2010

The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo

Won Kidane

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/blrlj/vol20/iss1/4

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38CW80

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Alienage Spectrum Disorder: The Bill of Rights From Chinese Exclusion to Guantanamo

Won Kidane*

I. INTRODUCTION

More than one hundred years of American jurisprudence suggests that some aliens are more alien than others. As such, their rights may be understood as lying along a spectrum ranging from those whose sole contact with the United States is with United States authorities located in a foreign territory to those who have resided in the United States for decades, having arrived as infants and acquired United States citizenship.

The fundamental notion that increased ties to the polity of the United States would entitle an alien to better rights is deeply rooted in the jurisprudence.

* Assistant Professor of Law, Seattle University School of Law. This article has benefited from the insights of a number of scholars who think and write about the various aspects of the issues it addresses. Among them, I would like to thank Professor Richard Delgado, one of the nation’s leading experts on alienage and identity, for taking the time to read a prior draft of the article and suggesting several detailed improvements. I would also like to thank Professor Victor C. Romero, one of the leading experts in constitutional immigration law, who challenged some of my assumptions and arguments in written exchanges as well as oral conversations, and helped me refine my thoughts about these issues. My appreciation also extends to Professor Robert Chang, one of the leading experts in critical race theory, who outlined the deficiencies of the prior draft and proposed constructive measures of improvement. This article would not have attained its current level of clarity of message and coherence without the generous help of all of them. For that I am deeply indebted. I also would like to thank my research assistant, Darren Thomson, and administrative assistant, Junsen Ohno, for their help in editing, bluebooking, and formatting the various drafts of the article. All arguments, errors, and omissions are solely attributable to me.


2. “The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all persons and guard against any encroachment on those rights by federal or state authority.” Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). “The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship, or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.” Mathews v. Diaz, 426 U.S. 67, 78-79 (1976) (emphasis added).

3. “The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful
Ordinarily, these rights tend to strengthen as one moves from the beginning of the alienage spectrum, which might involve the most attenuated contact, as in the case of enemy aliens detained by United States military in a foreign land or an overseas visa applicant, to the end of the spectrum, which might involve a United States citizen. While this seems to make perfect sense, a closer examination of the century-old jurisprudence suggests that the spectrum itself is replete with inconsistencies and is utterly disordered.

Disorder and inconsistencies are found when comparing Johnson v. Eisentrager with Boumediene v. Bush. In Eisentrager, the Court held that enemy aliens who have never set foot on United States soil are the worst form of aliens and do not have constitutional rights.\(^4\) In Boumediene v. Bush, however, the Court held that a similar category of enemy aliens have constitutional rights similar to the rights of lawful permanent residents or even citizens.\(^5\) As discussed in section (II)(a)(i)(1) below, Boumediene does this without overruling Eisentrager. The disorder in the alienage spectrum is not, however, a creation of Boumediene. It is as old as the Chinese Exclusion case of 1889, which consolidated the whole notion of separate and unequal treatment of aliens and articulated the plenary power doctrine in the presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties such as the due process of law of the Fourteenth Amendment. Johnson v. Eisentrager, 339 U.S. 763, 770-71 (1950). See also e.g., United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (requiring a "substantial voluntary" attachment to the U.S. for the applicability of the Fourth Amendment). For a detailed discussion of this question, see sec. (II)(a)(i)(3) infra. See also Mathews, 426 U.S. at 78-79 ("a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with wide-ranging variety of ties to this country.").


5. See Boumediene v. Bush, 128 S. Ct. 2229 (2008). Ironically, the procedural irregularities that the Court refused to tolerate as applied to enemy aliens in Boumediene are the same as or even better than the rules that apply to long term lawful residents in the immigration context or even citizens in the terrorism context. See id. at 2287 (Roberts, C.J., dissenting). For a thorough exposition of this argument see infra sec. (II)(a)(i)(1). As will be elaborated in several sections below, the spectrum is characterized by the notion of community ties or rootedness. Another example that shows a disorder in the spectrum is a comparison between the situations of unauthorized long-term residents and authorized newcomers. For example, while a person who wins a diversity lottery and immigrates to the United States as an adult may naturalize within five years and claim the full protection of the Bill of Rights, a person who was brought in without inspection at age one may never be able to claim the full protection of the Bill of Rights even if he or she is later married to a United States citizen and lives here for decades. See, e.g., INA, sec. 203(c) (allowing the immigration of diversity visa winners). See also INA sec. 245 (a) (denying adjustment of status to a person who entered without inspection regardless of the length of stay or nature of the family relationship and other forms of eligibility for lawful status). Note that even natural born citizens may be put on another citizenship/alienage spectrum depending on the circumstances, as demonstrated by the Japanese internment case of Korematsu v. United States, 323 U.S. 214 (1944) (upholding the constitutionality of an executive order interning Japanese Americans and immigrants alike on grounds of national security); and the more recent "enemy alien" cases of Padilla v. Rumsfeld, 542 U.S. 426 (2004) (discussing the rights of United States citizens captured in the United States on allegations of terrorism) and Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (discussing the rights of a United States citizen captured in Afghanistan on allegations of being an enemy combatant). As this is more of a sociological spectrum rather than a legal spectrum, its coverage in this article will be limited to the gist of the Korematsu and Padilla-Hamdi decisions, and their implications on the alienage jurisprudence.
name of sovereignty. The plenary power doctrine immunizes all actions of the political branches of government from any kind of judicial scrutiny. The jurisprudence of aliens characterized by this almost absolute immunity developed alongside a maturing rights-based jurisprudence. At times, they have crossed paths, but have never been united. This separation remains awkward and contributes to the insatiability and confusion in the alienage jurisprudence.

This article takes a unique approach to this problem by employing a spectrum-based analytical framework that examines the Bill of Rights of aliens by dividing them into a spectrum of definable and jurisprudentially appropriate categories. Predicated on this analytical framework, the article contends that the disorder is a product of the exclusion of aliens from the benefits of maturing notions of equal protection and due process that resulted from the Chinese exclusion case, and forms part of the Plessy v. Ferguson legacy. Put differently, the article’s

6. See Chae Chan Ping v. United States, 130 U.S. 581 (1889). This case is commonly referred to as the Chinese Exclusion case. Although Chae is the last name, throughout this article, the case will be referenced as Ping or the Chinese Exclusion case more frequently used in the literature.
7. See Ping, 130 U.S. at 606.
8. For scholarly commentary highlighting the divergences and occasional convergences see, e.g., Peter H. Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1 (1984), reprinted in I GABRIEL J. CHIN, VICTOR C. ROMERO & MICHAEL A. SCAPERLANDA, THE ORIGINS OF CONSTITUTIONAL LAW: IMMIGRATION AND THE CONSTITUTION 267, 284 (2001) ("[t]he signs of incipient change are abundant and unmistakable. The courts’ almost complete deference to Congress and the immigration authorities, long a keystone of the classical structure, is beginning to give way to a new understanding and rhetoric of judicial role ... Immigration is gradually rejoining the mainstream of our public law."); Alexander Aleinikoff, The United States Constitution in Its Third Century: Foreign Affairs: Rights Here and There: Federal Regulation of Aliens and the Constitution, 83 AM. J. INT’L L. 862, 866 (1989) ("We have therefore ended the second century of the Constitution as we ended its first. The descendants of Yick Wo and Wong Wing extend constitutional protections to aliens; yet they stand side by side with the progeny of Chinese Exclusion and Fong Yue Ting, which leave federal regulation of immigration virtually free from constitutional restrictions.").
9. Professor Hiroshi Motomura suggests that courts have over the ages attempted to mitigate the harsh and unacceptable effects of the application of the plenary power by relying on what he calls “phantom constitutional norms” rather than directly engaging constitutional issues. See Hiroshi Motomura, Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 549 (1990). Having noted the Supreme Court’s avoidance of the constitutional issue of race-based exclusion in Jean v. Nelson, 472 U.S. 846 (1985), Motomura concludes that “[s]tatutory interpretation confuses and contorts the law when the interpreting court relies for an extended period on constitutional norms that are doctrinally ‘improper’ in the sense that they do not control in cases which explicitly involve interpreting the Constitution. I suggest that the only way out of the dilemma posed by the prolonged reign of phantom norm decision making in immigration law is to bring the transitional phase to an end — in short, to undertake a direct and candid reassessment of plenary power as constitutional doctrine.” Id.
10. To the author’s knowledge, no existing work addresses the alienage spectrum and the disorder thereof in the same way as this work. The closest spectrum-based analytical work is Professor David Martin’s 2001 article in the University of Chicago’s Supreme Court Review. See David A. Martin, Graduated Application of Constitutional Protection for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 96-97 (2001). Professor Victor C. Romero has also conducted a spectrum-based analysis in the Fourth Amendment jurisprudence, but the nature, scope, and contexts of the inquiry are quite distinct. See VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 82-84 (2005).
11. See Ping, 130 U.S. 581. Other important cases in this era include Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (holding that due process is whatever one immigration officer says it is) and Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding the requirement that only “a credible white witness” may be presented as evidence of physical presence on specific dates to avoid deportation).
12. Plessy v. Ferguson, 163 U.S. 537 (1896) (interpreting equal protection as separate but
contention is that the source of the disorder is the century-old tug-of-war between the plenary power doctrine,\textsuperscript{13} which immunizes congressional acts relating to immigration from judicial review, and contemporary notions of due process and equal protection.\textsuperscript{14} In other words, the disorder is a product of tension between the perception of the Constitution as a compact between a selected group of people with the prerogative to exclude all others,\textsuperscript{15} and the perception of the Constitution "as a limitation on the Government's conduct with respect to all whom it seeks to govern."\textsuperscript{16} The interplay between these fundamental assumptions, coupled with historical accidents, has produced a jurisprudence that is incoherent, unstable, unpredictable, and inconsistent with contemporary understandings of the reach of the Bill of Rights.\textsuperscript{17} The article further contends that the Guantanamo cases have significantly contributed to the process of reunification of these two separate and unequal allocations of rights by bringing aliens with the least qualitative and quantitative contact with the United States within the realm of constitutional protection. Based on this assessment, the article argues that the total reunification of the alien-citizen based jurisprudential divide could be obtained by employing the traditional ascending scale of a rights approach. That would require according aliens who are better positioned on the spectrum superior rights to those enemy aliens who are at the very beginning of the spectrum. Such a result cannot be meaningfully achieved without overruling the original sources of the plenary power doctrine more explicitly than what has been attempted in some modern cases, including the Guantanamo cases. This article also proposes some simple and attainable legislative measures that minimize the undesirable effects of the disordered spectrum, ensure some level of stability, predictability and fairness, and recognize the fact that enduring jurisprudential changes would require the right mix of circumstances that occurs with time.

Part II defines the existing spectrum in light of the Supreme Court's century-old jurisprudence and the immigration and nationality law, and highlights

\textsuperscript{13} The plenary doctrine found its rudimentary expression in 1889 in a case commonly known as the Chinese Exclusion case. See Ping, 130 U.S. 581. While it is being continually challenged, its basic premise continues to guide the jurisprudence of alienage.


\textsuperscript{15} A very good representation of this perception is Chief Justice Rehnquist's opinion in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). For a detailed discussion of C.J. Rehnquist's opinion in this case, see infra sec. (II)(a)(i)(1).

\textsuperscript{16} See id. at 288 (Brennan, J., dissenting) (emphasis added). For a detailed discussion of this tension, and Brennan's opinion see infra sec. (II)(a)(i)(3). For a comprehensive treatment of this notion of mutuality, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW (1996).

\textsuperscript{17} It must be acknowledged at the outset that the spectrum analysis merges the alienage jurisprudence that has developed in various contexts (e.g., admission/exclusion, indefinite detention, unlawful searches and seizures, educational and public benefits, and associational and related rights) into a unitary paradigm. Such merger, however, is appropriate and analytically useful because the fundamental notion that aliens have no or reduced rights is not predicated on the types of benefits they seek or the nature of freedom they pursue but is essentially due to the fact that they are aliens. Although the nature of the claim seems to make a difference in many instances, the depth and breadth of their rights depends not on the nature of their claims but largely on their position on the alienage spectrum; in other words, on what kind of aliens they are. This proposition is fully developed throughout this article.
the factors that have had a disordereding impact. Part III identifies and critically analyzes the sources of the disorder by dividing the jurisprudence into various eras. Part IV engages the philosophical dilemma and outlines the steps that need to be taken to reorder the disordered spectrum and ensure the stability and predictability of the jurisprudence relating to the Bill of Rights as applied to aliens. Part V provides a brief conclusion.

II. THE SPECTRUM AND THE DISORDER

This part critically analyzes legislative and judicial sources to highlight the general assumption that more ties to the United States entitle an alien to better rights. It also sets the stage for Part III, which analyzes the constitutional jurisprudence pertaining to the Bill of Rights of aliens and demonstrates the disorder in the spectrum.

a. Aliens Outside the United States

The alienage spectrum begins with aliens who come in contact with United States authorities in a foreign territory. While contact may occur in many ways, this article classifies such contact into two categories: involuntary contacts, and voluntary contacts. Each category is discussed below.

i. Involuntary Encounter

Various categories of aliens may involuntarily come in contact with the United States authorities outside of the United States in ways that could test how the Bill of Rights applies to them. Three categories of such aliens could be identified. The first category is the “enemy alien” category. It is very difficult to imagine aliens more alien than “enemy aliens” detained outside of the United States. Not only are they aliens to the United States, but they are also its enemies. As will be discussed below, courts have looked at the applicability of the Bill of Rights to these aliens from a different perspective. As such, the discussion of the spectrum must begin with this category of aliens. The remaining two categories, which are discussed under the involuntary classification, include aliens detained by United States authorities in foreign countries who are brought to the United States for purposes of criminal prosecution, and aliens intercepted on the high seas while attempting to enter United States territorial waters. The Bill of Rights jurisprudence pertaining to each one of these three involuntary categories is discussed as follows.

1. Enemy Aliens Detained Outside the United States

The constitutional issues pertaining to the Bill of Rights of enemy aliens often arise in connection with claims of access to the judiciary in the form of the writ

18. The term “enemy aliens” represents a law of war concept relating to the treatment of nationals of an enemy state. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 35, Aug. 12, 1949, 75 U.N.T.S. 287 (providing for some rights of these individuals). As the following sections demonstrate, U.S. courts have used the concept in a variety of ways; however, it is used in this article only for its suggestion that the persons are both alien to the United States and are perceived to be enemies of the United States without going too much into the exact meaning under the law of war or international humanitarian law in general.
of habeas corpus. The Supreme Court's jurisprudence pertaining to this issue, which spans more than a century, is too broad to be covered here; however, a discussion of the implications of the most significant cases to the spectrum analysis is provided here.

One of the Supreme Court's most important post-World War II opinions, defining the rights of enemy aliens, particularly combatants, outside the United States, is Johnson v. Eisentrager.\(^9\) In Eisentrager, a group of twenty-one German nationals petitioned the District Court for the District of Columbia for writ of habeas corpus challenging the legality of their imprisonment. They were captured in China by the U.S. military, tried by a U.S. Military Commission sitting in China, and imprisoned in U.S. controlled territory in Germany.\(^20\) The District Court rejected their petition on the grounds that the aliens had no contact with the United States except their capture and trial by U.S. military in a foreign country.\(^21\) The Appeals Court reversed on the grounds that:

> Any person including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his cases of any constitutional rights or limitations would show his imprisonmen illegal; that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States; that where deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer.\(^22\)

The Supreme Court reversed. The Court stressed the importance of the distinction between citizens and aliens: "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar."\(^23\) The Court added: "The years have not diminished the importance of citizenship nor have they sapped the validity of a citizen's claim upon his government for protection."\(^24\) It further noted that even aliens are not a homogenous group. Some are friendly aliens, some are enemy aliens, some are enemy combatants, and others are resident aliens. Therefore, not all aliens warrant the same levels of constitutional protection.\(^25\) The Court then put the classic spectrum argument in these terms:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful

---

20. Id. at 765-67.
21. Id.
22. Id. at 767 (emphasis added).
23. Id. at 769. Unimpressed with the majority's Paul-Caesar relationship as an indication of the importance of citizenship, the dissent points to Rome's treatment of Paul himself and the other disciples. Id. at 798.
24. Id. at 769. The Court added that "[i]t is neither sentimentality nor chauvinism to repeat that 'Citizenship is a high privilege.'" Id. at 770.
25. Id. at 767.
presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more expansive and secure when he makes preliminary declaration of intention to become a citizen and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing.26

The Court’s decision rested on the argument that, while the Constitution follows citizens wherever they may go, aliens would need some connection with the territory of the United States to claim protection under the Bill of Rights.27 In rejecting the claims in this case, the Court observed that for purposes of constitutional protection, enemy combatants in a foreign territory receive the least protection.28 The Court gave the 21 German petitioners six “alienage points.”29 These points include: (1) being enemy aliens who took part in combat, (2) not having a claim of residence or contact with any territory over which United States sovereignty extends, (3) being captured in foreign land and kept there as prisoners of war, (4) being tried and convicted by a military commission sitting in a foreign country, (5) committing serious offenses, i.e., war crimes outside of the U.S., and finally, (6) being imprisoned outside of the United States at all times.30

Conversely, the key issue for the dissent was the very foundation of the principle of separation of powers and the role of the judiciary in the tripartite constitutional order. The ascending scale of the rights of aliens was not as important. More specifically, dissenting Justices Black, Douglas, and Burton framed the issue as: “whether the judiciary has power in habeas corpus proceedings to test the legality of criminal sentences imposed by the executive in a country which we have occupied for years.”31 In answering this question in the affirmative, they provided this compelling point:

[c]itizenship is enriched beyond price by our goal of equal justice under law-equal justice not for citizens alone, but for all persons coming within the ambit of our power. This ideal gave birth to the constitutional provision for an independent judiciary with authority to check abuses of executive power . . . .32

For the majority, it was about how many rights the alien should be given on an ascending scale. However, for the dissent it was about the very foundation of the constitutional order, and more specifically, it was about the role of the judiciary to

26. Id. at 770-71 (emphasis added). The Court cites numerous immigration cases, some of which will be discussed in subsequent sections in some detail, including: Yamataya v. Fisher, 189 U.S. 86 (1903) (Japanese Immigrant Case); United States ex rel. Tisi v. Tod, 264 U.S. 131 (1924); United States ex rel. Vajtauer v. Commissioner, 273 U.S. 103 (1927); Bridges v. Wixon, 326 U.S. 135 (1945); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) and Yick Wo v. Hopkins, 118 U.S. 356 (1886). Id.
27. Id. at 778.
28. Id.
29. The Court did not use the term “alienage points,” but it is used in this article for purposes of demonstrating the spectrum.
30. See Eisentrager, 339 U.S. at 777-78.
31. See id. at 797.
32. Id. at 791.
check abuses of power by the political branches. The majority in *Eisentrager*, just like in *Ping*, reasoned that the judiciary must stay out of the decisions of the political branches, at least as it relates to enemy aliens in a foreign land. The same issue was tested again more than half a century later in connection with the “War on Terror.”

