled to unusual deference, then neither are executive decisions.

120. 430 U.S. 787 (1977).

121. *See id.* at 790.

122. *See id.* at 788-89.

123. *See id.*

Government classifications by gender are subject to an intermediate standard of review between the deference rational basis standard and the strict scrutiny applied in racial discrimination cases. In gender discrimination cases the courts ask whether the classification serves important goverument objectives and is substantially related to achievement of those objectives. *See* Orr v. Orr, 440 U.S. 268, 279 (1979); *Fiallo*, 430 U.S. at 809 (Marshall, J., dissenting); Califano v. Webster, 430 U.S. 313, 316-17 (1977). Discrimination on the basis of legitimacy receives similar treatment. *See* Lalli v. Lalli, 439 U.S. 259, 265 (1978).

124. *See Fiallo*, 430 U.S. at 793 n. 5.

125. *See id.* at 795 n.6.

apply to congressionally mandated exclusions. The Court's discussion, however, of the justification for the distinctions made in the preference provisions indicates that the Court was applying the rational basis standard normally used in deference cases. Under the rational basis standard, the Court only inquires whether the statute in question bears a "reasonable relation to a proper legislative purpose";[126] any conceivable basis for the statute suffices.[127] *Fiallo*'s treatment of the justification for the preference provisions falls into this pattern.

> Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations. . . . In any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision.[128]

The *Mandel* facially legitimate and bona fide reason standard might itself be better expressed as a rational basis test. The two standards are equivalent. The *Mandel* standard incorporates the traditional requirement of a rational relationship between government means and ends; the courts are unlikely to regard as bona fide an asserted government interest that is not rationally related to the action taken. The rational basis test, on the other hand, includes the *Mandel* requirement that the government purpose be legitimate.[129] The term "facially" in the *Mandel* test probably means that the courts should not assess the wisdom or advisability of the government action, and that is also the case under the rational basis test.[130] Since the two standards are equivalent, it was unnecessary for the Court to have articulated a new standard in *Mandel*. The Court's doctrine in this area would be simpler and cleaner if it applied the same rational basis standard to executive decisions to exclude that is applied to legislative decisions and all other deference cases.

Although the rational basis standard is deferential, it is not entirely toothless. The legitimacy requirement, for example, may serve as a basis for overruling exclusions predicated exclusively on preventing discussion in the United States of ideas or views repugnant to government policies. Under conventional first amendment doctrine, the government has no interest in stifling the discussion of ideas that it finds unpalatable[131] and may only justify suppression by showing a threat of harm to an impor-

126. Nebbia v. New York, 291 U.S. 502, 537 (1934).

127. Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

128. *Fiallo*, 430 U.S. at 799.

129. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

130. Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

131. "[The] basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policies." Dennis v. United States, 341 U.S. 494, 503 (1951). The government thus has no interest in suppressing speech merely because it may lead to questioning of government policies.

tant government interest.[132] *Mandel* denies the courts the power to require proof of justification,[133] but by requiring a legitimate government interest it leaves intact the stricture against smothering debate. Thus, in meeting a citizen's first amendment challenge to exclusion, the government must at least advance some government interest that the exclusion serves other than preventing or mitigating dissension over government policies.

A district court employed this principle in *Abourezk v. Reagan*.[134] In *Abourezk*, citizens challenged the exclusion under 8 U.S.C. § 1182(a)(27) of aliens who had been invited to speak in the United States.[135] That section requires the exclusion of aliens seeking entry "to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States."[136] The court held that an affidavit stating simply that entry of the aliens "would have been prejudicial to the conduct of the foreign affairs of the United States" was inadequate to meet the *Mandel* standard.[137] The court stated that it could reasonably be inferred from that affidavit that the aliens were excluded because of the content of their message, and regulating content was, according to the court, an impermissible government purpose.[138] Ultimately, however, the court upheld the exclusion based on the in camera inspection of classified affidavits.[139]

The rational-relationship requirement provides another means of challenging exclusions. If an exclusion bears no rational relationship to a legitimate government interest, then the courts may, under *Mandel*, refuse effect to the exclusion and permit the alien to enter. In *Lesbian/Gay Freedom Day Committee v. INS*,[140] the district court did just that. *Lesbian/Gay* involved a challenge to the INS's policy of excluding persons who affirmed on immigration forms that they were homosexuals. The INS policy derived from a section of the immigration statute requiring exclusion of those with psychopathic personalities. The INS adopted this policy after the Public Health Service (PHS) discontinued issuing medical certificates of excludability based on an alien's homosexuality. The PHS's policy change resulted in turn from the American Psychiatric Association's decision to remove homosexuality from its list of mental

132. *Id.* at 509.

133. *See* Kleindienst v. Mandel, 408 U.S. 753, 765-70 (1972).

134. 592 F. Supp. 880 (D.D.C. 1984).

135. *See id.* at 881-82.

136. *See* 8 U.S.C. § 1182(a)(27) (1982).

137. *See Abourezk*, 592 F. Supp. at 886.

138. *See id.* at 887.

139. *See id.* at 887-88.

140. 541 F. Supp. 569 (N.D. Cal. 1982), *rev'd on other grounds*, 714 F.2d 1470 (9th Cir. 1983).

disorders.[141] An American organization that had invited a nonresident alien to participate in a gay rights demonstration in the United States sought relief from an order excluding that alien.[142] The court decided that since medical authorities no longer regarded homosexuality as an illness, no legitimate reason for excluding homosexuals existed.[143] In other words, the shift in medical opinion had eliminated any rational relationship between the government interest and the measure adopted to serve that interest. The court therefore refused effect to the exclusion.

Despite the potential for providing some first amendment protection, in the final analysis *Mandel* is a deferential standard. Lower courts that seek to expand it will risk reversal. The *Lesbian/Gay* court, for example, may have required too compelling a justification for the exclusion of homosexuals. If the shift in medical authority was not universal, then the government still had *some* basis for contending that its rule served a legitimate purpose. Under normal nondeference standards, some justification is not enough. Both first amendment justification standards require the government prove compelling justification for engaging in conduct that harms first amendment interests.[144] The *Mandel/Fiallo* deference standard, therefore, does not provide the protection for first amendment values in immigration cases that they receive in all other cases.

C. Deportation

What first amendment standard applies in deportation cases is less certain than in exclusion cases. That resident aliens, unlike nonresident aliens, possess first amendment interests is clear.[145] It is unclear, however, whether in deportation proceedings the courts will apply normal first amendment standards or will show the same deference to government decisions as in exclusion cases. Some commentators have assumed that the deference standard applies,[146] but this conclusion does not necessarily follow from Supreme Court decisions.

In the 1945 decision *Bridges v. Wixon*[147] the Court, although not addressing the issue directly, strongly suggested that deportation is subject to normal first amendment standards. The case involved an order of deportation entered against Harry Bridges, a resident alien and labor

141. *See id.* at 572-73.

142. *See id.* at 571.

143. *See id.* at 586.

144. *See supra* text accompanying notes 59-63.

145. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *cf.* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an *unadmitted* and non-resident alien, had no constitutional right of entry to this country . . . .") (emphasis added).

146. *See* C. GORDON & H. ROSENFIELD, *supra* note 10 § 1.5a, at 1-34 to 1-35.

147. 326 U.S. 135 (1945).

leader, under a statute requiring expulsion of any alien "affiliated" with the communist party.[148] The Court construed the term "affiliated" to mean "a working alliance to bring the proscribed program to fruition,"[149] and held that since Bridges had cooperated with the party only to achieve lawful objectives, the government could not deport him.[150] Although statutory construction was the basis of this holding, the Court made it clear that the first amendment was the basis of the construction. The Court noted that "freedom of speech and press is accorded aliens residing in this country."[151] The Court quoted with approval from a report stating: " 'That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits.' "[152]

A likely interpretation of the opinion is that the Court construed the statute to accord with the first amendment in order to avoid finding it unconstitutional. This interpretation suggests that a broader construction would have resulted in the statute's being held unconstitutional and therefore that normal first amendment standards apply to deportation. A more strained reading is that by its construction the Court was avoiding imputing to Congress an intent in conflict with first amendment values, and that the Court would have deferred to Congress's determination if such an intent had been clear from the face of the statute. *Bridges* thus suggests that nondeference first amendment standards may be applied to deportation, but the opinion does not preclude a deference standard.

Harisiades v. Shaughnessy,[153] a 1952 decision and the only case in which the Court addressed a first amendment challenge to deportation, is even more ambiguous. In *Harisiades*, the Court purported to apply the principles of *Dennis v. United States*[154] to the deportation of alien communists.[155] While citing *Dennis*, however, the Court did not apply the *Dennis* standard. Instead, the opinion states cryptically: "[T]he test applicable to the Communist Party has been stated too recently to make further discussion profitable."[156] In fact, however, *Dennis* requires discussion. Under *Dennis*, the courts must determine whether, given the particular facts of each case, the challenger's behavior inflicts sufficient harm to a substantial government interest to justify harm to the chal-

148. *See id.* at 138-39.
149. *Id.* at 146.
150. *Id.* at 147.
151. *Id.* at 148.
152. *Id.* at 149.
153. 342 U.S. 580 (1952).
154. 341 U.S. 494 (1951).
155. *See Harisiades*, 342 U.S. at 592 & nn. 18-19.
156. *Id.* at 592.

lenger's first amendment interests.[157] The *Harisiades* Court did not undertake this type of review, and if it had, the results of the case would have been difficult to justify.[158] The question is thus whether the court intended to accord the case deference or nondeference review.

The Court's ambiguous citation to *Dennis* could mean that the Court was deliberately applying a deference standard because the case involved a challenge to deportation. On the other hand, there are explanations of the case that would leave open the possibility of applying a nondeference standard of review to deportation decisions.[159] The Court may simply have misapplied *Dennis*.[160] Or the Court might have adopted a deference standard, not because the challengers were aliens seeking relief from deportation, but because they were communists.[161]

A second problem with the *Harisiades* opinion is the Court's discussion of the aliens' substantive due process challenge to deportation. At one point in the opinion, the Court seems to suggest that deportation is always subject to a deferential standard of review.

> It is pertinent to observe that 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. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[162]

Yet immediately after this passage, the Court noted that the restraints on judicial review imposed in cases involving foreign affairs and the war power "do not control today's decision, but they are pertinent."[163] The Court's treatment of the substantive due process challenge was deferen-

157. *See Dennis*, 341 U.S. at 508-11, 514-15.

158. The aliens challenging deportation were past members of the communist party who did not personally believe in or, in one case, know of, the party's program to overthrow the government by force and violence. *Harisiades*, 342 U.S. at 581-83. Presumably, the government's interest in *Harisiades* was the same as in *Dennis*—preventing insurrection. *See Dennis*, 341 U.S. at 501. It is difficult to see how these aliens harmed that government interest.

159. *But see* Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547, 552-53 (1953) (arguing that *Harisiades* holds that deportation is not subject to nondeference first amendment review).

160. If the Court did misapply *Dennis*, it would not be the first time. In a case that, like *Dennis*, involved a challenge to the Smith Act, the Court disposed of the first amendment challenge by noting that, "It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech . . . ." Scales v. United States, 367 U.S. 203, 228 (1960). The Court again failed to examine the particular facts of the case.

161. The McCarthy-era Court was in general not very receptive to first amendment appeals from members of the Communist Party. J. ELY, DEMOCRACY AND DISTRUST 107-08 (1980). In particular, Justice Jackson, who later wrote for the majority in *Harisiades*, disapproved of the strict scrutiny that the *Dennis* required in cases involving communists. *See Dennis*, 341 U.S. at 567-70 (Jackson, J., concurring).

162. *Harisiades*, 342 U.S. at 588-89.

163. *Id.* at 589-90.

tial,[164] but deference is the appropriate standard of review for substantive due process cases.[165] Arguably, then, this section of *Harisiades* does not hold that all constitutional challenges to deportation are subject to a relaxed standard of review, but only that under conventional constitutional standards the deportation of members of the communist party is not a violation of substantive due process.

Galvan v. Press,[166] decided two years after *Harisiades*, is another case in which the Court suggested that a deferential standard of review applies to constitutional challenges to deportation. That case, however, did not involve a first amendment challenge, and the Court's discussion of the substantive due process claim is open to an interpretation similar to that advanced above for *Harisiades*. Writing for the Court, Justice Frankfurter at first appeared sympathetic to the aliens' substantive due process argument. He stated that "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens."[167] He went on, however, to state:

> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," . . . but a whole volume. Policies pertaining to the entry of aliens and their rights to remain here are peculiarly concerned with the political conduct of government. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[168]

Initially, this language appears very broad. But again, taken in context, it can be read as not requiring deference in every constitutional challenge to deportation. As in *Harisiades*, the challenger was asking the Court to assess the reasonableness of Congress's decision to require the deportation of communists.[169] As a response to this request, the quoted passage is much like that in *Harisiades* and may be taken simply as a refusal to use due process to second guess Congress's policy determinations.