The first and principal case that reexamined these issues was *Rasul v. Bush*. In *Rasul*, two Australian citizens and twelve Kuwaiti citizens who were held at the U.S. Naval Base at Guantanamo Bay, Cuba after being captured in Afghanistan during the U.S. armed conflict with the Taliban, challenged their detention by a writ of habeas corpus filed in the District Court for the District of Columbia. The main issue in this case was whether federal courts have jurisdiction to consider the legality of detention of aliens captured in a foreign country and incarcerated at Guantanamo Bay. Justice Stevens writing for the Court answered this question in the affirmative by distinguishing *Eisentrager*. The Court began its opinion by addressing the very nature of habeas corpus and its historical roots. It quoted section 14 of the Judiciary Act of 1789, which authorized the issuance of habeas corpus to prisoners who are “in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same.” The historical review continues by highlighting that the 1867 Congress extended the right of habeas corpus to “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.” Although *Rasul* attempted to characterize the writ as a check against the exercise of authority, it did not go so far as to endorse the dissent in *Eisentrager*, which suggested that every time the United States exercises authority abroad, all aliens subjected to its authority may have access to federal courts. Instead, the Court chose to distinguish *Eisentrager* on a number of different levels.

Most notably, the Court analyzed the six alienage points discussed above and said that the *Rasul* detainees, unlike *Eisentrager*, were not nationals of a country at war with the United States. The Court also disputed any allegation that they took part in hostilities, had no access to any process, that their detention was lengthy and conceivably indefinite, and finally, that they were detained in a “territory over which the United States exercises exclusive jurisdiction and control.” The Court used all these factors to diminish the alienage of the petitioners by giving them “citizen

---

33. The debate in this area is part of the larger and enduring issue of judicial philosophy with wider and more serious consequences than the relatively smaller issue of alienage jurisprudence. A large amount of literature deals with the issue of judicial philosophy. This is a debate that seems to renew every time a new justice is nominated for the Supreme Court. For a good summary of contemporary notions of judicial philosophy, see Jeffrey Rosen, *What’s a Liberal Justice Now?* N.Y. TIMES, May 31, 2009, at MM50, available at http://www.nytimes.com/2009/05/31/magazine/31court-t.html?ref=politics.
35. *Id.* at 470-71.
36. *Id.* at 470.
37. Although the majority of the Court did not say that it overruled *Eisentrager*, Justice Scalia makes a compelling argument that the Court did indeed overrule *Eisentrager*. See *id.* at 476-78, 97-98.
38. *Id.* at 473 (citing Act of Sept. 24, 1789, ch. 20, sec. 14, 1 Stat. 82).
40. Justice Scalia reads this into the opinion. See *id.* at 498 (“The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a sec. 2241 petition against the Secretary of Defense.”).
41. They were Australian and Kuwaiti. See *id.* at 470-71.
42. *See Rasul*, 542 U.S. at 476.
points’ and bringing them within the ambit of the Constitution. In that light, the Court’s argument is effectively a spectrum or ascending scale of right argument. Although the basis of the decision was the several distinguishing factors noted above, the Court insinuated that Eisentrager’s underlying statutory rationale had already been overruled by prior cases in order to avoid the criticism that it was overruling Eisentrager without justification. Finally, in answering the long-standing presumption that congressional acts do not apply extraterritorially, the Court established that “considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.”

Unimpressed with the majority’s argument about Eisentrager being undermined by earlier cases, Justice Kennedy wrote a separate concurring opinion in the decision. He subscribed to the classic spectrum argument made by the majority of the Court, noting its “ascending scale of rights” approach. He further noted that citizenship provides a longstanding basis for jurisdiction, and that among aliens, physical presence within the United States also “gave the Judiciary power to act.” With respect to the specific issue at hand, he noted that Guantanamo Bay is not China or Germany and that it is far removed from hostilities. He concluded that on these bases alone, Eisentrager must be distinguished.

Justice Scalia, with Justice Thomas and Chief Justice Rehnquist concurring, did not quarrel with the idea of an ascending scale of rights; however, he did not think that the Rasul petitioners had better contacts with the United States than the Eisentrager petitioners. In other words, for Justice Scalia, Rasul was as much an alien as Eisentrager. For him, the Court blatantly overruled Eisentrager without having valid grounds to do so. In his own words:

The Court today holds that the habeas statute . . . extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdiction of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied.

If one takes Justice Scalia’s words, Eisentrager is overruled and enemy aliens detained by the authority of the United States perhaps anywhere may challenge their detention through habeas corpus. This characterization seems to make it all about the exercise of authority and the checking of abuse, and not about the alien’s location or status. Yet a careful reading of the Court’s opinion does not support Justice

43. Although the Court included a lengthy discussion of these prior cases to support the conclusion that Eisentrager was already undermined, later cases would resurrect the debate. Id. at 476-78 (citing Ahrens v. Clark, 335 U.S. 188, (1948); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)).
44. See Rasul, 542 U.S. at 481.
45. See id. at 486.
46. See id. at 487.
47. See id at 488-89.
48. Id.
49. Id. at 488.
50. See id. at 506 (citing Rumsfeld v. Padilla, 542 U.S. 426 (2004)). Justice Scalia considers
Scalia's characterization. As subsequent cases, discussed below, make clear, Justice Scalia himself would refrain from making such a broad generalization about Rasul.

In Rasul, the Supreme Court made it clear that even suspected enemy aliens detained at Guantanamo Bay must be given an opportunity to contest the legality of their detention. However, the specific nature of the due process that they must receive became a subject of great controversy later. The first of the many cases that considered the nature of mandated due process was Hamdan v. Rumsfeld. Hamdan tested the constitutional validity of a military commission set up to try some of the Guantanamo detainees. The petitioner, Salim Ahmed Hamdan, who was alleged to have served as Osama Bin Laden's driver, was brought before a military commission set up by a presidential order. Although this case involved numerous peripheral, complicated jurisdictional and separation of powers issues, Hamdan's principal challenge was twofold: (1) he was accused of a crime that does not exist under the Uniform Code of Military Conduct or the Geneva Conventions, and (2) the military commission's procedures denied him due process. On the substantive charges, the Court noted that the charging document had thirteen numbered paragraphs, eleven of which merely described the President's authority and Bin Laden's activities without even mentioning Hamdan. The remaining two paragraphs alleged that Hamdan conspired to commit violations of the laws of war by driving Bin Laden around. Utterly unimpressed with the legal theory behind these allegations and the manner of their presentation, the Court's view was that even if conspiracies to commit violations of the laws of war are said to be crimes without any conduct in furtherance of them, these are not the types of crimes that must be tried by a military commission with defective procedural foundations.

Perhaps a more important aspect to the case was the procedural controversy it presented. The military commission allowed, among other things, the admissibility of hearsay evidence and also evidence obtained possibly through torture. Moreover, the commission's rules denied the accused, as well as his attorney, access to classified evidence that could be used for his conviction. The Court did not find the government's war-exigencies argument of dispensing with fundamental guarantees of due process convincing. In particular, the Court agreed that there was no valid reason why military court-marshal process could not be used. The Court further ruled that the commission violated the Geneva Conventions, and in particular common article 3, which requires trial by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."
In its conclusion, the Court found that:

...it bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.60

This was a case that tested the limits of the Court's tolerance in dispensing with fundamental guarantees of due process because of the place of the alien in the alienage spectrum. Unfortunately, Rasul, Hamdan, and the other Guantanamo Bay cases61 did not resolve all the constitutional issues relating to the rights of enemy aliens detained outside of United States territory. Most importantly, none of these cases directly answered the essential question of whether detained enemy aliens have the constitutional right of habeas corpus as opposed to the statutory right of habeas corpus, and whether it may be suspended without conformance with the Suspension Clause.62 The Court answered this important question in Boumediene v. Bush.63

The Boumediene petitioners alleged that their right to habeas corpus was denied in violation of the Suspension Clause in the Detainee Treatment Act (DTA) and the Military Commission Act (MCA).64 The Court categorically declared that the procedures contained in these Acts unconstitutionally suspended habeas corpus by failing to provide an adequate substitute for habeas corpus.65

Before the Court's reasoning is discussed, it is important to note the evolution of the issue in the context of the detention of the alleged enemy aliens in Guantanamo. As indicated above, Rasul held that enemy aliens detained in Guantanamo Bay have a statutory right to contest the legality of their detention by habeas corpus. Hamdi v. Rumsfeld,66 was decided the same day as Rasul. In Hamdi, the Court also determined that a United States citizen detained at Guantanamo on allegation of being an enemy combatant has the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."67 Relating to the adequacy of any supposed process, the plurality of the Court suggested that "an appropriately authorized and properly constituted military tribunal" might be sufficient.68 The DTA was supposed to be the two political branches' response to the Court's persistent demand for a meaningful process.69 The DTA set up a two-step process:

60. Id. at 635.
61. These two cases are discussed in some detail later in this section. See Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (ruling that a U.S. citizen held as an enemy combatant be given a reasonable opportunity to contest his designation before an neutral decision maker); Rumsfeld v. Padilla, 124 S. Ct. 2711 (limiting habeas jurisdiction to the district of confinement).
63. 128 S. Ct. 2229 (2008).
65. See id. at 2240.
67. Id. at 533.
68. Id. at 538.
69. See Boumediene, 128 S. Ct. at 2241.
first, the detainee would appear before a Combatant Status Review Tribunal (CSRT) to have his combatant status determined. Second, the D.C. Circuit Court of Appeals would conduct a review to determine whether the CSRT proceedings were consistent with "the Constitution and laws of the United States." Before the Court addressed the specific issues relating to the adequacy of the process the DTA put in place, it categorically dismissed the government’s proposition that aliens detained in Guantanamo Bay are not entitled to constitutional habeas corpus. Once again, as in Rasul, the Court recited the rich history of the writ in the Anglo-American system as a check against tyranny. In relation to this overarching separation of powers issue, it added the following extremely impactful paragraph, which may have immense consequences in the immigration context:

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’

To reaffirm its Rasul decision this way, the Court had to confront Eisentrager once again. As Justice Scalia properly notes in his dissent, which is discussed here later, the Court reduced Eisentrager’s six “alienage” factors into a “functional test,” and distinguished the Boumediene facts from the Eisentrager facts. In particular, predicated on the Eisentrager alienage factors, it identified the three most important factors for the determination of the reach of the Suspension Clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination is made; (2) the nature of the sites where the apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”

With respect to the first factor, the Court made several important distinctions as they related to Boumediene and Eisentrager. The court outlined the issues of uncertainty surrounding the status of the Boumediene petitioners as to whether they were considered enemy combatants or not, and whether the absence of a military trial or any kind of trial for six years, including the lack of representation,

---

70. See id.
71. See id. at 2244.
72. See id. at 2244-52 (using two cases in support of its separation of powers argument including, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) and INS v. Chadha, 462 U.S. 919, 958-59 (1983)). Although the Court held that the Constitution applies to enemy aliens detained in a foreign territory, in specifically limiting the reach of this ruling to Guantanamo, it introduced this idea of de jure sovereignty, which made the application of the constitution possible. See Boumediene, 128 S. Ct. at 2253. The court, however, noted that “[e]ven when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’” Id. at 2259 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).
73. See Boumediene, 128 S. Ct. at 2259 (quoting Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)) (emphasis added).
74. See id. at 2299 (Scalia, J., dissenting).
75. See id. at 2259.
76. Id.
was appropriate. In relation to the second factor, the Court explained the special circumstances of Guantanamo Bay as a U.S. controlled territory to which de facto sovereignty extends. In the third factor, the Court noted that the United States does not face the kind of threat that it did during the Eisentrager era and, as such, the due process accorded to the Guantanamo detainees must be looked at in that light. Having noted these distinctions, the Court concluded by stating, “Art. I, § 9, cl. 2 of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”

Having firmly established the applicability of the Suspension Clause of the Constitution to Guantanamo Bay, the Court went on to discuss the two fundamental flaws that rendered the DTA process an inadequate substitute for habeas corpus, and, as such, an unlawful suspension of the writ of habeas corpus. While the first pertains to the fairness of the first instance proceeding, the second pertains to restrictions on judicial review. As each one of these factors has profound implications on the status of aliens in the immigration context, they are discussed below in some detail.

With respect to the CSRT process that the DTA set up, the Court noted numerous infirmities. These infirmities include the detainees’ inability to find and present evidence to rebut the Government’s allegations, lack of assistance of counsel, the use of confidential evidence, and the admissibility of hearsay evidence. According to the Court, these factors made the process constitutionally deficient. It is important to note here that immigration removal proceedings are characterized by all of these factors that the Court now cites as examples of constitutional infirmities of the CSRT process. Perhaps more importantly, the Court carefully evaluated the nature of the purported judicial review of the CSRT proceedings. It began by saying that for judicial review to be meaningful, courts must have “the means to correct errors that occur” at the trial level. More specifically it noted that this would include “some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.” According to the Court, the problem with the DTA’s judicial review provision is that it does not allow the Court of Appeals “to make requisite findings of fact.” The DTA’s authorization is limited to the review of whether the CSRT followed the “standards and procedures.” These standards include “the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence... allowing a rebuttable presumption in favor of the Government’s evidence.” Apart from this, the Court also noted the absence of a provision authorizing the Appellate Court to...

77. See id. at 2259-60.
78. Id. at 2259-60 (“But there are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantanamo Bay in 2008.”).
79. See id. at 2261.
80. Id. at 2262.
81. See id. at 2269.
82. See id. at 2270.
83. Id. at 2270.
84. Id. at 2272.
85. See id.
86. Id. at 2272 (citing DTA sec. 1005(e)(C)).
order the release of the detainees when necessary as evidence of a great constitutional infirmity. The Court mentioned its profound discomfort with the provisions of the DTA that seem to attempt to shield the factual findings of the CSRT from judicial review. Ironically, the judicial review provisions of the INA are exactly the same as the judicial review provisions of the DTA that the Court rejected in this case. This point will be explored further in subsequent sections.

For Justice Scalia, this was a historic departure from established precedent. He began his dissenting opinion, joined by Chief Justice Roberts, and Justices Thomas and Alito, by declaring: “Today, for the first time in our Nation’s history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.” Scalia ends his opinion by determining that the Court’s extension of the right to habeas corpus to enemy aliens in a foreign land is “ultra vires.”