The effect of the decisions in *Bridges*, *Harisiades*, and *Galvan* thus is problematic. *Bridges* suggests that nondeference first amendment review applies to deportation decisions that harm first amendment interests, but the opinion does not preclude the application of a deference standard.

164. *See id.*
165. *See* Nebbia v. New York, 291 U.S. 502 (1934).
166. 347 U.S. 522 (1954).
167. *Id.* at 530-31.
168. *Id.* at 531.
169. *See id* at 530.

Harisiades and *Galvan* can be read as either requiring deference or allowing nondeference. Despite the ambiguity in Supreme Court decisions, lower courts and commentators seem to regard the question as settled in favor of a deference standard.[170] And while the Supreme Court itself has indicated in dicta that it also suscribes to this view,[171] it has not explicitly decided the issue.

III
CRITIQUE OF THE SUPREME COURT'S APPROACH

A. Exclusion

The Supreme Court has adopted two rules placing limitations on the protections afforded first amendment values in exclusion cases. The Court has held that nonresident aliens possess no first amendment interests. It further has held that exclusions that harm the first amendment interests of citizens are subject to a deference standard of review. The rationale for these rules is not well-developed in the Court's opinions.[172] In *Mandel*, for example, the Supreme Court treated the proposition that aliens possess no first amendment interests as self-evident. In both *Mandel* and *Fiallo*, the Court relied on vague generalizations about the power to exclude to justify the deference standard of review for constitutional challenges in the immigration context.[173] So cursory is the justification, that it is necessary to look behind the language of its opinions in order to critique the Court's doctrine in this area. This Section will examine not only the reasons the Court has advanced for the rules it has adopted, but also other unstated concerus that might support the results in the exclusion opinions. It concludes that neither the expressed nor the unexpressed rationales justify the Court's rules in this area, and that the rules are unwise as a matter of constitutional policy.

1. The Rule that Aliens Have No First Amendment Interests

The effect of the *Turner* and *Mandel* opinions is to distinguish citizens and resident aliens from nonresident aliens. Citizens, wherever located,[174] and aliens within American territory,[175] possess first amend-

170. *See* Lennon v. INS, 527 F.2d 187, 188 (2d Cir. 1975), *aff'g*, Lennon v. United States, 387 F. Supp. 561 (S.D.N.Y. 1975); C. GORDON & H. ROSENFIELD, *supra* note 10, § 1.5a, at 1-35.

171. In *Mandel*, the Court relied in part on *Galvan* to justify the limited standard of review it applied to exclusion. *See* Kleindienst v. Mandel, 408 U.S. 753, 766-67 (1972). In *Fiallo*, the Court indicated that the power to expel was as unlimited as the power to exclude. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

172. Justice Marshall characterized the Supreme Court's reasoning in *Mandel* as "baroque." Kleindienst v. Mandel, 408 U.S. 753, 781 (1972) (Marshall, J., dissenting).

173. *See supra* text accompanying notes 102-23.

174. *See* Reid v. Covert, 354 U.S. 1, 5-6 (1957).

175. *See* Bridges v. Wixon, 326 U.S. 135, 148 (1945) (citing Bridges v. California, 314 U.S. 252

ment interests, and the government owes them a duty not to harm those interests without sufficient justification. Under *Turner* and *Mandel*, the government owes no such duty to aliens outside the United States, because they possess no first amendment interests.[176] The government can arbitrarily deny them access to an American audience, even on the basis of their beliefs, their affiliations, or the content of their expression.

The Supreme Court has provided no explicit justification for the rule that nonresident aliens possess no first amendment interests. Its exclusion decisions and decisions in other areas, however, suggest that one or both of two reasons may have influenced the Court's decisions. First, some of the Court's opinions indicate that the Court may have believed the consent theory of government compelled the conclusion that aliens possess no interests under the Constitution. Second, the Court may have been concerned that recognizing the first amendment interests of aliens ultimately would lead the Court to decide political questions. A close examination of these reasons reveals that neither of them justifies the rule that aliens possess no first amendment interests.

There is evidence in Supreme Court opinions that the Court has derived the rule that nonresident aliens possess no first amendment interests in part from the social contract theory of government. Under that theory, nonresident aliens, unlike citizens and resident aliens, are not parties to the social-contract.[177] Reliance on this distinction appears in Justice Field's dissenting opinion in *Fong Yue Ting v. United States*.[178]

> It does not follow that because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are no more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe . . . a temporary obedience, they are entitled, in return, to their protection and advantage.[179]

Here, Field seems to be drawing on Locke for the idea that resident aliens consent to the government and may therefore invoke the Constitution's protections. Implicit in this idea is the notion that the Constitution is a contract between the government and persons and that some form of adherence to the bargain is necessary to entitle a person the Constitu-

(1941)); *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (resident aliens possess interest in equal protection).

176. *See supra* text accompanying notes 91-102.

177. According to John Locke, consent to government may be express or tacit. Express consent consists of some manifestation of a "positive Engagement" with a political society, and tacit consent consists of any contact with a society that results in a person's enjoying any of the benefits of living under the government of that society. 2 J. LOCKE, TWO TREATISES OF GOVERNMENT §§ 119-122, at 392-94 (P. Laslett rev'd ed. 1963). Under this theory, resident aliens may be said to tacitly consent, but nonresident aliens do not give their consent in any form.

178. 149 U.S. 698 (1893).

179. *Id.* at 749 (Field, J., dissenting).

tion's benefits. This notion also may have formed the basis for the statement in *Turner* that "those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."[180] If *Turner* is read as holding that nonresident aliens possess no first amendment interests, the Court's reason for adopting that rule may be that because nonresident aliens in no sense belong to the United States, they are not parties to the Constitution and may not invoke its protections.

Basing the nonrecognition of nonresident aliens' first amendment interests on the social-contract theory rather than on an interpretation of the Constitution itself depends on a faulty construct. Even if the Constitution is a contract between the people and the government, it does not follow that nonresident aliens as nonparties may not invoke the Constitution's protections. Those who are not parties to a contract may enforce its provisions if they are intended beneficiaries of the contract.[181] But there is a more important argument that it is in any case a mistake to regard the Constitution as a contract between the people and the government. Under social-contract theory, the people compact with one another to form a political society and then establish government. Government, therefore, is not a party to the social contract, but the product of it.[182] When the American people established their government, they imposed certain limits on its powers, which the government has no authority to overstep.[183] It is, therefore, incorrect to maintain that Constitutional rights are part of a bargain with the government. They are, rather, limits imposed on the government by the people through the Constitution. It does not necessarily follow that those limits apply to all government actions, including exclusion; they may be interpreted to apply only to some types of goverument action and not to others. The crucial point, however, is that determining whether the Constitution's limits apply to certain government actions involves interpreting the Constitution itself. That determination cannot be made by recourse to the social–contract theory.

A second possible rationale for the rule that nonresident aliens possess no first amendment interests is that a contrary rule ultimately might involve the federal courts in disputes that are beyond their competence to resolve.[184] The United States, as a world power, engages in many activities abroad that could be said to abridge freedom of expression or other

180. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

181. *See* E. FARNSWORTH, CONTRACTS § 10.4, at 734 (1982).

182. *See* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 59-61 (1985).

183. *See* R. BERGER, CONGRESS V. THE SUPREME COURT 13-15 (1969).

184. Whether exclusion is in general a political question or should be treated like one is discussed *infra* at text accompanying notes 201-35.

constitutional rights. For example, a plausible argument could be made that in supporting repressive regimes in certain countries, the United States indirectly abridges freedom of expression and belief in those countries. If citizens of these countries possessed first amendment interests, they might bring claims before the federal courts challenging the constitutionality of United States foreign policy.[185]

However, denying nonresident aliens the protections of the first amendment in all cases is unnecessary, because the Court already has doctrinal tools to deal with claims based on the effects of United States foreign policy. For instance, the courts could hold these claims to be nonjusticiable under the political question doctrine. The standards for assessing the effects of United States foreign policy are inherently political, because they involve weighing present and future effects of countless alternatives. Claims like the ones suggested above present political questions in part because the courts are not competent to resolve them. They require assessments of information to which the courts have poor access, and court review would limit the political departments in dealing with situations beyond the courts' area of expertise.[186]

In refusing to recognize nonresident aliens' first amendment interests, the Supreme Court may be seeking to prevent from arising cases in which United States foreign policy is challenged. However, avoiding those cases by denying constitutional rights to a class of persons otherwise entitled to protection is a violation of the courts' usual principles of adjudication. The political question doctrine itself contemplates a case-by-case application.[187] Particular issues which present a political question in some cases may be justiciable in other cases presenting different circumstances.[188] As Justice Brennan has explained, "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' "[189] If the political question doctrine itself forbids holding an entire class of cases to be beyond the courts' cognizance, the desire to avoid confronting cases embodying political questions should not justify a broad rule of constitutional law that holds a large class of persons to be

185. *Cf.* Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (tort claim brought by citizens of Paraguay against former Paraguayan chief of police for violation of human rights).

186. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567-73, 578-83 (1966). Under the Court's formulation of political question criteria, whether the United States should support a particular foreign regime is a question for which there are no judicial standards and which requires adherence to a political decision already made. Baker v. Carr, 369 U.S. 186, 217 (1962). Even those who argue that the doctrine does not exist as a separate, coherent theory of judicial abstention would probably argue that the cases presenting this issue warrant dismissal for want of equity. *See, e.g.*, Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 617-22 (1976).

187. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

188. *See id.* at 211-17.

189. *Id.* at 217.

beyond the protections of the Constitution. If the courts may not define a class of "political cases," they should not define a class of "political plaintiffs."

In sum, the social-contract theory and political question doctrine do not support the Supreme Court's rule that nonresident aliens possess no first amendment interests. In addition, there are affirmative reasons for recognizing nonresident aliens' first amendment interests.

First, recognizing nonresident aliens' first amendment interests will serve the first amendment value of individual self-realization.[190] Refusing effect to exclusions based on the content of aliens' beliefs or expression will diminish the government's interference with nonresident aliens' freedom to choose their beliefs. The Court cannot justify denying first amendment protection on the basis of the social-contract theory alone, but must resort to interpretation of the Constitution itself.[191] The words of the first amendment indicate that abridging freedom of speech is inappropriate activity for a democratic government regardless of whose freedom is abridged. If that is the case, then the Court should recognize nonresident aliens' first amendment interests by requiring the government to justify actions harming those interests.[192]

Even under the view that first amendment values apply only to members of the national political community, recognition of interests of nonresident aliens could still be a means of protecting first amendment values for citizens and resident aliens. Nonresident aliens contribute fresh perspectives to discussions in the United States of political and other matters. In doing so, they contribute to the first amendment values of maintaining a marketplace of ideas[193] and allowing the free and open debate necessary to self-government.[194] In order to protect these values the Court should recognize nonresident aliens' first amendment interests and apply the usual first amendment justification standards when the government harms those interests.[195]

If the free hand the courts have allowed the political branches in

190. *See supra* note 43 and accompanying text. A possible rejoinder to this argument is that first amendment values are only of concern to American courts when the challenged government action affects members of the American political community. But it is not obvious why this should be so. The words of the first amendment do not refer to any class of persons, but provide simply that Congress shall "make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

191. *See supra* text accompanying notes 177-83.

192. "Thought control is not within the competence of one branch of government." Kleindienst v. Mandel, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting).

193. *See supra* note 41 and accompanying text.

194. *See supra* note 42 and accompanying text.

195. *Cf.* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-77 & n.12, 784 (1978) (recognizing corporation's first amendment interests in publishing political advertisements in order to preserve value of free political debate, even though the first amendment was arguably unconcerned with corporation's individual self-expression).

making exclusion decisions has served any useful purpose, it is to illustrate the need for judicial supervision of government actions that affect individual rights. Unrestrained by the prospect of a judgment of unconstitutionality, the government often has used its exclusion power in a manner clearly inconsistent with first amendment values. In particular, exclusion has frequently served as a tool for minimizing dissension over government policies.[196] This experience shows a potential benefit of judicial restraint of government interference with individuals' first amendment interests. The Court usually instructs that the government may only override this interest if it proves a compelling need to do so,[197] and this approach, when properly applied, serves to contain government action affecting speech within fairly narrow boundaries. By opening up a large loophole in those boundaries, the Court weakens the moral force of its usual first amendment teaching. As a result, the government may be more willing to take action affecting those outside the unprotected class, and the courts may be more willing to condone such action.