For the dissent, particularly Justice Scalia and Chief Justice Roberts, Boumediene overrule important precedent, but they differ in the importance they attach to said precedent. Justice Scalia is more worried about the possible silent overruling of Eisentrager, and Chief Justice Roberts is more worried about the possible silent overruling of Hamdi v. Bush. The petitioner in Hamdi was a U.S. citizen held at Guantanamo on allegations of being an enemy combatant; however, Chief Justice Roberts contends that the Court’s demand was limited to the right to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.” Further, Roberts points out that in Hamdi, the Court deemed a trial “by an appropriately authorized and properly constituted military tribunal” sufficient. This may strike Roberts as ironical where such limited process, which includes the admissibility of hearsay and a rebuttable presumption in favor of the government, is deemed sufficient for a U.S. citizen, but not sufficient for enemy aliens. For Roberts, the determinative factor is the distinction between citizens and aliens. He categorically finds that “the Due Process Clause does not afford non-citizens in such circumstances greater protection than citizens.” Again, for Roberts the “evidentiary and other limitations the Court complained about reflect the nature of the issue in contest, namely, the status of aliens captured by our Armed Forces abroad and alleged to be enemy combatants.” As such, a review of their rights “need not parallel the habeas privileges enjoyed by noncombatant American citizens[;]...[i]t need only provide process adequate for non-citizens detained as alleged combatants.”

87. See id. at 2272-73.
88. See id. at 2273-74.
89. Id. at 2293-94 (Scalia, J., dissenting).
90. See id. at 2294.
91. Id. at 2280-89 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).
92. See id. at 2281.
93. Id.
94. See id. at 2281-83, 2288 (citing Hamdi, 542 U.S. at 533 (“hearsay, for example, may need to be accepted as the most reliable available evidence from the Government.”)).
95. See id. at 2281, 2283. Roberts also relies on Mathews v. Eldridge, to support the argument that the circumstances warrant a limited process, and that the Mathews balancing test may be satisfied. See Mathews, 424 U.S. 319, 335 (1976).
96. See Boumediene, 128 S. Ct. at 2287.
97. See id. (citing 28 U.S.C. sec. 2241 (200 ed. and Supp. V)).
In defending the DTA’s judicial review provisions, Chief Justice Roberts relied on similar provisions upheld in the immigration context. He accurately noted that “in immigration cases, other than the question whether there was some evidence to support the [deportation] order, the courts generally did not review factual determinations made by the Executive.”

Roberts’ argument that judicial review provisions of the DTA mirror that of the immigration laws is remarkable and accurate, particularly after the enactment of the Real ID Act of 2005, which overruled St. Cyril. Although St. Cyril supports the proposition that Roberts cites it for, (i.e., the Court’s lack of inquiry into factual determinations) its importance is linked to the Court’s reiteration of the need for express congressional language for the repeal of statutory habeas claim. The Real ID Act categorically eliminated all writs, habeas and mandamus. The pertinent provision under the title “exclusive means of review” states:

Notwithstanding any provision of law (statutory or non-statutory), including section 2241 of title 28, United States Code or any other habeas corpus provision...a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act.

The impact of this provision is exactly the same as the DTA provision the Court rejected in Boumediene as an inadequate substitute for habeas corpus because of two fundamental reasons: 1) the review by the Courts of Appeals is limited to constitutional and other questions of law; and 2) the reviewing court would not get an opportunity to correct any flawed factual findings. Another fact that the Court found objectionable in the DTA is the admissibility of hearsay and confidential evidence. In the immigration context, by contrast, both are admissible. This is precisely what Chief Justice Roberts considers ironic given the position of the “enemy aliens” in the alienage spectrum. In other words, Roberts’ objection is
absolutely accurate in that *Boumediene* would give better due process rights to enemy aliens detained in Guantanamo than ordinary aliens fighting deportation from the United States. As such, it could be concluded that *Boumediene* does indeed disorder the alienage spectrum by giving to enemy aliens detained at Guantanamo better rights than to ordinary aliens in deportation proceedings in the United States, and perhaps to U.S. citizens detained at Guantanamo Bay. However, as subsequent sections elaborate, the solution to this problem is not denying the Guantanamo detainees due process rights just because immigrants in the U.S. do not have the same rights, as Roberts suggests, but instead, extending the same kinds of due process rights to immigrants.

2. Interception on the High Seas, Detention and Return

Aliens intercepted on the high seas could rightfully be placed towards the beginning of the alienage spectrum because they have not set foot on U.S. soil. The Supreme Court in *Sale v. Haitian Center Councils* examined the claim of rights by aliens in this category. In *Sale*, several Haitian refugees challenged a presidential decree that authorized the Coast Guard to intercept Haitian boatpeople on the high seas and return them to Haiti, where their life or freedom would be threatened. The essential question presented was whether the aliens intercepted per such decree could avail themselves of a Congressional Act which granted aliens the right not to be returned to a place where their "life or freedom would be threatened." Writing for the majority, Justice Stevens began his analysis by making a spectrum argument. He noted that the principle of non-refoulement, i.e., non-return, is mandatory as long as the alien can show that there is a clear possibility that his life or freedom would be threatened. The question was, however, if aliens who were actively prevented from reaching the U.S. territory could claim this protection. In answering this question he emphasized the distinction that Congress and the courts have long made between aliens who seek admission on the border in exclusion proceedings, and those who fight deportation after having been admitted. To set the stage for his spectrum argument, he finds that those in exclusion proceedings have always received less due process than those in deportation proceedings. Relying on 1950s precedent, Stevens further noted that just because an alien is

---

106. See INA sec. 242(a)(2) (Real ID) (limiting judicial review by the appeals courts to questions of law and constitutional claims only).

107. See *Hamdi*, 542 U.S. at 533.


109. See id. at 158-59.


111. See *Sale*, 509 U.S. at 159-60. The old INA provision at issue in *Sale* was sec. 243(h)(1). It is now sec. 241(b)(3)(A) and it provides that, "[t]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." See also *I.N.S. v. Stevie*, 467 U.S. 407, 423 (1984).

112. See *Sale*, 509 U.S. at 159.

113. See id. at 159-60, 175-76 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)).
physically in the U.S. does not mean that he is "within the United States" within the meaning of the statute. In other words, a person who is temporarily paroled into the country is not considered "within the United States" for purposes of procedural due process. More importantly, Justice Stevens reiterated that in the absence of express authorization, Acts of Congress are presumed to have no extraterritorial application, and that Congress expressed no such intent in enacting the provision under consideration. Based on these reasons, Justice Stevens concluded that Haitian refugees fleeing undisputed persecution might be forcibly returned to Haiti as long as the U.S. Coast Guard intercepted them before they could reach U.S. territory.

In other words, aliens who have not reached U.S. territory are not entitled to the claim of any benefits under the immigration laws even when the U.S. actively sought to prevent them from reaching its shores and return them to the place where they would face persecution. Justice Stevens' concluding paragraph is perhaps more telling than everything he said in this case. He quoted a concurring opinion by a Circuit Court Judge: "This case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy." This is, of course, a classic *Ping* plenary power argument; otherwise it could not have passed the Court's "shocks the conscience" test, let alone any kind of due process analysis. The last paragraph of the Court's opinion established that even if gathering refugees fleeing for safety from the high seas and returning them to their persecutors violates the spirit of the law,

114. See Sale, 509 U.S. at 174-5 (citing among others Leng May Ma v. Barber, 357 U.S. 185, 186 (1958); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1956); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)). ("Under the INA, both then and now, those seeking 'admission' and trying to avoid 'exclusion' were already within our territory (or at its border), but the law treated them as though they had never entered the United States at all; they were within United States territory but not 'within the United States.' Those who had been admitted (or found their way in) but sought to avoid 'expulsion' had the added benefit of 'deportation proceedings;' they were both within the United States territory and 'within the United States.' Although the phrase 'within the United States' presumed the alien's actual presence in the United States, it had more to do with an alien's legal status than with his location.").


116. See Sale, 509 U.S. at 176, 188 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

117. See id. at 162 ("As the District Court stated in an uncontested finding of fact, since the military coup 'hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and destruction of their property because of their political beliefs. Thousands have been forced into hiding.'").


119. See Sale, 509 U.S. at 188.

120. Justice Stevens surprisingly admits that much. See id. at 183 ("The drafters of the Convention and the parties to the Protocol-like the drafters of § 243(h)-may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about
courts must not second-guess the wisdom of laws enacted by Congress as long as they merely affect aliens who were collected from the high seas because their relationship with the United States is limited to their encounter with the Coast Guard on the high seas.

3. Arrest in a Foreign Country and Detention in the United States on Criminal Charges

The legal quandary relating to the applicability of the Bill of Rights vis-à-vis aliens detained by U.S. authorities outside of the United States for law enforcement purposes is demonstrated by the Verdugo-Urquidez case. The Supreme Court framed the issue as "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." The Court begins by holding that the Fourth Amendment does not apply in such circumstances. The Court's plurality opinion, as per Chief Justice Rehnquist, was principally focused on the alienage spectrum. Specifically, the Court opined that the applicability of the Fourth Amendment to aliens depends on where the particular alien is on the spectrum, although it did not use the term "spectrum." It is clear from the Court's opinion that Verdugo-Urquidez falls towards the very beginning of that spectrum.

Verdugo-Urquidez, a Mexican national, was suspected of serious drug trafficking offenses. U.S. federal agents had an arrest warrant, and they arrested him in Mexico City with the help of Mexican authorities; afterwards, they brought him to the U.S. and charged him with several offenses. At trial, the prosecutors purported to use evidence seized without a warrant from his Mexico City residence. He moved to exclude the evidence on grounds of violation of his Fourth Amendment right against unlawful searches and seizures. The Court of Appeals for the Ninth Circuit agreed with him, but the Supreme Court reversed.

The Court agreed with the dissenting opinion of the Ninth Circuit Court of Appeals, which relied on United States v. Curtiss-Wright Export Corp, a case holding that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." Although the Court could have disposed of the case by simply relying on Curtiss-Wright, it chose to reject this simplistic and categorical approach and rendered a more nuanced opinion. By so doing, the Court tremendously complicated the already complex jurisprudence relating to the applicability of the Bill of Rights to aliens. First, the Court tried very hard to assign different meanings to the term "persons" as used in the Fifth and Sixth Amendments to the U.S. Constitution and "the people" as used in a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

122. Id. at 261.
123. Id.
124. See id. at 274-75.
125. See id.
126. See id. at 261-64.
127. Id.
128. See id. at 264 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (understanding the Constitution as a compact among "the people" of the United States)).
the Preamble, and the First, Second, Fourth, Ninth, and Tenth Amendments.\(^{129}\)

Having engaged in some historical inquest, the Court concluded that:

> The available historical data show[s], therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.\(^{130}\)

The Court did not, however, say that no alien may be a part of the people. Some aliens may be considered "the people," but others may not. Verdugo-Urquidez is just a person, not part of "the people" because he lacked a "voluntary attachment"\(^{131}\) and "a substantial connection"\(^{132}\) with the United States. In reaching this decision, one of the greatest hurdles that Chief Justice Rehnquist faced hailed from an unexpected corner: Chinese exclusion era cases. *Yick Wo v. Hopkins* upheld aliens' equal protection claims under the Fourteenth Amendment,\(^{133}\) and *Wong Wing v. United States* upheld aliens' claims for protection under the Fifth and Sixth Amendments.\(^{134}\) Rehnquist distinguished these cases in that the aliens involved had voluntary and substantial connections with the United States.

No written opinion or legal text so clearly expresses the problem with the Court's decision, and the entire doctrinal quandary relating to the applicability, or the lack thereof, of the Bill of Rights vis-à-vis aliens as Justice Brennan's dissenting opinion does in this case. It reads in part:

> According to the majority, the term "the people" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." The Court admits that "the people" extends beyond the citizenry, but leaves the precise contours of its "sufficient connection" test unclear. At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop "substantial connections" with our country. At other junctures, the Court suggests that an alien's presence in the United States must be voluntary and that the alien must have "accepted some societal obligations." At yet other points, the majority implies that respondent would be protected by the Fourth Amendment if the place searched were in the United States.\(^{135}\)

Unfortunately, the contours of the "sufficient connections" remained forever undefined, which significantly contributed to the disorder in the alienage spectrum, which of course predates this case.

\(^{129}\) See *id.* at 263-65.

\(^{130}\) *Id.* at 266.

\(^{131}\) *Id.* at 275.

\(^{132}\) *Id.* at 271.

\(^{133}\) See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (cited in *id.* at 271).

\(^{134}\) See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (cited in *id.* at 271).

\(^{135}\) See *Verdugo-Urquidez*, 494 U.S. at 282-83 (Brennan, J., dissenting) (emphasis added).
Justices Brennan and Marshall, dissenting, had no confusion about the applicability of the Bill of Rights. To them, the Bill of Rights “did not purport to ‘create’ rights.” Rather, the Framers “designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.” As such, “bestowing rights and delineating protected groups would have been inconsistent with the Drafters’ fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern.”

The dissenting justices were not impressed with the “person–people” dichotomy. At a minimum, they did not think the historical evidence supported that conclusion. In fact, they thought the historical evidence supported the contrary by noting that the Constitutional Convention specifically rejected a recommended amendment that would have limited the Fourth Amendment to “every freeman.”

Justice Brennan went on to articulate a compelling line of reasoning:

By concluding that respondent is not one of “the people” protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them. We have recognized this fundamental principle of mutuality since the time of the Framers.

For this proposition, he sought support from James Madison, who he said was “universally recognized as the primary architect of the Bill of Rights,” and who “emphasized the importance of mutuality when he spoke out against the Alien and Sedition Acts less than a decade after the adoption of the Fourth Amendment.” Madison’s statement reads:

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have 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, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

The plurality of the Court obviously did not adopt this notion of mutuality and the applicability of the Bill of Rights to aliens, but rather chose the alienage spectrum option, the contours of which it failed to define.

Finally, the Court deliberately left open the question of the role of illegal presence in the determination of the alien’s position in the spectrum although it recognized that its previous Fourth Amendment decision involving aliens, Lopez-

---

136. Id. at 288.
137. Id. (emphasis added).
138. Id. (citing W. Cuddihy, Search and Seizure in Great Britain and American Colonies, pt. 2, p. 571, n. 134 (1974)).
139. Verdugo-Urquidez, 494 U.S. at 284-85 (citing Madison’s Report on the Virginia Resolutions (1800), reprinted in 4 Elliot’s Debates 556 (2d ed. 1836)).
140. Id.
Mendoza, suggested that the inapplicability of the Fourth Amendment is limited to deportation proceedings not criminal trials. Although the Court’s temptation to overrule that precedent is clear from the opinion, it did not do so. As a result, it is now unclear whether illegal presence, albeit for a long time, may provide the requisite voluntary and substantial association to trigger the application of the Fourth Amendment.

ii. Voluntary Contact

Moving a step forward in the spectrum brings the discussion into the domain of voluntary contact. The most common form of voluntary contact that an alien may have with U.S. authorities in a foreign territory involves a visa application at a U.S. consulate office. The alien may apply for an immigrant or non-immigrant visa. The United States, by virtue of its sovereignty, is under no international obligation to allow the admission of aliens into its territory unless it desires to do so. The recurring question, however, relates to instances where the U.S. has chosen to provide access to qualifying aliens by law, but denies procedural due process on the basis of the claimant’s position on the alienage spectrum. Several courts have considered the issue of whether an alien outside of the U.S. could have a right to review for a visa denial by a consular officer. Some of the important decisions are discussed as follows.

Although the notion “consular absolutism” is a very well established principle, its expressions are sporadic, at best, as there is no Supreme Court decision defining its source and parameters. Two appellate court cases rendered in the late 1920s, United States ex rel. London v. Phelps and Ulrich v. Kellogg, could be cited as the earliest expressions of this principle. While, in London, the Second Circuit Court of Appeals rejected reviewability of consular decisions on grounds of

142. Verdugo-Urquidez, 494 U.S. at 272-73 (citing I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984). (“Our statements in Lopez-Mendoza are therefore not dispositive on how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us. Even assuming such aliens would be entitled to Fourth Amendment protections, their situation is different from respondents. The illegal aliens in Lopez-Mendoza were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among ‘the people’ of the United States.”).
144. The INA defines the term “immigrant” by exclusion, i.e., “the term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant alien,” and goes on listing nonimmigrant aliens who come to the U.S. temporarily. See INA sec. 101(a)(15) (listing all the nonimmigrant categories).
145. See Ping, 130 U.S. 581, 603-04 (1889); Ekiu v. United States, 142 U.S. 651, 659 (1892).
146. See, e.g., INS Sec. 203(a) (allowing the spouse, children, parents and siblings of U.S. citizens to immigrate to the U.S. on the basis of the family relationship).

147. It stands for the proposition that the determinations of a consular officer are final and unreviewable. For commentary see, e.g., James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 WASH. L. REV. 1 (1991) (providing a critical review of the principle).
lack of jurisdiction, in *Ulrich*, the D.C. Circuit rejected the matter because it could not find statutory authority to review consular decisions. Almost a century later, the D.C. Circuit revisited the same issue in *Saavedra Bruno v. Albright*, and reaffirmed and articulated the principle of consular absolutism.