2. *The Rule that Exclusions that Harm Citizens' First Amendment Interests Are Subject to a Deference Standard of Review*

The Supreme Court has indicated that there are three reasons for the deference shown to congressionally mandated exclusions. First, the Court has suggested that exclusions raise political question concerns.[198] Second, the Court has indicated that because the power to exclude is not found in the Constitution, the Constitution's limits do not apply to the power.[199] Finally, the Court has indicated that the characterization of the power as plenary supports the conclusion that the power is not sub-

196. In 1982, for example, the government denied entry to 315 aliens who wanted to attend demonstrations set to coincide with the United Nations's special session on disarmament. N.Y. Times, June 8, 1982, at A3, col. 1. According to government officials, these aliens were excluded because they were members of "Soviet front groups." *Id.* A statement by Lawrence Eagleburger, the Undersecretary of State for Political Affairs, revealed that the government's concern was not with security; the excluded aliens were not suspected of being spies. Rather, the aliens were excluded because the government wanted to prevent Americans from hearing their views. Eagleburger pointed out that "[w]e have absolutely no legal obligation to let Tommy Bulgaria or anyone else from Soviet-front groups come here, *participate in demonstrations, get on air time* and do the Soviet Government's work for it." Schanberg, *The Killer Idea Menace*, N.Y. Times, June 12, 1982, at 31, col. 5 (emphasis added). It is not unrealistic to infer that the government used the immigration statute to hinder debate on disarmament policies. *See* N.Y. Times, June 11, 1982, at A30, col. 1.

The government has frequently used the immigration statute to exclude aliens who pose no threat of anything except disagreement with government policies. *See* N.Y. Times, June 14, 1982, at B1, col. 1. The exclusion of Farley Mowat, *see supra* text accompanying notes 1-5, and Ernest Mandel, *see* Kleindienst v. Mandel, 408 U.S. 753 (1972), are examples, as is the exclusion of Nobel Prize winner Gabriel Garcia Marquez, *see* New York Times, June 14, 1982, at B1, col. 1.

197. *See supra* notes 59-63 and accompanying text.

198. *See supra* text accompanying note 114.

199. *See supra* text accompanying notes 111-12.

ject to normal first amendment review.[200] None of these reasons justifies applying anything less than full first amendment review to exclusion decisions.

The Court's political question concerns are inapposite. It is clear that exclusion cases do not fall within the Court's traditional political question doctrine. The most authoritative statement of the doctrine[201] is the Court's eclectic summary in *Baker v. Carr*.[202] None of the indicia of a political question listed by the Court in that case is present in first amendment challenges to exclusion.[203] Moreover, the Court's treatment of exclusion cases is inconsistent with the disposition contemplated by *Baker v. Carr*—complete abstention from review on the merits. The Court subjects exclusion decisions to some, though very limited, judicial review, rather than holding the cases to be nonjusticiable. In addition, the Court, in the exclusion cases, exempts from normal first amendment review all exclusion decisions, rather than engaging in the appropriate case-by-case inquiry that *Baker v. Carr* mandates.[204]

The question then remains what the Court means when it says,

---

200. *See supra* text accompanying note 113.

201. *See* L. TRIBE, *supra* note 13, § 3-16, at 71 n.1. It has been suggested that there is no true political question doctrine in the sense of a separate set of rules dictating extraordinary judicial abstention in particular cases. *See generally* Henkin, *supra* note 186. The Court, however, seems to find the doctrine relevant to exclusion cases.

202. 369 U.S. 186 (1962).

203. In *Baker*, the Court enumerated the reasons for finding an issue to be nonjusticiable as a political question as follows:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an intial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

The first reason obviously does not apply to first amendment challenges to exclusion, because, according to the Court, the power to exclude does not appear in the text of the Constitution. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977). In any case, one could just as well say the issue is the first amendment rather than exclusion, which would put the case clearly within the province of the judiciary. Similarly, reason two does not apply, since the question is the constitutionality of a government action under the first amendment. The judicial standards for that issue are well developed. First amendment challenges to exclusion involve normal adjudicatory functions. Reason three is therefore also inapplicable. Reason four is somewhat circular, since the "respect due" the political branches depends on whether judicial intervention is appropriate. The "respect due" could in any event hardly extend to government actions otherwise in violation of the first amendment. Reason five contemplates an emergency situation calling for an expeditious and final decision, *see Baker*, 369 U.S. at 213, and most exclusion decisions are not in that category. Finally, reason six does not apply, because exclusion decisions only rarely have implications for foreign relations where the concern over embarassment is most acute. *See also* text accompanying notes 206-35.

204. *See Baker*, 369 U.S. at 217.

"[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[205] Since specific reasons advanced in *Baker v. Carr* do not apply, it is appropriate to inquire what broader concerns underlie the political question doctrine. The Court seems to believe that these broader concerns justify the limited scope of judicial review in exclusion cases, though they do not require complete judicial abstention. The concerns may be that the courts are not competent to deal with the issues presented in exclusion cases and that nondeference judicial review of exclusions will itself defeat important government interests.

One general concern behind the political question doctrine is the institutional incapacity of the courts to deal with certain issues. In *Baker v. Carr*, for example, the Court identified "a lack of judicially discoverable and manageable standards for resolving" an issue and "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion" as characteristics of political questions.[206] In addition, the "functional" theory of political questions maintains that difficulty in judicial access to information is one basis on which cases have been held to be nonjusticiable.[207]

The concern over institutional competence should not be the basis for the Court's deference to exclusion decisions, however, since the courts are not institutionally incompetent to deal with first amendment challenges to exclusion.[208] Exclusion cases do not present obstacles to information gathering great enough to justify deference in cases involving individual rights. Certainly, exclusion cases will turn on events occurring in foreign countries, and that presents difficulties for adjudication in the United States. But those difficulties alone do not usually disqualify federal courts from deciding cases. The courts have decided constitutional and other issues that have turned on events occurring overseas.[209] Exclusion cases usually do not involve issues of relations with foreign states, where the courts might have incomplete information about government foreign policy objectives.[210] Rather, first amendment challenges to exclusions present the types of issues the courts deal with routinely in first amendment adjudication: Does an alien subversive's expression present a clear and present danger of inciting others to violence? Is the

205. Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting Matthews v. Diaz, 426 U.S. 67, 81-82 (1976)).

206. *Baker*, 369 U.S. at 217.

207. Scharpf, *supra* note 186, at 567-73 (1966).

208. *See supra* note 203.

209. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957) (holding trial by military tribunal of civilians overseas violated sixth amendment right to jury trial).

210. *See* Scharpf, *supra* note 186, at 568; *see also infra* notes 219-20 and accompanying text.

exclusion of an alien homosexual the least restrictive means of achieving the end of protecting the health of citizens? These issues present no obvious grounds for deferring to the political branches' exclusion decisions.

Another broad concern underlying the political question doctrine is the possibility that judicial review will interfere with important government interests. This concern is reflected in the last three *Baker v. Carr* criteria: "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[211] An examination of the government interests implicated in exclusion decisions, however, reveals either that important government interests will not be defeated by normal first amendment review or that they are undeserving of judicial deference.

Probably the most important government interests involved in immigration are those connected with quantitative restrictions on admission of aliens who desire to become permanent residents. Numerical limits on immigration are designed to control population growth, protect economic interests of residents, and prevent the development of insular, unassimilable minorities within the United States.[212] Though these limits are content-neutral, they conceivably could be the subject of a first amendment challenge.[213] If they were challenged, however, the courts would be likely to recognize the important government interests involved and give effect to any exclusion under the numerical restrictions.

The appropriate standard of justification would be that expressed in *United States v. O'Brien*.[214] Under the *O'Brien* standard, harm to a first amendment interest is justified if the government regulation furthers a compelling government interest unrelated to the suppression of speech and no less onerous alternative is available to achieve the government's purpose.[215] According to the Supreme Court, that standard is applicable when the burdens on first amendment interests from the challenged government action are "incidental."[216] However, this standard may also be appropriate in cases where the government's interest is in treating all

211. 369 U.S. at 217.

212. *See* S. REP. NO. 62, 98th Cong., 1st Sess. 4-7 (1983) (report of Senate Committee on the Judiciary regarding bill on immigration reform and control).

213. A university that invited a foreign professor to become a tenured member of its faculty, for example, could complain that its first amendment interests were injured if that professor could not obtain an immigrant visa because of the numerical limitations. *See supra* notes 48-49 and accompanying text.

214. 391 U.S. 367 (1968).

215. *Id.* at 377.

216. *Id.* at 376-77.

persons equally.[217] The courts would apply the *O'Brien* test to numerical restrictions because the government's interest in maintaining the restrictions is not in preventing the entry of any particular alien, but in applying the limits evenhandedly to all potential immigrants in order to control the flood of immigration. The numerical restrictions would almost certainly be upheld under this standard. The interests described above are both compelling and content-neutral, and it is difficult to imagine a less restrictive means of achieving those interests than numerical restrictions.[218]

Some have argued that immigration decisions warrant judicial deference because they may have far-reaching international political implications.[219] They argue that the courts, in putting restrictions on the United States government, might unduly limit the government in dealing with other nations not under similar restraints. It is difficult to understand, however, why the courts could not take the actions of foreign governments into account in measuring the interests of the United States Government. If, for example, the United States excluded the citizens of a foreign state in retaliation for that state's exclusion of American citizens, there is no reason the court could not evaluate the government's interests in retaliation. In any case, very few exclusion cases involve foreign policy issues of this kind.[220] Even if there are particular cases that are proper subjects of judicial deference, the courts need only defer in those cases; the desire to avoid interference with foreign relations cannot justify wholesale deference to government exclusion decisions.

Another government interest assertedly involved in exclusion decisions is that of defining the qualifications for membership in American political society. Aliens admitted for permanent residency are very likely to become citizens. The decision to admit is therefore the first and most important step in the process of accepting new members of American political society.[221] One commentator has argued that membership decisions of this kind "are of a different order of importance from most other

217. *See supra* note 63 and accompanying text.

218. Moreover, once the restrictions themselves were determined to be justified, the courts would give the government wide latitude to consider alternative approaches to the problem. When the legislation under review involves setting some numerical limit, the Supreme Court recognizes that such line-drawing is a function to which the legislatures are better suited than the courts. *See* Buckley v. Valeo, 424 U.S. 1, 83 (1976). Nondeference first amendment review therefore will not frustrate the most important function of immigration law, limiting the number of immigrants.

219. *See* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 211 (1983); Scharpf, *supra* note 186, at 578-81.

220. In fact, none of the grounds for exclusion listed in the immigration statute is explicitly aimed at serving this type of interest. Only the section requiring the Attorney General to exclude aliens whose presence would be harmful to the United States could arguably be used to serve this interest. *See* 8 U.S.C. § 1182(a)(27) (1982).

221. *See* Martin, *supra* note 219, at 200.

decisions subjected to constitutional scrutiny."[222] Because democratic politics require certain shared beliefs and values, it is argued, admission of the wrong aliens may jeopardize the continued effective functioning of American political institutions.[223] One might then argue that it is critical that Congress have flexibility in making these membership decisions, and that nondeference first amendment review of exclusion decisions would impair flexibility.

Yet any attempt by Congress to define what beliefs and values will make an alien a good American citizen would certainly conflict with the first amendment. If anything, this is a reason to pursue judicial review rather than avoid it. The premise of the first amendment is that it is not the government's place to determine whether ideas are good or bad. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[224] This principle does not lose any of its force because an opinion or belief is held by an alien or because the alien, in Congress's view, may be a poor ideological risk as a potential citizen.

In fact, history shows that Congress is no more competent than the courts to judge who will be good citizens and who will not. In the late nineteenth century, Congress passed legislation excluding Chinese immigrants at the behest of Pacific Coast residents who believed that the Chinese would never assimilate into American society.[225] Experience has proven, as reason should have, that this belief was wrong.[226] Current beliefs may prove to be wrong as well and should not be the basis for depriving American citizens of the opportunity to hear unorthodox ideas from foreign lands. It may be appropriate for Congress to prescribe certain minimal requirements for admission, such as excluding habitual criminals.[227] But Congress cannot, consistently with constitutional values, prescribe an ideological test for admission to the United States.

The Court further may be concerned that first amendment review will interfere with the procedural flexibility necessary in immigration

222. *Id.* at 199.

223. *See id.*

> This concern was part of the motivation for recent efforts at reforming the immigration laws. [I]f language and cultural separatism rise above a certain level, the unity and political stability of the nation will—in time—be seriously diminished. Pluralism, within a united American nation, has been the single greatest strength of this country. This unity comes from a common language and a core public culture of certain shared values, beliefs, and customs which make us distinctly "Americans."

S. REP., *supra* note 212, at 7.

224. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

225. *See* The Chinese Exclusion Case, 130 U.S. 581, 595 (1889).

226. *See* McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase 1850-1870*, 72 CALIF. L. REV. 529 (1984).