As framed by the court, the issue in *Bruno* was “whether, under the Administrative Procedure Act, an alien is entitled to judicial review of a consul’s denial of his application for a visa, and of the revocation of a visa he already held.” Bruno, a native of Bolivia, first came to America in 1993 on a non-immigrant student visa. In 1995, he petitioned for a work related non-immigrant visa, which was approved by the former INS. He was however, advised to travel outside of the U.S., appear before a U.S. consular officer and collect the visa. Relying on such advice, he traveled to Panama City and applied for a visa at a U.S. consulate office there on May 16, 1996. Unfortunately for him, the consulate officer denied the visa based on confidential information that Bruno was involved in drug related criminal conduct. Bruno, who denied any wrongdoing, demanded a hearing so that he could contest the charges. Since no such review procedures existed, he traveled back to the U.S. on his initial non-immigrant visa, which had not yet expired. He was briefly detained at the airport, and then released with a Court date. On the said date, he appeared before immigration officials who told him to resolve the matter at the U.S. consulate office in his home country of Bolivia. He took the advice and traveled to Bolivia to obtain the visa. The U.S. consulate office in Bolivia not only denied the new work visa, but also revoked the other nonimmigrant visa that he already had. Although he did not see the confidential evidence against him, he petitioned the Attorney General for a waiver. When he did not hear from the Attorney General for two years, he filed a suit in the District Court for the District of Columbia seeking a review of the denial and seeking a remedy for the unreasonable delay in the waiver petition based on the Administrative Procedure Act’s presumption of reviewability.

The D.C. Court of Appeals began its analysis by acknowledging Bruno’s argument that in the absence of express preclusion, judicial review of administrative decisions must be presumed. The Court, however, denied Bruno’s claim in this case based on three important theories that are unique to immigration. The first and most important proposition is that more than a century of jurisprudence denies aliens outside of the U.S. any right to recourse against the executive branch of government. The Court supported this proposition by none other than the Chinese Exclusion Case. It said:

For more than a century, the Supreme Court has thus recognized

---

150. See London, 22 F. 2d at 290.
151. See *Ulrich*, 30 F. 2d at 985-86. Although the D.C. Circuit said that it could not find any statutory authority, it actually rejected the matter on its own merits. Its expression of the lack of statutory authorization, however, remained the most important aspect of the decision.
152. 197 F. 3d 1153 (D.C. Cir. 1999).
153. See *Bruno*, 197 F. 3d. at 1156.
154. See id. at 1155.
155. *Id.*
156. *Id.*
157. *Id.* at 1155-56.
158. *Id.* at 1157 (citing, among other cases, Lincoln v. Vigil, 508 U.S. 182, 190 (1993)).
the power to exclude aliens as 'inherent in sovereignty, 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 and not granted away or restrained on behalf of anyone.'

Second, the Court made a spectrum argument, stating that aliens seeking a visa abroad cannot have greater rights than those who are seeking admission at the border. Again, among other cases, it relied on one of the Chinese Exclusion era cases, i.e., Ekiu v. United States, which held that the due process of aliens seeking admission at the border is limited to what the inspecting officer says it is because of the plenary power doctrine. In other words, the Court said, if such is the extent of due process that an alien who is already at the border gets, one who is not even here cannot claim a better right. Of course, the court conveniently failed to take in to account Bruno’s prior residence in the U.S. and also disregarded his reliance on the advice of the immigration authorities in the U.S. As it has been explored in relation to the Fourth Amendment above, a voluntary association or attachment with the U.S. is an important consideration that the Supreme Court often looks at in determining the extent of aliens’ rights. Finally, the Court engaged in a technical statutory interpretation exercise and concluded that federal courts lack jurisdiction to review consular decisions.

Bruno’s importance is not limited to the specific jurisdiction where it was rendered because it consolidated most of the grounds the other circuits relied upon in confirming and reconfirming the principle of “consular absolutism.”

The breadth of this principle is such that it even affects the rights of U.S. citizens because of their affinity with aliens. A constitutional challenge based on the citizen’s right to family unity has never succeeded. Hermina Sague v. United States provides a good example of such a case. In this case, the plaintiffs, Sague, a U.S. citizen and her husband, Berger, a French citizen, challenged the constitutionality of the immigration laws that gave a consular officer’s decision finality. A consular officer denied Berger an immigrant visa for reasons neither he nor his U.S. citizen wife understood. As they realized that the law was not on their side, they challenged the constitutionality of the law based on the principle of family unity. Sague alleged that, as a U.S. citizen, she had a right and a privilege to live with her husband. The Court rejected this claim based on two main arguments. The first argument is the same old assertion that congressional acts in the area of immigration are

159. See Bruno, 197 F. 3d at 1159 (citing The Chinese Exclusion Case, 130 U.S. 581, 609 (1889); Ekiu v. United States, 142 U.S. 651, 659 (1992); Hairisidas v. Shaughnessy, 242 U.S. 580, 596 (1952) (Frankfurter, J., concurring); Reno v. American-Arab Comm., 525 U.S. 471 (1999)).

160. Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). In this case, a Japanese woman was excluded on public charge grounds as she only had twenty-two dollars in cash when she arrived. She, however, claimed that her husband, who was living in the U.S., then would support her and she asked to contact him. The officer denied that privilege and ordered her deported. The Supreme Court said that that was sufficient due process for the alien because Congress said so. See id.

161. See Bruno, 197 F. 3d at 1160-61.

162. See id. at 1162-64.

163. Some of the important old cases include: United States ex rel. London v. Phelps, 22 F. 2d 288 (2d Cir. 1927); United States ex rel. Ulrich v. Kellogg, 30 F. 2d 984 (D.C. Cir. 1929); Kleindienst v. Mandel, 408 U.S. 753 (1972).


165. Id. at 220-21.

166. Id.
unreviewable. As all other courts would do, this court also relied on one of the Chinese Exclusion era cases, and subsequent cases that also rely on those cases. Second, and perhaps more importantly, the Court opined: "there is no constitutional right of a citizen spouse, who voluntarily chooses to marry an alien outside the jurisdiction of the United States, to have her alien spouse enter the United States." The Court concluded that "no citizen can, by the individual action of contracting matrimony in a foreign jurisdiction with an alien, deprive the United States of as fundamental an act of sovereignty as is the determination of what aliens may enter its territory.

These two cases demonstrate the nature and extent of the due process rights of aliens outside of the U.S. who voluntarily apply for a visa. The last case further shows that even citizens could have the rights that they would otherwise have curtailed because of their affiliation with aliens. It is important to note that both of these cases derive their legitimacy from the Chinese Exclusion era cases.

b. Aliens Seeking Admission at the Border

Those who are able to evade the Coast Guard, obtain a visa from a consulate office, or in some other way arrive at the border, must be inspected before they are admitted or expelled; presumably, these categories of persons have a minimum level of relationship with the U.S., as their feet are now dry and on U.S. soil, which should form a basis for greater access to due process rights. Nevertheless, courts have not established such a consistent correlation between level of relationship to the United States and due process rights.

One of the Supreme Court's earliest cases that dealt with the due process right of aliens seeking admission was Ekiu v. U.S. Because this case was decided three years after the Chinese Exclusion case, it is also considered one of the Chinese Exclusion era cases. The petitioner in this habeas proceeding, Ekiu, was a twenty-five year old Japanese woman who only had twenty-two dollars on her person when she arrived at a San Francisco port. Under the then existing law, as it remains today, an alien who is likely to become a public charge would be denied entry and deported. When asked by an immigration officer how she might be able to support herself in America, she replied that she had been married for two years to a person who was then living in San Francisco, and that he would contact her at a certain hotel if she were to be allowed entry. Not believing the story, the officer denied her entry and ordered her deported. She challenged the sufficiency of the due process she was accorded by habeas corpus. To her disappointment, the Supreme

167. Id.
170. See id.
171. See id.
173. See id.
174. See id. at 651.
175. Id.
176. Id.
Court held:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

As a result, the Ekiu decision establishes that the due process that an arriving alien may receive upon entry is limited to the inspecting officer’s determination. Ekiu, however, suggests that those who have already secured entry may have better rights. The Supreme Court addressed this issue eleven years later in Yamataya v. Fisher. The petitioner in Yamataya, a Japanese woman like Ekiu, challenged the sufficiency of the due process she was accorded by an immigration officer. Unlike Ekiu, Yamataya landed at the port of Seattle on July 11, 1891, and was not taken into custody until July 23 of the same year. Therefore, she had twelve days of contact with the U.S. before she was arrested.

The officer, who interviewed her in English, found that Yamataya had admitted to being a “pauper” or in his view, a possible public charge, and ordered her deported back to Japan by the vessel that brought her to Seattle. She challenged the order on constitutional due process grounds. In particular, she alleged that when the officer was talking to her, she did not even know he was investigating her, as she did not understand English. In addition, she denied admitting to being a “pauper.” She also alleged that she was denied the right to counsel or any kind of consultation and that the investigation was a “pretend” process and, as such, violated her due process rights. She then demanded the right to be heard so that she could demonstrate that she would not be a public charge. To her disappointment, the Supreme Court held:

If the appellant’s want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus. We perceive no ground for such intervention, none for the contention that due process of law was denied to appellant.

177. Id. at 660-61 (emphasis added).
179. See id. at 94-95.
180. See id. at 87.
181. See id. at 87-95.
182. Id.
183. Id.
184. Id. at 102.
The rationale:

Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was "due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."

In relation to this, the Court suggested that the petitioners brief presence in the country, twelve days, did not entitle her to better due process rights than a newly arriving alien such as Ekiu. Although the Court also suggested that illegal presence itself, regardless of the length of such stay, might preclude the application of better constitutional due process, the Court stopped short of making that determination in express terms. As will be discussed below, more than a hundred years later, this issue is still a subject of great controversy. Despite this uncertainty, however, there is no dispute that Yamataya stands for the proposition that more links with the polity of the U.S. would entitle an alien to more rights. Unfortunately for Yamataya, her twelve days in Seattle did not take her out of the arriving alien category for purposes of constitutional due process.

Existing rules appear to be predicated on the assumptions contained in these Chinese Exclusion era cases. Although several legislative and judicial actions separate the existing INA provisions on admission from the Chinese Exclusion cases, the similarity between the standards set by Yamataya and some subsections of

---

185. Id. at 100 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)).

186. See id. at 100 ("Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified.").

187. But note that the Court also said that:

"[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends, -not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." Id. at 100-01.
existing INA §235 is unmistakable. In fact, some subsections of INA §235 appear to be the codification of the *Yamataya* standard. Subsequent legislative actions have, however, complicated the notion of admission in some significant ways. These notions as well as their impact on the alienage spectrum are discussed in some detail below.

Provisions of the INA § 235 closely track the decision in *Yamataya*. Yamataya’s physical presence for twelve days was insufficient to entitle her better due process rights than Eku, who barely disembarked the vessel that brought her to the U.S. Along the same lines, existing INA section 235(b)(1)(A)(i) provides: “If an immigration officer determines that an alien [ ] who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(C) [illegal entrants and immigration violators] or 212(a)(7) [lack of valid documentation], the officer shall order the alien removed from the United States without further hearing.” If an alien falls under the cross-referenced provisions because he or she is an illegal entrant or immigration violator, the immigration officer’s decision to deport would be the entirety of due process that the alien would receive because it is not only final but also unreviewable. This rule essentially codifies *Eku*.

Subsection (iii) of the same provision appears to extend Eku to *Yamataya*, and beyond. It provides: “The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.” The cross referenced subsection (II) in turn gives the Attorney General discretion to extend this swift and expedited procedure by regulation to aliens who have been physically present in the United States for less than two years. According to this provision, therefore, the Court’s insufficient connection under *Yamataya* could extend to up to two years of presence in the U.S. However, existing regulations limit the reach of the INA §235 swift and expedited procedures to aliens apprehended within one hundred miles of the border within fourteen days of their arrival.

According to these existing regulations, an alien who manages to travel at least 101 miles or evades capture for at least fifteen days would have reduced alienage points and may claim regular removal procedures under INA §240. Although, as will be discussed below, INA § 240 itself has some fundamental due process flaws, it would still entitle the alien to much better procedural due process rights, including appearance before an immigration judge, right to proper interpretation at government expense, right to counsel at his own expense, administrative appeals, and some limited right of judicial review.

The fourteen-day rule is quite interesting in light of *Yamataya*. Of course, the *Yamataya* Court did not say how many days would provide sufficient connections for more elaborate procedures to apply; it only suggested that twelve days is not sufficient. According to INA §235 and regulations issued in accordance with it, fifteen days would probably satisfy the sufficient connections requirement.

Though the exact number of days seems somewhat arbitrary, the notion that

188. See INA sec. 235(b)(1)(A)(ii). Subsection (ii) provides an exception for asylum seekers.
a greater number of days establishes a firmer connection is a sensible approach with respect to the alienage spectrum. However, this largely coherent approach to establishing a connection to the United States is disrupted in instances where the alien severs an established connection to the United States and later seeks to reclaim that connection. This phenomenon often occurs when a lawful resident travels abroad and seeks to be readmitted. The main problem relates to the circumstances that are considered to sever the relationship subjecting the former resident to minimal due process just like newly arriving aliens. This issue has over the years arisen in different contexts. The following cases and statutory rules demonstrate the disorder that this problem brings to the alienage spectrum.

The Supreme Court's earliest post-World War II due process pronouncement was contained in *Knauff v. Shaughnessy*. Knauff was a German national; she married a naturalized U.S. citizen in Germany and attempted to enter the U.S. to naturalize. The Attorney General denied her entry without any process, citing national security concerns, and ordered her deported citing statutory authority that allowed him to do so. She challenged the constitutionality of the process by habeas corpus. Relying exclusively on the Chinese Exclusion era cases, the Court held that as long as Congress gave the executive officials the exclusive right to admit an alien or deny her admission, the decision of such executive officer is "final and conclusive." The Court further added that, "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." Knauff's relationship with the U.S. was limited to her marriage to a U.S. citizen and work for the U.S. military in Germany. She had never been to the U.S. prior to her attempt to enter. In that sense, although she had better connections with the U.S. than, for example, Ekiu or Yamataya, the process she received was exactly the same as those two Japanese nationals who came almost a century before her.

To make matters worse, the Court expanded the same principle to aliens who had actually lived in the U.S. for a long time prior to their departure and application for reentry. The case that extended the same principle to returning lawful residents is *Mezei v. Shaughnessy*. Mezei, a resident of the U.S. for twenty-five years, traveled to his country of origin to visit his dying mother and returned to the U.S. after nineteen months. The Attorney General excluded him without a hearing based on confidential national security information. He challenged the exclusion and continued detention on constitutional due process grounds. Again, predicated

---

193. See id. at 539-40.
194. See id.
195. See id.
196. See id. at 543 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893); Ludecke v. Watkins, 335 U.S. 160 (1948); cf. Yamataya v. Fisher, 189 U.S. 86, 101 (1903)).
197. Id.
199. See id. at 208.
200. See id.
201. See id. at 209-10.
on the Chinese Exclusion era cases and their progeny, the Court rejected all of Mezei's challenges, including the lack of procedural due process and possible indefinite detention. The Court had to overcome its own apparent contrary ruling in *Kwong Hai Chew v. Colding* the same year. In *Chew*, the petitioner, a lawful permanent resident that worked on a U.S. registered vessel as a chief steward, was summarily excluded from admission when returning after four months of voyage on board the vessel. The Court extended the procedural due process rights that would ordinarily apply to permanent residents to him despite his four months of absence. In distinguishing *Mezei* from *Chew*, the Court said that unlike Mezei, Chew served on a U.S. vessel for four months while he was away, and that he had security clearance. Mezei, however, stayed outside of the U.S. "behind the Iron Curtain for 19 months," which "assimilated" him into the arriving alien category.

These two cases suggest that any entitlement to constitutional due process accrued as a result of long term lawful residence may be lost because of absence for a certain period of time, the length and nature of which depends on the circumstances. While four months was not sufficient to sever Chew's relations with the U.S. as he worked on a U.S. registered vessel during his absence, Mezei's nineteen months of absence "behind the Iron Curtain" was sufficient to completely sever the relationship and totally alienate him.

The Court faced the same issue again some three decades later in *Landon v. Plasencia*. Plasencia, a long-time permanent resident who was married to a U.S. citizen and had U.S. citizen children, briefly traveled to Mexico and was stopped at the border while attempting to smuggle undocumented persons. Despite her lawful residence and several connections, the immigration service placed her in exclusion proceedings designed for newcomers rather than deportation proceedings designed for the removal of persons already in the U.S. Because the exclusion proceedings granted fewer due process rights than the deportation proceedings, she challenged the legality of the process by habeas corpus. The Court held that she could be considered as an arriving alien and be subjected to the inferior exclusion proceedings, but those proceedings themselves have to be fair. The Court remanded the case to the lower court for the determination of whether she had

---

203. See id. at 210-11. Although perhaps the most important due process issue in this case was the possibility of Mezei's indefinite detention, as no country was willing to take him, this case is also important on the issue of procedural due process as the Court considered him a new arrival despite his prior long term residence.
205. See id. at 601.
206. See id. at 596, 599-601.
207. See Mezei, 345 U.S. at 214-15.
208. See id. at 214.
210. See id. at 23-24.
211. See id.
212. The Court agreed that exclusion proceedings provide inferior due process rights because of several reasons, among them, the right to be informed of the charges in a timely manner, representation, right to direct appeal, except a challenge by habeas corpus, etc. See id. at 35-36.
213. See id. at 36-37.
received due process that passes the *Mathews v. Eldridge* balancing test.\(^{214}\)

In arriving at its conclusion, the Court had to address two of its own decisions that appeared to conflict with this decision. The first was the *Chew* decision in which the Court said a four-month absence did not sever the alien's relationship with the U.S. because he had worked on a U.S. registered vessel during his absence. In the application of the principles in *Chew*, the Court said that the case was never about the exact forum, but it was about the nature of the due process.\(^{215}\) As a result, the Court limited its *Chew* decision to the proposition that whatever the process might be, it needs to pass the *Mathews* test. The second challenge to the Court's line of reasoning came from the Court's decision in *Rosenberg v. Fleuti*,\(^{216}\) where it held that an "innocent, casual and brief excursion" is insufficient to sever the ties and subject the alien to rules of entry.\(^{217}\) In response to this challenge, the Court said that the issue of whether Plasencia was effecting an "entry" within the meaning of *Fleuti* may be determined in exclusion proceedings as long as those proceedings themselves are considered sufficient.\(^{218}\) Although the Court repeatedly recognized that exclusion proceedings are inferior,\(^{219}\) it reverted back to the Chinese Exclusion rationale that due process is whatever Congress says it is, even when the alien has been a permanent resident.\(^{220}\) This conclusion is effectively a significant retreat from *Chew* and an endorsement of *Mezei*.\(^{221}\)

The cases discussed above demonstrate that, although the Supreme Court professes to adhere to the principle of an ascending scale of rights, a concept as old as the Chinese Exclusion era, in reality it has gone back and forth, completely disordering the spectrum. There is no better example of the disorder than the above discussed four cases: *Knauff*, *Chew*, *Mezei*, and *Plasencia*. If the Court had strictly adhered to the ascending scale of connections theory it espoused since at least 1903,\(^{222}\) none of the four cases would have come out the way they did. An ascending scale or spectrum analysis would have allowed all of the petitioners the better due process rights that apply in deportation proceedings. In denying due process rights to Knauff, the Court concluded that her marriage to a U.S. citizen and her work for the U.S. military in Germany were immaterial. Although *Eisenhower* would have supported this decision, it is doubtful if *Boumediene* would do the same. Mezei's twenty-five years of permanent residence were completely overshadowed by his

\(^{214}\) *See id.* at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Mathews' three part balancing test basically looks at the importance of the interest of the applicant and the interest of the government in dispensing with the procedures.).

\(^{215}\) *See id.* at 33-34.


\(^{217}\) *See Plasencia*, 459 U.S. at 28-29 (citing *Fleuti*, 459 U.S. at 462).

\(^{218}\) *See id.* at 31-32.

\(^{219}\) *See id.*

\(^{220}\) *Id.* at 34-35. ("The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. Our previous discussion has shown that Congress did not intend to require the use of deportation procedures in cases such as this one. Thus, it would be improper simply to impose deportation procedures here because the reviewing court may find them preferable. Instead, the courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the re-entry of a permanent resident alien.").

\(^{221}\) Although the Court expressly said *Mezei* did not apply in this case. *See id.* at 34.

\(^{222}\) *See, e.g.*, *Yamataya v. Fisher*, 189 U.S. 86, 106 (1903).
nineteen months of absence. Chew, however, maintained his relationship with the U.S. despite the fact that his residence in the U.S. and other connections were less than half that of Mezei. Plasencia’s situation is anomalous. Despite her strong relationship to the U.S., including family ties and a long-term lawful residence, the Court was not willing to grant her the better of two alternative removal procedures. In doing so, the Court reaffirmed the old ruling that the judiciary must not second-guess the actions of Congress in the area of admission and exclusion of aliens. By injecting some irregular cases such as Chew, however, the Court made the disorder worse.

In 1996, Congress codified this disordered spectrum by abandoning the concept of entry and replacing it with a more elusive concept of “admission.” It defined “admission” as “the lawful entry of [an] alien into the United States after inspection and authorization.” According to this definition, even if an alien has lived in the U.S. for thirty years or more following an un-inspected entry, he would remain an un-admitted alien with almost no substantive rights, but some procedural due process rights. As will be discussed in some detail in section c below, despite the long-standing jurisprudential “truth” to the contrary, the newly adopted notion of “admission” worsened the already existing disorder in the alienage spectrum by disqualifying “un-admitted” long-term residents from a number of immigration and other forms of benefits.

Congress also discussed the concept of severance of ties, once linked to entry, to its definition of admission. Congress made elaborate and specific rules that seem to codify the disorder in the case law discussed above. In particular, it provided that a lawful permanent resident might be deemed to be seeking admission just like a newly arriving alien if the alien:

(i) has abandoned or relinquished that status,
(ii) has been absent from the United States for a continuous period in excess of 180 days,
(iii) has engaged in illegal activity after having departed the United States,
(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,
(v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or
(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

223. See INA sec. 101(a)(13) as amended by sec. 301 of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Pub. L. No. 104-208, 110 Stat. 3009 (1996) (consolidating what used to be known as exclusion and deportation proceedings into a solitary “removal” proceeding. It did not, however, change the fundamental distinction between exclusion and deportation.); see id. at sec. 306.


225. Id.
Any one of these acts or omissions would eliminate social and juridical connections that the alien might have developed, and render him a newcomer subjecting him to the inferior form of due process that newly arriving aliens receive. The IRA’s introduction of this elaborate list of acts and omissions that purportedly sever existing ties and thus remove the alien from the realm of due process protection, adds to the disorder in the alienage spectrum by undermining the notion of an ascending scales of rights derived from rootedness in the community.

c. Undocumented Aliens

By far the single most important category that disorders the whole notion of the alienage spectrum or the notion of the ascending scale of rights is the undocumented-aliens category. Under existing law, long-term residents who have entered without inspection derive no better rights as a result of their connections than all of the above-discussed categories. In fact, in most instances, they have fewer rights because of their unauthorized entry or stay. For example, while an alien who marries a U.S. citizen may lawfully enter and naturalize within three years and claim the full range of constitutional rights and privileges due to citizens, a thirty-seven year old woman, whose parents brought her to the U.S. at age one and lived in the U.S. ever since, will have no hope of claiming legal status and the full protection of the Constitution. She will either remain an alien forever in the shadows or face deportation at any time. She is also excluded from claiming almost all forms of relief from deportation. For example, if she had married a U.S. citizen at age twenty-eight and was blessed with three healthy U.S. citizen children, she would still face deportation as she would not be able to adjust her status because of her unlawful entry three dozen years before. Her thirty-seven years of residence would give her no ascending rights whatsoever. Had the spectrum not been disordered, she would have had better substantive and procedural rights than the woman who became a U.S. citizen within three years of her coming to America. Moreover, in the event of a deportation proceeding against her, she would not be able to claim cancellation of removal. Having a U.S. citizen husband and three healthy children would not demonstrate, “exceptional and extremely unusual hardship,” as required by the existing rules. This disorder in the spectrum, which gives a three year resident full rights and privileges and denies the most basic of rights to a thirty-seven year resident who has a U.S. citizen husband and children, is a result of Congress’s introduction of the concept of admission in 1996, which exasperated the disorder in the spectrum.

This problem is not limited to substantive ineligibility to immigration

---

226. See INA sec. 319 (a).
227. Age thirty-seven is chosen because as of the writing of this article a thirty-eight year old unauthorized entrant may be able to claim lawful status under registry, which currently applies to persons who entered the U.S. prior to January 1, 1972. See INA sec. 249. This example also assumes that she failed to take advantage of the 1986 legalization program, which is not unlikely. See id.
228. See INA 245(a) (requiring inspection and admission for adjustment of status). A temporary provision that would have allowed adjustment despite unauthorized entry has long expired and never got renewed. See INA 245(1). Thirty-seven years of age is chosen because if she had entered before January 1, 1972, she would have been able to adjust her status under INA 249, a legalization provision known as registry.
229. See INA sec. 240A(b)(1).
230. See INA sec. 245(a).
benefits. The illegality of the presence opens the door to uncertainties of rights and privileges for undocumented migrants in other areas. For example, there is serious uncertainty about the applicability of the Fourth Amendment vis-à-vis undocumented migrants. This uncertainty emanates from the Supreme Court’s plurality opinion in *U.S. v. Verdugo-Urquidez*, which suggested that an alien would need “substantial and voluntary” connections with the U.S. to be considered a member of the community or be a part of the “people,” to whom the Fourth Amendment applies.

By so doing, the Court reduced the Fourth Amendment from a prudential rule of control against government abuse, to a right that the Constitution would grant to a privileged category of persons called “the people.” Because the Court never articulated the nature and extent of the needed connections, persons illegally present remain at all times vulnerable. For example, in *U.S. v. Ezparza-Mendoza*, a U.S. District Court held that the Fourth Amendment does not protect a Mexican national who lived in the U.S. illegally for two years because of his illegal presence as well as some illegal conduct.

In the context of immigration proceedings, however, the issue of the applicability of the Fourth Amendment is a settled matter. The Supreme Court made a categorical determination in *I.N.S. v. Lopez-Mendoza*. In particular, the Court ruled that evidence obtained in violation of the Fourth Amendment may be used in removal proceedings.

The respondents in *Lopez-Mendoza* challenged the admissibility of evidence in their removal proceedings on grounds that the evidence was obtained in violation of the plaintiff’s Fourth Amendment rights. The controversy arose out of two separate incidents of illegal searches and seizures, which led to the respondents’ admission of illegal presence. Per Justice O’Connor, the Court held that the exclusionary rule does not apply in immigration proceedings for several reasons, including that immigration proceedings are civil proceedings as opposed to criminal proceedings, and most importantly, that “the ‘body’ or identity of a defendant or

---

232. See id. at 265.
234. For a thorough discussion of the implications of this case, see Romero, supra note 141 at 69-91. For a discussion on the implications of illegal presence on the applicability of the Fourth Amendment, see generally, Michael A. Scaperlanda, The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive United States v. Verdugo-Urquidez, 56 Mo. L. Rev. 213 (1991) (arguing that the Fourth Amendment must apply regardless of the immigration status of the aggrieved person).
236. See id. at 1051-52.
237. See id. at 1036-37.
238. See id.
239. See id. at 1038 (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. The deportation hearing looks prospectively to the respondent’s right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent’s right to remain.”) To support this conclusion, the Court noted that Courts of Appeals have held that evidence obtained without Miranda warnings is admissible in deportation proceedings. See id. (citing Navia-Duran v. I.N.S., 568 F.2d 803, 808 (CA1 1977); Avila-Gallegos v. I.N.S., 525 F.2d 666, 667 (CA2 1975); Chavez-Ray v. I.N.S., 519 F.2d 397, 399-401 (CA7 1975); Abel v. United States, 362 U.S. 217, 236-37 (1960)). Suggesting that ex post facto laws do not apply in deportation proceedings (citing Galvan v. Press, 347 U. S. 522, 531 (1954)). Noting the admissibility of involuntary confession in deportation proceedings (citing United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 157 (1923)).
respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. It is moderately surprising that Justice O’Connor would suggest that the identity of a person is the body rather than some government documentation attesting to his legal status, and that attempting to suppress the “body” would be futile as Lopez-Mendoza probably looks and talks like a Mexican immigrant.

Finally, although some undocumented immigrants may have the “substantial and voluntary connections” required under Verdugo-Urquidez because of their long-term residence, they nevertheless have fewer rights than newly arriving documented aliens. This completely undermines the whole notion of the ascending scale of rights doctrine and further disorders the alienage spectrum. In the case of the long-term resident discussed above, despite her thirty-seven years of residence, a U.S. citizen husband and three U.S. citizen children would arguably give her the required level of substantial and voluntary connections for her to be considered a part of the “people,” she would have fewer rights than almost all other categories of aliens.

d. Admitted Aliens

Aliens admitted into the country with lawful credentials could be classified into several categories. For purposes of highlighting the spectrum issues, they are discussed in four different subcategories below.

i. Non-immigrants

Persons admitted under the non-immigrant category are supposed to be in the U.S. for specific purposes, and must return upon the accomplishment of that purpose. Presumably, they are entitled to the benefits the law attaches to the respective non-immigrant category. The whole notion of the ascending scale of rights does not have direct applicability with respect to this category. In fact, almost invariably their rights diminish with time as most categories expire and become non-renewable.

240. See Lopez-Mendoza, 468 U.S. at 1039-40 (citing among other cases the 1924 case of United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 157 (1923)). In addition to these two factors, the Court also noted the administrative hurdles that the exclusionary rule would impose as well as the minimal deterrent value it may have. It finally made an exception for an egregious violation of the Fourth Amendment. See Lopez-Mendoza, 468 U.S. at 1043-1052. Some Courts of Appeals have adopted an expanded view of the egregious violation exception in excluding illegally obtained evidence in removal proceedings. See, e.g., Gonzalez-Rivera v. I.N.S., 22 F. 3d 1441 (9th Cir. 1994).

241. In fact, the only category that she is better off in terms of procedural due process is the arriving alien category, which will be subject to the expedited removal procedure under INA sec. 235. She will get the regular INA sec. 240 removal procedure because of her thirty-seven years of presence. Even then, her rights are not better than the rights that a person who had arrived fifteen days prior to his apprehension, as the expedited procedures are limited to persons who get apprehended with fourteen days of their arrival within one-hundred miles of the border. See INA sec. 235 (b)(1)(A)(ii)(I)-(II) (providing a two year limit); but see 69 Fed. Reg. 48877 (Aug. 11, 2004) (limiting it to fourteen days).

242. See INA sec. 101(a)(15) (enumerating all of the non-immigrant categories and specifying the terms of admission.)

243. See, e.g., INA Sec. 101(a)(15)(H)(1)(b) (explaining that temporary visa for work are renewable only once); see also 101(a)(15)(F) (noting temporary visa for study, the validity of which is limited to the duration of the study).
A more interesting aspect of the position of non-immigrants on the alienage spectrum is the fact that extended stays beyond the authorized period, despite the voluntary and substantial relations that it might give them, would not only make them deportable but also inadmissible for periods ranging from three years to ten years.244 Ironically, the longer they stay, the fewer rights they accrue. As such, the entire non-immigrant category is a category that defies the whole notion of the ascending scale of rights, thereby completely disordering the spectrum.245

**ii. Immigrants**

Immigrants in this context are persons who come to the U.S. permanently.246 Immigrants come under either one of four different categories: family,247 business,248 refugee249 and diversity visa.250 If everything works well, there is no disorder in the spectrum within each category. While those who immigrate through marriage may naturalize within three years,251 all those who immigrate through the other three categories may naturalize within five years of their admission.252 This indicates that three or five years of stay would give them the required connections to become full members of the community and to be considered the “people.”

However, things do not go well for some immigrants, creating a serious challenge to the ascending scale of rights doctrine. Before an immigrant can naturalize, there is always the possibility of deportation. The most common grounds for deportation are extended absence from the U.S. and commission of crimes, which may include misdemeanors. As demonstrated in some detail below, the latter category disorders the spectrum more than the former. The discussion begins with

---

244. See INA sec. 212(a)(9)(B) (providing for grounds of inadmissibility on grounds of illegal entry and overstay). See also INA sec. 237(a)(1)(C) (providing that non-immigrant visa violators are deportable).

245. It must, however, be noted that courts have recognized some levels of rights of non-immigrants in non-immigration related contexts, in particular as it relates to their liberty and property interests. See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976). Although Mathews upheld a federal law that discriminated against lawful permanent residents with respect to eligibility for Medicare, citing Congress’s plenary power to regulate the conditions of aliens, it recognized some liberty and property rights of all aliens. See id. at 77-78 (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects everyone of these persons from deprivation of life, liberty, or property without due process of law ... [i]even those whose presence in this country is unlawful, involuntary, or transitory are entitled to that constitutional protection.” Id. at 78 (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); Wong Wing v. United States, 163 U.S. 228, 238 (1896)). It is also important to note that Congress has also, on occasion, made rules that apply to lawful permanent residents in the same way as they do to non-immigrants. See David A. Martin, Graduated Application of Constitutional Protection for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 96-97 (2001). Professor Martin ranks non-immigrants third on his six-class spectrum that includes citizens, lawful permanent residents, admitted non-immigrants, entrants without inspection, parolees, and applicants at the border. See id. at 92-93. This article has taken a broader view of the spectrum and its foundations, and also included several more categories.