227. *See* 8 U.S.C. § 1182(a)(9)-(10) (1982).

matters, since the protection of first amendment rights carries with it certain procedural requirements, including final determination by the judiciary of first amendment issues.[228] The present system of consular non-reviewability, therefore, would have to be modified in order to assure "the necessary sensitivity to freedom of expression" implicit in first amendment adjudication.[229] The courts would at least have to review consular exclusion decisions when the excluded aliens raised first amendment objections. While this process would somewhat inhibit flexibility, many commentators have argued that the system of consular nonreviewability is unworthy of solicitude and, in fact, should be abandoned.[230] Furthermore, a large degree of procedural flexibility could still be preserved by using properly developed administrative records in the first amendment review of consular decisions.[231]

The abandonment of consular nonreviewability in the case of first amendment challenges to exclusion would be unlikely to result in a flood of exclusion cases overwhelming the courts. If content-based exclusion provisions were subject to normal first amendment standards, they would probably either be held formally invalid or be so narrowly construed that the number of aliens excluded would be minimal.[232] In either case, the potential number of cases arising under those provisions would be greatly diminished. The result would be the same[233] for those provisions giving the executive such wide discretion as to risk discrimination based on the content of aliens' expression or beliefs.[234] On the other hand, narrowly drawn, content-neutral provisions are unlikely to be subject to frequent challenges because of the probable futility of such efforts.[235] Therefore,

228. *See* L. TRIBE, *supra* note 13, § 12-34, at 732; Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 520-24 (1970).

229. Monaghan, *supra* note 228, at 519, *quoting* Freedman v. Maryland, 380 U.S. 51, 58 (1965).

230. *See, e.g.*, Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137 (1977). *But see* SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT 253-55 (1981) (recommending modification, but not abandonment, of informal review procedure).

231. *See* Monaghan, *supra* note 228, at 525-26.

232. *See infra* text accompanying notes 249-53.

233. *See infra* text accompanying notes 254-57.

234. *See supra* text accompanying note 27.

235. A good example of such a provision is that requiring exclusion of aliens with communicable diseases. *See* 8 U.S.C. § 1182(a)(6) (1982). Exclusions under this provision would likely be given effect. The appropriate standard would be that requiring justification on the particular facts of the case, because the government's interest is in preventing the harm threatened by each individual alien, not in applying its rule equally to all aliens. *See supra* notes 59-63 and accompanying text. Under that standard, any harm to citizens' first amendment interests from the exclusion of aliens with communicable diseases would be justified in almost all cases, since entry of those aliens would harm the government's interest in protecting the health of United States residents.

extending nondeference first amendment review to consular decisions would not deplete judicial resources.

In short, first amendment challenges to exclusions are not per se political questions, and the concerns underlying the political question doctrine do not justify showing deference to exclusion decisions. The courts are competent to deal with the issues presented in exclusion cases. Applying nondeference first amendment review in exclusion cases will not defeat important government interests. From time to time a case may arise meriting deference to the legislative or executive judgment, but cases of that sort are best handled through the ordinary case-by-case political question approach. That approach allows the courts to protect the fundamental values underlying the first amendment, while at the same time insuring that the courts do not decide issues best left to the political branches.

Another justification sometimes advanced for limited judicial review of exclusion decisions is that the power to exclude is not enumerated in the Constitution and therefore cannot be subject to the Constitution's limits.[236] This rationale, however, has been explicitly rejected by the Supreme Court in cases dealing with other implied powers.[237] In addition, there is a logical flaw in this argument. It simply does not follow that because the exclusion power is not found within the Constitution, that power is not subject to constitutional limitations. The Constitution limits federal power in two ways: the government normally may exercise only those powers enumerated by the Constitution, and it may not exercise those powers in violation of the Bill of Rights and other specific constitutional restraints. The Supreme Court has made an exception to the first limitation with regard to the power to exclude, considering it an implied power traditionally exercised by a sovereign state. This does not mean, however, that the second source of constitutional limitations should not apply. Furthermore, if the extraconstitutional origin of the exclusion power means that the power is not subject to constitutional limitations, then the power should be free from *any* judicial review for constitutionality, and thereofore not subject to even limited review.

A final reason advanced for applying a deference standard of review

236. *See* Jean v. Nelson, 727 F.2d 957, 964 n.5 (11th Cir. 1984) (en banc) ("Because this 'undefined and undefinable' sovereign power does not depend on any constitutional grant of authority, there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States . . . ."), *aff'd*, 105 S. Ct. 2992 (1985). *But see Jean*, 105 S. Ct. at 3009 (Marshall, J., dissenting) ("But even with respect to entry decisions, the Court has refused to characterize the authority . . . as wholly unbridled.").

237. *See* Perez v. Brownell, 356 U.S. 44, 57-58 (1958) (implied congressional power to regulate foreign relations subject to same restrictions as expressly delegated powers), *overruled on other grounds*, Afroyim v. Rusk, 387 U.S. 253 (1967); Kleindienst v. Mandel, 408 U.S. 753, 782-83 & n.5 (1972) (Marshall, J., dissenting).

to citizens' first amendment challenges is that the power to exclude is plenary.[238] Plenary powers, however, are normally subject to the express limitations of the Constitution.[239] Taken in its ordinary sense, then, the label "plenary" does not justify the Court's refusal to apply nondeference first amendment standards in exclusion cases. The Court, however, may have attached a special meaning to "plenary" in immigration cases, intending that the word denote a power due deference in all cases. Some of the early immigration decisions suggest this definition.[240] But in that case attaching the label plenary does nothing more than restate the conclusion that the courts should apply a deference standard to first amendment challenges to the congressional exclusion power.

None of the reasons advanced by the courts justifies subjecting citizens' first amendment challenges to congressional decisions to exclude to a deference standard of review. Application of a nondeference standard would not by itself defeat important government interests and would not be inconsistent with characterizations of the exclusion power as "inherent in sovereignty" and "plenary." Because of the lack of justification for deference and the preeminence of first amendment values among constitutional values,[241] the Supreme Court should reconsider the doctrine it has espoused in *Mandel* and *Fiallo* and apply nondeference first amendment review to exclusion.