246. See INA sec. 101(a)(15) (defining the immigrant category by exclusion).

247. See INA sec. 203(a).

248. See INA sec. 203(b).

249. See INA sec. 207 & 208.

250. See INA sec. 203(c).

251. See INA sec. 319(a).

252. See INA sec. 316.
the former. As indicated in subsection C (1) above, under the INA, a person admitted for permanent residence is deemed to be seeking inadmission if he has abandoned the status or if he has been absent for more than 180 days.\textsuperscript{253} That means a person who has lived as a permanent resident for decades, but left for her country of origin or any other country, and stayed there for 181 days, could be subjected to grounds of inadmissibility under INA 212(a), which are generally broader than grounds of deportability under INA 237(a).\textsuperscript{254} \textit{Rosenberg v. Fleuti} demonstrates the dramatic consequences of being subjected to grounds of inadmissibility rather than grounds of deportability.\textsuperscript{255} The Court in this case held that a return from a casual, brief, and innocent departure does not amount to entry.\textsuperscript{256} If Fleuti’s return was considered an entry, he would be subject to a rule that would render him inadmissible and result in deportation, whereas if he did not leave the country before he could naturalize, he would not face deportation.\textsuperscript{257}

Similar consequences could result under existing provisions of the INA. If, for example, a long term lawful permanent resident departs from the U.S. and comes back 181 days later, and admits to the inspecting officer “the essential elements of a crime of moral turpitude,” even if there was no conviction, he would be considered inadmissible and sent back.\textsuperscript{258} These crimes may range from shoplifting\textsuperscript{259} to possession of stolen bus transfers,\textsuperscript{260} from going into the subway without a ticket\textsuperscript{261} to burglary.\textsuperscript{262} Decades of residence and socio-economic ties cannot help him because the 181 days are considered to have severed his pre-existing connections.

The grounds for deportability under 237(a) are actually more ironic in their role in disordering the alienage spectrum because there is a strange time component built into them. The time notion enshrined in these provisions directly contradicts the notion of the ascending scale of rights or the substantial connections test. For example, the INA provides that “[a]ny alien who- (I) is convicted of a crime involving moral turpitude committed within five years… after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer maybe imposed[,] is deportable.”\textsuperscript{263} This particular ground of deportation and the time component preserve the ascending scale of rights by limiting the grounds for deportation to a crime committed before the alien could have established more than

\begin{footnotes}
\item[253] See INA sec. 101(a)(13)(C).
\item[254] Compare INA sec. 212(a) and INA sec. 237(a). The Court in this case held that a return from a casual, brief and innocent departure does not amount to entry. If Fleuti’s return was considered a reentry, he would have been subject to a rule that would have rendered him inadmissible resulting in his deportation even if it would not have resulted in his deportation had he not left the country before he could naturalize.
\item[256] Id. at 462.
\item[257] Id. at 450-53.
\item[258] Compare INA sec. 212(a)(2)(A)(i)(I) and INA sec. 237(a)(2)(B) (limiting it to convictions and also imposing a time limit). Note, however, that sec. 212(a) has an exception for a single petty offense. See INA sec. 212(a)(2)(A)(ii).
\item[260] See, e.g., Michel v. I.N.S., 206 F. 3d 253, 261 (2nd Cir. 2000).
\item[261] See, e.g., Santos-Gonzalez v. Reno, 93 F. Supp. 2d 286, 288 n. 3 (E.D. N Y. 2000).
\item[262] See, e.g., Cuevas-Gaspar v. Gonzales, 430 F. 3d 1013 (9th Cir. 2005).
\item[263] INA sec. 237(a)(2)(A)(i).
\end{footnotes}
five years worth of substantial connections, but also disorder it by failing to credit every additional year of connections accrued after the crime. To illustrate, a person who was admitted for permanent residency in 1970 and committed a crime of moral turpitude in 1975 may be considered deportable in 2009 for that same crime.264

Perhaps the main category of crimes that has absolutely no respect for long-term residence or any level of substantial connections is that of the aggravated felony.265 A creation of the immigration law, the term aggravated felony refers to a wide range of felonies as well as misdemeanors.266 If a long-term lawful resident commits an aggravated felony, including shoplifting, that earns a suspended sentence of one year,267 she will not only face deportation268 and be ineligible for all forms of relief from deportation,269 but she will also be barred from ever coming back.270 Her decades of lawful residence and any level of substantial relations would give her no better rights than those of a person who arrived the day before. This category of offenses completely disregards the ascending scale of rights. Furthermore, some of the crimes that are considered aggravated felonies under the INA may actually be misdemeanors under state law.271

All three branches of government do their own share of crafting immigration laws and policies. Together, about a century ago, they created this notion that some immigrants are more alien than others and repeated the same theme consistently throughout the last century. The laws they made intermittently failed to respect their own theory of the ascending scale of rights. As demonstrated in the above sections, some long-term residents do indeed have fewer rights than newcomers. In absolute terms, all long-term un-naturalized residents are vulnerable to deportation and permanent bar for crimes as trivial as shoplifting, despite several decades of residence. Not surprisingly, however, the courts use the substantial connections test to deny rights based on the lack of substantial connections rather than to use the presence of substantial connections to grant more rights; such usage began to change with Rasul v. Bush in 2004.272

Before providing a detailed summary and analysis of the Court's use of the substantial relations test over the last century and the subsequent changes with the Guantanamo cases, the impact of acquiring citizenship on the alienage spectrum must be addressed. The next section provides this information.

264. It is important to note, however, that he may be eligible for a one-time cancellation or removal relief. See INA sec. 240A(a).

265. See INA sec. 101(a)(43).

266. See id. (defining an aggravated felony).

267. See INA sec. 101(a)(43)(G) (defining an aggravated felony as including "a theft offense for which one year is given"). The suspension of the sentence does not make a difference. See INA (a)(48)(B).

268. See INA sec. 237(a)(2)(A)(ii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

269. See INA sec. 208(b)(2)(B)(i) (barring asylum for a person who committed an aggravated felony); INA sec. 240A(a)(1)&(b)(1)(C) (barring voluntary departure); INA sec. 240A (barring cancellation of removal); and also INA sec. 245(a) (barring adjustment of status wherever potentially applicable).

270. See INA sec. 212(a)(9)(A).

271. See, e.g. Matter of Small, 23 I. & N. Dec. 448 (B.I.A. 2002) (holding that a state misdemeanor offense may be considered an aggravated felony for the purposes of immigration law).

e. Citizens

Citizens are the “people” or the only category of persons entitled to all the protections of the Constitution. Citizens are also entitled to exclude all non-citizens. Just like the alienage spectrum, however, there is also a citizenship spectrum. Some citizens are more citizen than others. Rooted in sociological constructs, the citizenship spectrum often enjoys significant legal manifestations. This section discusses the legal manifestations of the spillover of the alienage spectrum into the citizenship spectrum.

As a matter of law, the citizenship spectrum has a constitutional basis. In fact, the text of the Constitution recognizes it to a certain extent. For example, a naturalized U.S. citizen does not qualify to occupy a seat in the House of Representatives before seven years have passed since she naturalized. Similarly, if she wants to occupy a seat in the United States Senate, she would need nine years of post-citizenship residence. These disabilities are temporary. Perhaps the most well known permanent disability is the total and unconditional exclusion of naturalized citizens from seeking the presidency. The Constitution preserves the presidency for a “natural born citizen.”

Aside from these constitutional provisions marking a clear distinction between some categories of citizens in relation to political office, revisions to the INA in 1990 shifted the power of naturalization from the courts to the Attorney General. This shift indicates that newly naturalized citizens might have their citizenship revoked through an administrative proceeding in the immigration court system, thus suggesting that newly naturalized citizens are not full members of the community. INA section 340(h) demonstrates this by stating that “[n]othing contained in this section be regarded as limiting, denying, or restricting the power of the Attorney General to correct, alter, modify, or vacate an order naturalizing the person.”

Based on this seeming grant of power, former Attorney General Janet Reno enacted implementing regulations. In those regulations she limited the exercise of such power to two years from the date of naturalization. In other words, the regulations assume that a naturalized citizen is barely American for at least two years since naturalization and allow an immigration judge to revoke.

273. Citizenship is a difficult concept. For a thorough discussion of the concept of citizenship and its various connotations, see Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership 17-36 (Princeton Univ. Press 2006) (concluding that although the concept is a subject of great controversy its meaning is “not entirely indeterminate. Status, rights, political participation, and identity represent the core of its analytical concerns.”).


275. See id.; see also Ping v. U.S., 130 U.S. 581, 606 (1889).

276. See U.S. CONST. art. I, § 2, cl. 2.

277. See U.S. CONST. art. I, § 3, cl. 3.

278. See U.S. CONST. art. II, § 1, cl. 5.

279. See INA sec. 301(a), 8 U.S.C. 1401(a) (2006); see also Immigration Act of 1990, §408(a)(1), Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978 (adding “The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.”); Another source of minor confusion has been a provision that allowed the Attorney General to cancel a certificate of naturalization, while expressly saying that cancellation of the certificate “shall affect the certificate not the citizenship status of the person.” See INA § 342, 8 U.S.C. 1453 (2006).


282. See id.
citizenship through removal proceedings. Ordinarily, citizenship may only be revoked after a judicial determination of the facts and the law. In fact, the INA itself provides that "[i]t shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause thereof, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit . . . ."

However, Attorney General Reno's attempt to maintain administrative jurisdiction over newly naturalized, barely American citizens was permanently enjoined by the Ninth Circuit Court of Appeals in 2000 in Gorbach v. Reno. In Gorbach, the court rejected all of Reno's statutory arguments, including the argument that the right to denaturalize is inherent in the right to naturalize, an argument that suggests that an alien would always remain an alien even if naturalized. To her credit, Reno limited that to two years by regulation. The language that the Ninth Circuit Court of Appeals (en banc) used in rejecting Reno's inherent power argument is quite interesting:

There is no general principle that what one can do, one can undo. It sounds good, just as the Beatles' lyrics "Nothing you can know that isn't known/ Nothing you can see that isn't shown/ Nowhere you can be that isn't where you're meant to be," sound good. But as Sportin' Life said, "It ain't necessarily so." Congress has confirmed the traditional inherent power of United States District Courts to vacate their own judgments. But there is no statutory confirmation of any inherent power the Immigration and Naturalization Service may have to vacate its judgments, except for its narrow authority to cancel certificates without affecting citizenship."

Although this injunction is still in effect, this whole controversy

284. Gorbach v. Reno, 219 F. 3d. 1087, 1099 (9th Cir. 2000).
285. Id. at 1098-99. ("Citizenship in the United States of America is among our most valuable rights. For many of us, it is all that protects our life, liberty, and property from arbitrary deprivation... An executive department cannot simply decide, without express statutory authorization, to create an internal executive procedure to deprive people of those rights without even going to court. For the Attorney General to gain the terrible power to take citizenship away without going to court, she needs Congress to say so. The district court correctly held that the new regulations for administrative denaturalization were promulgated without authority from Congress. Congress has provided one way to revoke the citizenship of a naturalized American citizen: that is for a United States Attorney to file a petition in a United States District Court. There is no statutory warrant for a second way, whereby the Immigration and Naturalization Service may have to vacate its judgments, except for its narrow authority to cancel certificates without affecting citizenship.").
286. Id. at 1095. In relation to this, the same court further noted that:

[If] the power of courts to vacate their own judgments needs confirmation by an express rule approved by Congress, it is too much to infer an analogous power in the Attorney General, for so weighty a matter as revocation of American citizenship, from silence. The formula the government urges, that what one can do, one can undo, is sometimes true, sometimes not. A person can give a gift, but cannot take it back. A minister, priest, or rabbi can marry people, but cannot grant divorces and annulments for civil purposes. A jury can acquit, but cannot revoke its acquittal and convict. Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could. Id.
demonstrates the underlying assumption about the relationship between duration of stay, the nature and extent of ties, allegiance, and even racial or ethnic identity. There is no doubt that social perceptions influence policy and consequently find expression in rules and regulations. Reno’s denationalization policy is one such example. Unfortunately, however, other policies have not been as transparent as Reno’s two years of transition period to full citizenship. For centuries the perpetual alienage cloud has affected many communities regardless of how many generations of ties they have. Although the perception that some Americans are more American than others is as old as the nation itself, wartime exigencies have always reinforced the notion that citizenship is more than the possession of a naturalization or birth certificate.

A good starting point to demonstrate how citizens were treated like aliens because of their ethnicity or national origin may begin with the internment and deportation of persons of German origin during World War I. Historical records suggest that due to the insecurity created by World War I, the United States banished or interned an estimated twelve to sixty-three hundred persons of German ancestry under suspicion of disloyalty. Similar acts of internment and deportation were repeated against persons of German ancestry during World War II. During the same period, a more compressive act of alienation was committed against persons of Japanese ancestry, citizens and non-citizens alike. It took the form of widespread and systematic internment and maltreatment. United States citizens of Japanese ancestry who resisted the internment measure challenged the constitutionality of the military and legislative actions that made the internment of hundreds of thousands of innocent people possible. The seminal case that condoned the constitutionality of this race-based measure is none other than the infamous Korematsu v. United States.

Fred Korematsu, a natural born United States citizen who is identified in court records mainly by his middle name Toyosaburo instead of Fred, was convicted of the violation of a civilian exclusion order that prohibited persons of Japanese ancestry from certain areas. The measure was not limited to exclusion from some sensitive militarily areas. By that time a decision had already been made to intern persons of Japanese ancestry. The dissent in Korematsu argued that the imprisonment of a United States citizen in an internment camp “solely because of his

288. See Karen E. Ebel, WWII Violations of German Americans’ Civil Liberties by the U.S. Government, (2003) available at http://www.foitimes.com/internment/gasummary.htm (reporting that about 11,000 persons of German ancestry were interned).
291. The source of this observation is Professor Margaret Chon of the Seattle University School of Law. She noticed the usage of the name and included it in her keynote address during the inauguration of the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law, April 18, 2009.
292. Military Exclusion Order No. 34 of the Commanding General of the Western Command of the U.S. Army directed that all persons of Japanese ancestry should be excluded from certain areas. Korematsu, 323 U.S. at 216.
293. Id. at 221.
ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States" violated his constitutional rights. The Supreme Court rejected this argument on the grounds that the measure was based on national security and wartime exigencies not racial prejudice or animus. Interestingly, although this was a race-based classification subject to strict scrutiny, the Court deferred to the decision of the military authorities in a language reminiscent of the Chinese Exclusion decision of 1889. It reads:

He [Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. The justification for this rule, just like the Chinese Exclusion case, seems to be predicated on the perpetual “alienage” status of a certain segment of the society, supporting the suggestion that in reality the alienage spectrum does not end where it should. In his dissenting opinion, Justice Murphy said, “such exclusion goes over the very brink of constitutional power” and falls into the ugly abyss of racism. Korematsu challenges the genuineness and legitimacy of the military official’s assessment of risk and loyalty and attributes the measures to racial animus. To support his allegation he cites to the Commanding General’s Final Report in which he labeled all persons of “Japanese descent as ‘subversive,’ as belonging to ‘an enemy race’ whose ‘racial strains are undiluted,’ and as constituting ‘over 112,000 potential enemies at large today.’” Additionally, Justice Murphy also noted that when testifying before the House Naval Affairs Committee the same General said that “[i]t makes no difference whether he [the person with Japanese ancestry] is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. But we must worry about the Japanese all the time until he is wiped off the map.” Commenting on these issues Professor Robert Chang explained: “World War II taught us the tragic lesson that even citizenship was not enough. The Nisei second generation Japanese Americans and United States citizens by birth were denied their place in the national community.”

A related issue arose more than half a century later in the context of the

294. Id. at 223.
295. Id.
296. Id. at 219-220 (recognizing that “[c]ompulsory exclusion of large groups of citizens from their homes would be inconsistent with the Constitution unless “in times of direct emergency”).
297. Id. at 223.
298. Id.
299. Id. at 236.
300. Id. at 236, n. 12.
301. ROBERT S. CHANG, A MEDIATION ON BORDERS, IN IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, 244, 247 (Juan F. Perea ed., 1997).
“war on terror.” Although in Rumsfeld v. Padilla the Supreme Court had the opportunity to determine the extent of the President’s power relating to the military detention of U.S. citizens suspected of being “enemy combatants,” the Court refused to address the issue and focused instead on jurisdictional issues. Padilla, a U.S. citizen, was detained at O’Hare International Airport in Chicago on his way back from Pakistan on allegations of being an enemy combatant. The President claimed constitutional and statutory power to militarily detain him. If the Court had chosen to address the merits of the case, perhaps one of the most appropriate precedents would have been Korematsu, but it chose not to rely on that precedent.

Despite the Supreme Court’s unwillingness to resurrect Korematsu on the basis of the “war on terror” following 9/11, Korematsu-type administrative measures have targeted certain segments of society based on their perceived “alienage status.” The use of ethnicity, religion, and country of origin as proxies for determining the loyalty and perhaps the position of the individuals or the groups on the alienage and citizenship spectra is not a new phenomenon. Commenting on the administrative measures that the federal government took against persons of Middle Eastern origin following 9/11, Professor Susan Akram and Dean Kevin Johnson said that these measures “reinforce deeply-held negative stereotypes – foreignness and possibly disloyalty – about Arabs and Muslims.” In accord, Professor Victor Romero also notes that “stereotypes of foreignness seem to follow racial patterns: Latinas and Asians are perpetually foreign; European and African Americans are not.” Professor Robert Chang neatly summarizes the phenomenon in these terms: “We are left with people who live in transit, between their imaginary homeland and mythic America.” Unfortunately, these stereotypes are not purely sociological phenomena; they have constantly underpinned legislative and administrative actions as well as judicial opinions and policies that contribute to the existing disorder in the alienage spectrum. The following part will provide a more detailed discussion of the sources of the disorder.

III. THE SOURCES OF THE DISORDER

Complex combinations of historical, political, social, and cultural circumstances have in one way or another contributed to the existing disorder in the alienage spectrum discussed in Part II above. However, the scope of this section is limited to the factors that most immediately influenced the jurisprudence that led to the disorder. Like many things in life, decisions affecting aliens are products of a tug-of-war between well-intentioned and not so well intentioned actors. Oppressive

303. Id.
304. Id. at 430-431.
305. Id.
306. ROMERO at 29 (quoting Susan Akram & Kevin R. Johnson, Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Muslims and Arabs, 58 NYU Annual Survey of American Law 295, 331 (2002)).
307. See ROMERO, supra note 141, at 29.
308. CHANG, supra note 301, at 251.
309. For a comprehensive treatment of the social hierarchy and conceptions of foreignness as underpinnings of immigration law and policy over the ages, see KEVIN JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS (2003).
laws are often made when people in positions of power are inclined to restrict others’ rights prevail and vice versa. These historical incidents often select the winning side, causing a back and forth movement, which in turn makes a disordered jurisprudence possible. This has been noted in almost all judicial and political decisions affecting the rights of aliens throughout history. Alienage as a distinct and inferior legal status often serves as an excuse for the enactment and implementation of discriminatory laws. As a maturing society’s tolerance for discrimination diminishes in all other areas, using alienage as a justification for discriminatory measures inevitably faces serious resistance from a number of directions. An attempt to remedy the glaring inconsistency between the alienage jurisprudence predicated on the principle of unequal rights with the maturing due process jurisprudence in all other areas unavoidably leads to an inconsistent and disordered jurisprudence. This section critically examines the most important and most immediately relevant legislative and judicial decisions of the last century and a half in an attempt to highlight the source of the disorder and set the stage for the observations in Part IV. This section is organized chronologically by different jurisprudential eras.

a. The Ping Era

The Ping era saw a litany of unfortunate Supreme Court decisions that have had an enduring jurisprudential impact. A close examination of Ping suggests that it is in fact a continuation of the Dred Scott v. Sanford era. The operative language of the two decisions is strikingly similar. In denying freedom to a runaway slave in Dred Scott the Supreme Court gave the following opinion:

The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might

310. By using the term “era” the author refers to a period of time within a reasonable range before and after a landmark legislation or Supreme Court decision. Some of these eras may not be well recognized in the way the author uses them and merely represent the author’s own assessment.
choose to grant them. It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.\textsuperscript{313}

Once Dred Scott unequivocally confirmed that freed slaves were not U.S. citizens, politicians, including President Lincoln, seriously considered the idea of deporting former slaves to Africa or elsewhere in South and Central America.\textsuperscript{314} Professor Daniel Kanstroom suggests that Lincoln had early on linked emancipation with removal and quotes Lincoln’s 1854 speech, “I should not know what to do . . . . My first impulse would be to free all the slaves and send them to Liberia, to their own native land.”\textsuperscript{315} He supported that idea because he noted that “there [was] a natural disgust in the minds of nearly all white people with the idea of indiscriminate amalgamation of the white and black races,\textsuperscript{316} and that the only way to make sure that such amalgamation did not happen was to deport the black race.\textsuperscript{317} Although the deportation plan gained enormous support, including appropriation of significant amounts of money by Congress, by 1864 it became clear that it was not a workable plan.\textsuperscript{318} Ironically, the implementation of the plan to remove millions of persons of African descent required immigrant labor and, as Professor Kanstroom puts it, “as thousands of laborers arrived from China, the conceptual matrices of the Fugitive Slave Laws\textsuperscript{319} and colonization plans\textsuperscript{320} awaited them.\textsuperscript{321} The clearest expression of this is found in Ping.

In Ping, the Supreme Court affirmed the arbitrary exclusion of persons of Chinese origin on the basis of their race. In doing so, it crafted the “Dred Scott-type,”\textsuperscript{322} and enduring plenary power doctrine in the following terms:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a

\textsuperscript{313} Id. at 404-05 (emphasis added).
\textsuperscript{314} See DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 86 (2007). This plan was not new in 1854; it was entertained as early as 1714 in different forms. See id. at 84.
\textsuperscript{315} THE COLLECTED WORKS OF ABRAHAM LINCOLN 2, 255-56 (Roy P. Basler, ed., 1953) (cited in KANSTROOM supra note 314, at 86.).
\textsuperscript{316} Id. at 405, 408-09.
\textsuperscript{317} See KANSTROOM, supra note 314, at 86.
\textsuperscript{318} See id. at 86-90.
\textsuperscript{319} Professor Kanstroom notes that the Fugitive Slave Laws were products of compromise when making the Constitution. See id. Kanstroom describes the 1850 Fugitive Slave Act as “a federal law that forced movement of people on the basis of their legal status and their race.” Id. at 77. He then analogizes the lack of due process rights held by the targets of the Fugitive Slave Act with people in deportation proceedings. See id. at 81-82.
\textsuperscript{320} Colonization refers to the resettlement of former slaves in new lands creating black colonies. Id. at 83-90.
\textsuperscript{321} Id. at 90.
\textsuperscript{322} This expression is borrowed from Professor Richard Delgado’s usage in his piece “Citizenship.” See RICHARD DELGADO, CITIZENSHIP, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 322 (Juan F. Perea ed., 1997).
different race in this country, who will not assimilate with us, to be
dangerous to its peace and security, their exclusion is not to be
stayed because at the time there are no actual hostilities with the
nation of which the foreigners are subjects. The existence of war
would render the necessity of the proceeding only more obvious
and pressing. The same necessity, in a less pressing degree, may
arise when war does not exist, and the same authority which
adjudges the necessity in one case must also determine it in the
other. In both cases its determination is conclusive upon the
judiciary.323

The adoption of the Fourteenth Amendment necessitated a repackaging of Dred Scott
into Plessy v. Ferguson324 until Brown v. Board of Education subsequently overruled
it.325 No similar measures ameliorated the vestiges of Ping in the jurisprudence of
alienage. In fact, Professor Richard Delgado even sees the “overtones of Dred Scott
reasoning” in “the argument, structure, and rhetoric” of some of today’s approaches,
particularly the movement to limit the Fourteenth Amendment’s grant of birthright
citizenship to all born in the United States.326

The consistent use of the Dred Scott-type reasoning would not have resulted
in the kind of alienage spectrum disorder that we see now. For every Dred Scott
reasoning, there has almost always been a powerful, but often losing Brown-type
reasoning. On the few occasions that the Brown-type prevailed, it made the full-
scale implementation of Ping difficult. This is illustrated in the Ping era’s Yick Wo
v. Hopkins.327 In Yick Wo, a facially neutral city ordinance regulating the operation
of laundries granted arbitrary power to city officials to grant variance.328 The
exercise of this arbitrary power resulted in an undisputed discriminatory impact
affecting only Chinese operators.329 In holding that the implementation of the
ordinance violated the Fourteenth Amendment, the Court observed that:

Though the law itself be fair on its face and impartial in
appearance, yet, if it is applied and administered by public
authority with an evil eye and an unequal hand, so as practically
to make unjust and illegal discriminations between persons in similar
circumstances, material to their rights, the denial of equal justice is
still within the prohibition of the Constitution.330

Having noted that while no Chinese immigrants out of two hundred applicants were
allowed the variance that would have enabled them to operate their laundries, eighty
non-Chinese were allowed to do so, the Court concluded that:

The fact of this discrimination is admitted. No reason for it is

323. Ping, 130 U.S. at 606.
324. Plessy v. Ferguson, 163 U.S. 537 (1896) (affirming the “separate but equal” principle).
326. DELGADO at 322; see generally Kevin Johnson, Race, The Immigration Laws, and
(linking the function of race in the immigration context to domestic race relations).
328. See id. at 374.
329. Id.
330. Id. at 373-74.
shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. 331

The Yick Wo Court condemned the race neutral, yet discriminatory ordinance with strong language. Although Yick Wo and Ping dealt with different aspects of the regulation of aliens, the Court's general attitude reflected in these two decisions makes it almost impossible to believe that Ping was decided only three years after Yick Wo. Justice Field, who authored the Ping opinion, had actually joined Justice Matthews's opinion in Yick Wo. More notably, just four years after he authored the Ping opinion, Field dissented in Fong Yue Ting v. United States. 332 Ting extended the Ping principle to the deportation of aliens who had already entered, as opposed to those who were on the verge of entry. 333 Although Justice Field's positions in the two cases could be reconciled by applying a classic spectrum argument, it is almost impossible to reconcile the philosophical underpinnings of the two opinions. Aside from the clever legal arguments, Ping, just like Yick Wo and Ting, is principally a race-based exclusion. To add to the confusion, Justice Field actually joined the Court's opinion in Plessy, decided three years after Ting. At the most practical level, Justice Field's inconsistent positions in Ping and Plessy on the one hand, and Yick Wo and Ting on the other, are indicative of the discomfort that arises in enabling the deprivation of rights and privileges on the basis of race. His individual dilemma is exactly the same as the national dilemma that leads to inconsistent and even conflicting laws and policies, which in turn lead to disorder in

331. Id. at 374.
332. 149 U.S. 698 (1893).
333. See id. at 745. Compare Ting, 149 U.S. 698, 753-54 (1893) and Ping, 130 U.S. at 606. Note the difference between Justice Field's Ting dissent and his Ping opinion:

This object being constitutional, the only question for our consideration is the lawfulness of the procedure provided for its accomplishment, and this must be tested by the provisions of the Constitution and laws intended for the protection of all persons against encroachment upon their rights. Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property, which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent – and such consent will always be implied when not expressly withheld, and, in the case of the Chinese laborers before us, was, in terms, given by the treaty referred to – he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection. Arbitrary and despotic power can no more be exercised over them, with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law, or are less protected in any particular, than other person, in my judgment, to ignore the teachings of our history, the practice of our Government, and the language of our Constitution. Id. at 753-54.
the alienage jurisprudence.

b. The Quota Era

The Ping era was followed by a national origin quota system. There is no 
334 disagreement that the quota system was designed to be an instrument of racial and 
economic selection. The concept of limiting immigration by assigning specific quotas 
to various regions was first temporarily instituted in 1921.335 Aside from completely 
banning Japanese immigration, the Act limited immigration from Europe to 150,000 
while exempting the Western Hampshire from the quotas.336 The allocation of 
European visas was designed to disfavor migration from Eastern and Southern 
Europe.337 One year after the institution of the quota system, the Commission of 
Immigration reported that “virtually all immigrants now ‘looked’ exactly like 
Americans.”338 The quota system, made permanent in 1924, remained in effect until 
it was replaced by the existing race neutral system of preference in 1965.339

The quota era unequivocally affirmed the underlying Dred Scott - Ping 
notion of citizenship and American identity. Korematsu, decided in the quota era, 
confirms this more than the legislative action itself. As Justice Murphy wrote in his 
dissent, the forced internment of about 120,000 persons of Japanese descent, most of 
whom were natural born citizens, embodied “one of the most sweeping and complete 
deprivation of constitutional rights in the history of this nation.”340 The U.S. citizens 
in Korematsu were seen as enemy aliens, thus linking the alienage and citizenship 
spectra. As Professor David Cole, writing in the context of the “war on terror,” 
explains, “[t]he close interrelationship between anti-Asian racism and anti-immigrant 
sentiment made the transition from ‘enemy alien’ to ‘enemy race’ a disturbingly 
smooth one.”341 As will be discussed in the Guantanamo era section below, recent 
government actions attempted to reaffirm the Korematsu-type reasoning, but the 
Supreme Court rejected almost every effort. The Court gradually consolidated the 
substantial shift in the fundamental assumptions that underpinned the previous eras.

c. The Civil Rights Era

Despite the vigorous dissents and serious political opposition that supplied 
powerful ammunition for the changes that would come later, the Ping and Quota eras 
did not see a concrete shift in policy or philosophy. However, a notable change 
came in 1965, when Congress reversed the quota system and overhauled the entire

EVOLUTION OF OPEN SOCIETY, (1981), excerpted in THOMAS ALEXANDER ALEINIKOFF, DAVID MARTIN & 
335. Id. at 158.
336. Id. at 158-59.
337. See id. at 157-58. For example, the use of the 1890 census reduced Italian quotas from 
42,000 to about 4,000; the Polish quota from 31,000 to 6,000, and the Greek quota from 3,000 to 100. Id. 
at 158. In some corners it was believed that “post war immigration was composed of largely Jews, who 
were ‘filthy, un-American, and often dangerous in their habits[,]’” Id. at 157.
338. Id. at 159.
339. Id. at 162-63.
340. Korematsu, 323 U.S. at 234 (Murphy, J., dissenting).
immigration system. The bill that eventually became the 1965 law was introduced by President Kennedy, who wrote a book when he was a senator condemning the quota system, and was passed during the presidency of Lyndon Johnson; yet, the initiative dates back to the time of Truman, who in 1952 commissioned a group of experts to evaluate the immigration policies of the day. This commission issued its report at the beginning of 1953 and concluded that, among other things, the immigration laws violated “fundamental American traditions and ideals, display[ed] a lack of faith in America's future, damage[d] American prestige and position among other nations, [and] ignore[d] the lessons of the American way of life,” and recommended that it be “completely rewritten.”

This conflict between espoused American ideals and the implementation of almost outrageously discriminatory laws and policies contributed to the existing disorder. And yet, despite the age-old and enduring implementation of these discriminatory policies, certain segments of society do not consider them core American values. The Truman Commission’s expression is exemplary. By the time the Commission issued its report in 1953, the systematic policy of racial and ethnic exclusion was almost a century old. Yet, members of the Commission did not consider the laws that implemented those policies part of the American tradition. In their own words, those laws in fact “flout fundamental American traditions and ideals, [and] display a lack of faith in America.”

The aspirations often claimed as being traditions and ideals eventually gained expression in the laws. The 1965 immigration statute is one such example. It eventually claimed a position in the ranks of the civil rights era laws. As the spirit of the civil rights era was gradually replaced with unforeseen and unintended immigration patterns, policy makers started thinking of revisiting their civil rights era wisdom. Perhaps the most notable problem involved immigrants from the Western Hemisphere who had enjoyed unlimited access under the quota system. In fact, it is argued that the elimination of the quota system in 1965 gained enormous support in part because it purported to put a limit to the increasing number of Latin American immigrants who were benefiting from the Western Hemisphere exemption. There is much disagreement on the impact of the 1965 abolition of the quota system; however, it is clear that it complicated immigration from Central and South America. Although theoretically exempt from the quota system, it is clear that they had nevertheless been subject to several restrictions. Pre-existing restrictions coupled with the new quota system contributed to the remarkable increase in the undocumented population from the Americas, particularly from Mexico, and created

342. See ALENIKOFF ET AL., supra note 334, at 162.
343. The law is called the Hart-Celler Immigration Act of 1965, and has been amended several times since then.
344. See ALENIKOFF ET AL., supra note 334 at 162. See also generally, Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. Rev. 273 (1996) (detailing the racial diversity that followed the enactment of the 1965 Immigration Act.)
345. See ALENIKOFF ET AL., supra note 334 at 162.
346. See id.
347. See id. at 164.
348. See id. at 163.
a new set of issues while reinvigorating old debates.

d.  The New Immigrants Era

Most of the immigrants that came to the United States after the elimination of the old quota system in 1965 have been persons of color. These new immigrants reinvigorated the old debate about immigration. It challenged America’s aspirations, often called traditions and values, in many ways. The old tug-of-war between aspirations of equality, non-discrimination, tolerance, civility, and civil rights on the one hand, and bigotry, exclusion, and racism on the other, found a new battleground. The result was a back and forth movement and a disordered jurisprudence. This section explains this disorder in some detail.

One of the lesser-known aspects of the 1965 law is that it actually contained provisions for the admission of limited categories of refugees. The comprehensive Refugee Act of 1980 replaced the 1965 provisions. This Act brought the United States into compliance with the 1967 U.N. Protocol on the Status of Refugees, which it had previously ratified. Although this implementation was later criticized, the Act began the decade with a vigorous humanitarian tone.