B. Deportation

Although it is settled that resident aliens possess first amendment interests,[242] the standard of review applicable to resident aliens' first amendment challenges to deportation is not clear. It is an open question whether the Court will apply normal nondeference standards or a deference standard like that applicable in exclusion cases.[243]

The Supreme Court should resolve this ambiguity in favor of the nondeference standard. Like the exclusion power, the deportation power is plenary,[244] but as with exclusion, attaching that label does not justify applying a deference standard.[245] Moreover, the deportation power is said to be inherent in sovereignty and not enumerated in the Constitution.[246] Just as with exclusion, however, an extraconstitutional source does not compel the conclusion that deportation is not subject to the

238. *See supra* text accompanying note 113.
239. *See supra* text accompanying note 71.
240. *See supra* text accompanying notes 71-80.
241. *See* Schneiderman v. United States, 320 U.S. 118, 144 (1943).
242. *See supra* note 145 and accompanying text.
243. *See supra* text accompanying notes 146-71.
244. *See supra* text accompanying notes 77-80.
245. *See supra* text accompanying notes 238-39.
246. *See supra* text accompanying notes 83-85.

express limitations the Constitution places on all government power.[247] Finally, political question concerns no more apply to deportation cases than to exclusion cases.[248]

The reasons for applying normal first amendment standards, on the other hand, are more compelling in deportation cases than in exclusions. The Constitution's protections are supposed to apply to resident aliens and citizens alike. But if those protections do not apply, or apply with only limited force, in deportation proceedings, resident aliens are denied the protection against the federal government which the Constitution guarantees them. This denial is bad policy for a democratic society. Resident immigrant aliens are apprentice citizens. Many of them come from countries where persecution for holding the wrong ideas is the rule, and caution in speech and action is necessary for survival. Their apprenticeship should be a time when they lose the habits of caution and learn to engage in the unfettered debate that is necessary to a free society. If the federal government can deport with only the thinnest of justifications, resident aliens learn instead to remain cautious. This caution will deprive other Americans of a unique source of new ideas and perspectives during the apprenticeship. It will also carry over into the aliens' attitudes once they become United States citizens.

IV
JUDICIAL AND LEGISLATIVE PROTECTION OF FIRST AMENDMENT VALUES IMPLICATED IN IMMIGRATION DECISIONS

Both Congress and the Supreme Court can take steps to improve the protection afforded first amendment values implicated in immigration decisions. The appropriate judicial action follows from the discussion above. First, the Court should recognize nonresident aliens' first amendment interests. Second, it should apply normal nondeference first amendment standards to exclusion decisions that harm the first amendment interests of citizens. Finally, the Supreme Court should resolve the ambiguity in its deportation decisions in favor of applying a nondeference standard of review.

If the Court follows this course, a number of substantive outcomes are likely to follow in cases raising first amendment challenges to immigration decisions. To begin with, courts are likely to hold that the present provisions requiring the exclusion or deportation of subversives[249] should be refused effect in all cases. In applying the first amendment justification standards, the courts have evolved certain doctrinal rules

247. *See supra* text accompanying notes 236-37.
248. *See supra* text accompanying notes 201-35.
249. 8 U.S.C. §§ 1182 (a)(28), 1251(a)(6)-(7) (1982).

relating to government regulation of subversive activities. The Supreme Court has held that the government may not proscribe the advocacy of abstract doctrine, but only the advocacy of action.[250] The Court also has held that the government may not punish membership in a group advocating illegal activities unless the member in question knew of the group's illegal purposes and had the specific intent to aid the group in achieving those purposes.[251] Each of the provisions requiring the exclusion or deportation of subversive aliens violates these rules on its face.[252] Statutes which on their face improperly burden activities protected under the first amendment are constitutionally invalid.[253] The immigration provisions relating to subversive activities likely would be refused effect under these standards.

Alternatively, the courts might construe these exclusion and deportation provisions in accordance with established first amendment standards. For example, the advocacy sections of the immigration statute might be interpreted to require the exclusion only of aliens who advocate illegal action, not of aliens who teach abstract doctrines. Courts might read the membership provisions as mandating the exclusion or deportation only of alien members who possess both knowledge of the group's illegal purposes and the specific intent to bring those purposes to fruition.

Other provisions of the immigration statute would probably be refused effect as overbroad delegations of executive discretion. Executive officials charged with regulating first amendment activities may not be given discretion broad enough to permit discrimination on the basis of the content of expression.[254] A number of exclusion provisions suffer from this infirmity.[255] The primary example is the provision requiring the exclusion of aliens whom a consular officer or the Attorney General determines to be entering the United States "to engage in activities which would be prejudicial to the public interest."[256] Another example is the provision requiring the exclusion of aliens afflicted with psychopathic

250. *See* Communist Party v. Whitcomb, 414 U.S. 441, 447-50 (1974).

251. *See* Noto v. United States, 367 U.S. 290, 294-300 (1961); Scales v. United States, 367 U.S. 203, 229-30 (1961).

252. *See* 8 U.S.C. §§ 1182(a)(28), 1251(a)(7) (1982).

253. *See* United States v. Robel, 389 U.S. 258 (1967).

254. In Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), the Court held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id.* at 150-51. In preventing aliens from reaching an American audience, the immigration statute operates like a prior restraint. In *Shuttlesworth*, the legislation in question was an ordinance conferring broad licensing authority on a city commission. *See id.* at 150. If, as argued here, the Court is not justified in applying special constitutional rules to grants of executive authority in the immigration field, then there is no reason not to apply the *Shuttlesworth* principle to the national executive.

255. *See supra* note 28 and accompanying text.

256. 8 U.S.C. § 1182(a)(27) (1982); *see supra* text accompanying note 28.

personalities.[257]

Congress could also protect first amendment values by enacting amendments to the immigration statute. For example, Congress could delete the provisions requiring exclusion or deportation of subversives or amend those provisions to conform better with first amendment principles. Congress could delete the section requiring exclusion of aliens whom the Attorney General believes will engage in harmful activities, or try to define with greater precision the evils it is trying to prevent and correspondingly limit the Attorney General's discretion.

Piecemeal legislative changes of this nature, however, cannot afford the protection to first amendment values that nondeference first amendment review would provide. Under traditional nondeference standards, when the government charges an individual with advocacy of illegal aims it must prove that the challenger's advocacy harmed a government interest, and that that harm justified suppressing the challenger's speech. This judicial safeguard against violation of first amendment rights would be difficult to incorporate into legislation.

CONCLUSION

The Supreme Court should abandon the special rules it has adopted for immigration cases. Neither the reasons it has advanced nor other conceivable reasons justify the Court's refusal to recognize nonresident aliens' first amendment interests or its failure to apply a nondeference standard of review to exclusions that harm citizens' first amendment interests. Similarly, there is no reason to apply anything less than the first amendment's normal strict justification standards to the deportation of resident aliens, and ambiguities in Supreme Court opinions which might allow application of a deference standard in those cases should be resolved in favor of a nondeference standard.

*Steven J. Burr**

257. 8 U.S.C. § 1182(a)(4) (1982); *see supra* note 28.

* A.B. 1981, Stanford University; third-year student, Boalt Hall School of Law, University of California, Berkeley.