The implementation of the new 1965 quota system imposed numerical limitations on all prospective immigrants, particularly those in the Western Hemisphere who were exempt from earlier quotas. It also introduced the enduring problem of a gradual accumulation of undocumented migrants. By 1986, millions of workers from all over the world lacked legal immigration status. That year, after a very difficult debate, Congress passed the Immigration Reform and Control Act (IRCA). IRCA was a compromise that provided legal status to undocumented migrants who could establish physical presence for about four years, and also contained provisions imposing civil as well as criminal penalties against employers who knowingly hire unauthorized persons. The compromise that gave IRCA its

350. See Kevin R. Johnson, The New Nativism: Something Old, Something New, Something Borrowed, Something Blue, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 169 (Juan F. Perea ed., 1997) (relying on NARRY EDMONDSON AND JEFFREY S. PASSEL, EDS, IMMIGRATION AND ETHNICITY: THE INTEGRATION OF AMERICA’S NEWEST ARRIVALS (1994)). For example, the number of immigrants from Asia between 1951 and 1965 was 154,000. Between 1981-90, that number rose to about 2.7 million. Similarly the number of Mexicans who immigrated lawfully between 1951 and 1965 was 300,000. From 1981-1990 that number rose to about 1.6 million, almost 1 million of who immigrated in the year 1990 alone. See Johnson (citing U.S. Department of Justice Statistics).

351. See KANSTROOM, (noting it allowed the admission of refugees from communist nations and the general area of the Middle East. It, however, subjected its implementation to administrative parole power.).


354. See, e.g., Davalene Cooper, Promised Land or Land of Broken Promises? Political Asylum in the United States, 76 Ky. L.J. 923 (1988) (suggesting that the admission process is influenced by ideological rather than humanitarian considerations).


356. See INA sec. 245A(a)(2)(A)&(B). Agricultural workers were exempt from the residence requirement as long as they proved the performance of seasonal agricultural work for 90 man-hours. See INA sec. 210(a)(1)(B).

357. See INA sec. 274A(a)-(h).
final shape is an excellent example of the age-old tug-of-war between the two camps, Ping and Yick Wo, discussed above. In an article written shortly after the passage of the Act, Professor Linda Bosniak explained the debate between the two sides as follows:

Supporters of increased restrictionist measures viewed opponents alternatively as dangerously naïve bleeding-heart liberals, as opportunistic exploiters of cheap labor and vulnerable labor, or as supporters of Third World revolution at home and abroad. Opponents accused supporters of xenophobic racism, of convenient scapegoating of a defenseless population for the society's economic and social ills, and paving the way for the rise of a 'big Brother' state.

Eventually, the opposing camps supported the bill because it contained some of the measures they wanted. For the restrictionists it contained employer sanctions and limited the scope of the amnesty to only those who could show four years of residence and for supporters of immigration, although unsatisfactory, it contained some amnesty and employment-based anti-discrimination provisions.

That same year, concerned about the supposed high rate of acquisition of lawful immigration status on the basis of fraudulent marriages, Congress enacted the Immigration Marriage Amendments Act. Although, ironically, the passage of the Act itself was predicated on fraudulent data supplied by the Immigration Service to Congress, this Act continues to complicate the adjudication of family-based petitions to this date.

The 1990s also saw significant immigration reforms. Just like the previous decades, the balance was clearly towards the restriction side. The decade began with

---

358. Although the two cases represented different aspects of the conditions of aliens (Ping - federal admission/exclusion law, but Yick Wo - state alienage law), the underlying philosophical backgrounds largely remain the same. Aside from occasional shift in opinion, as in Justice Field's change of position in Ping on the one hand and Ting and Yick Wo on the other, it is not difficult to discern a clear pattern of decisions as being for or against the immigrant.

359. Bosniak was then a law clerk for the Second Circuit Court of Appeals (1988).


361. See id.

362. See id. at 258-59. IRCA's anti-discrimination provision is contained in sec. 274B of the INA.


364. See STEPHEN H. LEGOMSKY, IMMIGRATION REFUGEE LAW AND POLICY 271 (4th ed. 2004). In his testimony to the Senate Subcommittee on Immigration, the then I.N.S. Commissioner, Alan Nelson, said that the former I.N.S. believed that as much as thirty percent of marriages were fraudulent. It was later discovered that the I.N.S. study was flawed in many respects. For on thing the study focused on suspicious cases by excluding marriages that contained certain indicia of reliability. Moreover, the thirty percent figure, reported as a fact, was based on the investigators' "suspicion" rather than a factual conclusion. See id. at 271-72.

365. The main operative provision that this Act added was the requirement of subjecting the residence permit acquired through marriage to a two year waiting period and some serious conditions subsequent. See INA sec. 216 (introducing an elaborate set of conditions for permanent residence).
the enactment of the Immigration Act of 1990, which was a relatively major overhaul of the immigration system.\textsuperscript{366} While on the one hand the Act’s “Diversity Visa” created a very useful and new avenue of eligibility for permanent residence for underrepresented countries;\textsuperscript{367} on the other hand, the Act significantly expanded the grounds for exclusion and deportation.\textsuperscript{368} In 1996 Congress further expanded the grounds for exclusion and deportation by passing two almost revolutionary acts: the Anti-terrorism and Effective Death Penalty Act (\textit{AEDPA})\textsuperscript{369} and the Illegal Immigration Reform and Immigrant Responsibility Act (\textit{IIRIRA}).\textsuperscript{370} The \textit{IIRIRA} introduced the concept of admission, which adopted a legal fiction separate from physical entry and presence. It defined admission or admitted to mean “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”\textsuperscript{371} This notion immensely complicated the alienage spectrum and led to a disordered jurisprudence because it did not allow an un-inspected entrant who had lived here for decades, regardless of his age during entry, to be considered as admitted. Moreover, he would be barred from almost all forms of relief from deportation. This law is even more severe because it prohibits adjustment of status even if an unauthorized entrant came at age one and subsequently married a United States citizen.\textsuperscript{372} By contrast, a diversity visa winner could acquire citizenship within five years. This undermines the notion of attachment to the community as a basis for the granting or recognition of rights.

In addition, the 1996 twin laws reformulated the entire exclusion and deportation system. For example, \textit{AEDPA} added more crimes to the list of deportable offenses, introduced an extremely expansive meaning of terrorism, enhanced law enforcement, and set up the so-called criminal alien identification system.\textsuperscript{373} \textit{IIRIRA}, besides introducing the concept of admission, also significantly expanded grounds for deportation by adding to the list aggravated felonies\textsuperscript{374} for which there is no relief from deportation.\textsuperscript{375}

\textsuperscript{367} See INA sec. 203(c) as enacted by sec. 131 of the Immigration Act of 1990. Dean Kevin Johnson says that this visa category is “ironically named” because it was principally designed to encourage European immigration because it purports to benefit those who are underrepresented in recent immigration patterns. See Johnson, supra note 344, at 174. Although Dean Johnson’s observations seem correct, it is undeniable that Africans have also been the primary beneficiaries of the diversity visa program. In fact, in recent decades, the diversity visa program was the main path for African immigration.
\textsuperscript{368} See, e.g., INA sec. 212(a)(6)(C) (making seeking the procurement of a visa through misrepresentation grounds for inadmissibility).
\textsuperscript{371} See INA sec. 101(a)(13) as amended by sec. 301 of IIRAIRA.
\textsuperscript{372} See INA sec. 245(a). INS sec. 245(i) had provided relief for these kinds of entrants but it was short lived and has never been renewed since it lapsed on April 30, 2001.
\textsuperscript{373} See AEDPA secs. 323, 435, 440.
\textsuperscript{374} See IIRIRA sec. 321 (amending INA sec. 101(a)(43)). The existing list could be interpreted to include shoplifting for which a suspended sentence of one year is given. See INA 101(a)(43)(G) ("a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.") added by sec. 321(a)(3) of IIRIRA. The suspension of the sentence does not make a difference. See INA sec. 101(a)(48)(B). The concept of aggravated felony as a deportable offense was introduced by the 1988 Anti-Drug Abuse Act. Pub. L. No. 100-690, 102 Stat. 4181 (1988). This Act limited the list of these offenses to most serious crimes such as murder, and trafficking in drugs and firearms. See id.
\textsuperscript{375} See, e.g., INA 245(a) (prohibiting adjustment of status), see also 240A (prohibiting
Another testament to the perception of the position of immigrants in the U.S. that prevailed in the 1990s is the inclusion of provisions that deprived welfare benefits to lawful residents in the comprehensive welfare reform law.376 Its deprivation went as far as to deny food stamps to lawful residents who resided in the U.S. for less than five years.377 In Mathews v. Diaz, decided in 1976, the Supreme Court upheld the constitutionality of this kind of deprivation.378 While Mathews recognized that the Fifth Amendment protected aliens from invidious discrimination, it upheld the federal government’s power to distinguish between lawful resident aliens and citizens on the basis of the length of their stay for purposes of public benefits.379 Mathews is a classic spectrum case.

Just like the statutory developments discussed at some length above, judicial decisions were also mixed. A few years after the Court in Mathews opened the door for clear discrimination on the basis of alienage by applying what looked like a rational basis test, the Court in Plyler v. Doe380 applied an intermediate scrutiny-like test to strike down a Texas law that prohibited children of undocumented migrants from attending public schools.381 Mathews and Plyler seem to mirror Ping and Yick Wo respectively.

e. The Guantamano Era

The jurisprudence relating to the rights and conditions of aliens has never been as complex as in the Guantanamo era. Professor David Cole begins his book, Enemy Aliens, with a powerful observation. He recalls what Ari Fleischer, President Bush’s Press Secretary, said when the first “American Taliban,” California resident John Walker Lindh, was captured by U.S. Forces in Afghanistan and transferred back to the U.S., “The great strength of America is he will now have his day in court.” Professor Cole notes that Lindh “was represented by one of the nation’s premier defense attorneys,” and that he faced a very favorable outcome because the main charge against him was dropped.382 He contrasts this case with the administration’s response in Hamdi and Padilla, where both plaintiffs were U.S. citizens, and warns that “[t]he transition from denying the rights of enemy aliens to infringing those of American citizens was unusually swift with Hamdi and Padilla . . . .” But history suggests that the transition is virtually inevitable, and that in the long term, the rights of all of us are in the balance when the government selectively sacrifices foreign nationals’ liberties.383

Legislative actions were also swift and some of them draconian. The most

---

377. See id.
379. See id. at 77-90. The Court had stricken down a similar state law a few years earlier applying strict scrutiny. See Graham v. Richardson, 403 U.S. 365 (1971). But see, Sugarman v. Dougall, 413 U.S. 643 (1073) (carving out a political participation exception).
381. See id. at 210.
382. See Cole, supra note 341, at 1.
383. Id. at 5.
notable and relevant ones are the Patriot Act of 2001 and the Real ID Act of 2005. These Acts made some revisions to the existing law relating mainly to terrorism and significantly expanded the Attorney General's authority to arrest, detain, and deport immigrants. The use of these laws, particularly the Patriot Act, resulted in the detention and deportation of thousands of Arabs and Muslims, virtually all of whom had nothing to do with terrorism.

Perhaps the most interesting role in the Guantanamo era was played not by the political branches but by the judicial branch. The Supreme Court took particular interest in the way the political branches responded to the terrorist attacks of 9/11. The Court's response was more active and perhaps unprecedented. It struck down almost every effort by the executive to undermine the rights of aliens in its custody. The most notable cases are discussed in section II above. However, to conclude this section, it is important to highlight the gist of the jurisprudence that emerged from these Guantanamo cases because they have the potential for fundamentally reshaping the constitutional jurisprudence pertaining to alienage.

This does not mean that the Post-9/11 alienage jurisprudence was entirely consistent and moved in one direction only. Just like the previous era, it had its own conflicts. The discussion may rightfully begin with the landmark case of Zadvydas v. Davis, which coincidentally was decided less than three months before 9/11. In Zadvydas, per Justice Stevens, the Court held that the plenary power is subject to "important constitutional limitations," and that indefinite detention is not permissible, at least as it is imposed on certain categories of aliens. Following this decision, scholars speculated as to what it meant for the plenary power doctrine.

Two years later the same issue arose again with a slight variation in Demare v. Kim. Per Justice Rehnquist, the Court held that a categorical preventive detention during immigration removal proceedings is constitutional even if the particular

---

386. For a discussion of the impact of these laws see Won Kidane, The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination, 41 U. MICH. J.L. REFORM 669, 676-77 (2007).
387. See Cole, supra note 341, at 188-89 (noting that only three of the 1,200 suspected terrorist and none of the 4,000 more immigrants detained warranted even a charge of terrorism).
389. Id. at 695.
390. See, e.g., T. Alexander Aleinikoff, Detaining the Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 386 (2002) (predicting that it probably won't have a significant impact on the plenary power doctrine) ("Zadvydas, then, is a conundrum. It is a doctrinal muddle, yet it kindles the possibility of a dramatic shift in constitutional norms in the immigration field. It purports to put an end to indefinite detention, yet it supplies grounds to the Executive Branch and Congress to mandate indefinite detention. It reaches out to produce a just result, yet it appears to embrace one of the Court's least just immigration decisions. The problem here is not so much the Court's opinion; it is the damage that the plenary power doctrine has done to immigration law for more than a century. Constitutional norms have not been able to evolve over time, reflecting and influencing developments in other areas of constitutional law. So we have awkward, surprising, interventions from time to time - decisions that bring even further incoherence to the field. Thus, in Zadvydas, we are given no satisfactory grounds for the continuing validity of Mezei or for the "terrorist exception." Both will supply doctrinal fodder for the newly adopted policies that restrict the rights and freedoms of non-citizens and citizens - and this from an opinion that strikes a hard blow for individual liberty!").
individual poses no flight or security risk. Of course, 9/11 punctuated these two decisions.

In the subsequent years, significant Guantanamo cases followed. None of them matched Kim in their treatment of aliens. Instead, they were all more closely aligned with Zadvydas. The first of the Guantanamo cases, Rasul, struck down the executive's effort to indefinitely detain aliens in Guantanamo Bay, Cuba. The Court held that the Constitution prohibited such indefinite detention of aliens without due process, noting that the right to habeas corpus extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty of the United States." Although Rasul demanded some due process for alien detainees, it did not clarify the exact nature of the due process that was owed to them. Subsequent cases articulated the exact nature of the acceptable due process. In Hamdan, the Court held that the executive's attempt to use a military commission with questionable procedural safeguards was inadequate. Neither Rasul nor Hamdan answered the more fundamental question of whether aliens detained by United States authorities outside of the United States have a constitutional right to habeas corpus. Boumediene v. Bush answered this question in the affirmative.

Boumediene is by far the most important of all the Guantanamo cases and is likely to have more far reaching consequences than any other Guantanamo case. First, it is fair to say that no case has ever undermined the plenary power doctrine, introduced by Ping, as has Boumediene. The Court's response to the plenary power argument was unequivocal and categorical. It said:

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on and off at will quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not the Court, say "what the law is."

What does the Court cite to? Marbury v. Madison? It is almost unbelievable to see Marbury v. Madison approvingly cited in a case involving the rights of aliens. Contrasting this language with the Ping operative language could be instructive. In Ping, the Court held:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war

---

392. The vote was largely on ideological lines with Justices Stevens, Ginsburg, Breyer, and Souter dissenting on the essential ruling. Id.
396. See Boumediene, 128 S. Ct. at 2259.
397. Marbury, 1 Cranch 137, 177, 2 L. Ed. 60 (1803) (cited in id).
would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.398

It is difficult to believe that these two passages, from the same Court, could co-exist.

Second, yet another way that Boumediene undermined Ping was by reducing the Eisentrager alienage factors into a “functional test,” as Justice Scalia rightfully suggests.399 This “functional test” looks very much like the Mathews v. Eldridge balancing test.400

Third, the Court examined the procedures set up by Congress at the request of the executive very closely and found them inadequate, and it struck them down as an unconstitutional suspension of the Great Writ. This is also almost unprecedented in the jurisprudence of alienage. Again, comparing this with Ekiu, one of the Ping era procedural due process cases is instructive. In Ekiu the Court held:

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.

Fourth, in Boumediene, Chief Justice Roberts correctly observes that the Court expands aliens’ rights beyond what it actually recognized for U.S. citizens in Hamdi.402 In Hamdi, the Court said that a duly constituted military commission might be sufficient. It also added that hearsay evidence, if that is all the government has, might suffice.403 Again, as Roberts correctly indicates, Boumediene failed to recognize those same procedures as adequate substitutes for the constitutional writ of habeas corpus.404

Finally, Roberts notes that the procedures the Court considered inadequate, including the judicial review rules, are exactly the same as the existing rules in the immigration context. But the Court held that these same rules, including the hearsay rules, violated the “enemy alien” detainees’ rights to constitutional writ of habeas

399. See id. at 2299 (Scalia, J., dissenting).
403. Id.
404. Id.
corpus. Chief Justice Roberts’ bewilderment, in short, is that now “enemy aliens,” the worst form of alien that one can be for purposes of constitutional rights, are said to have rights that aliens within the U.S. and even some U.S. citizens do not have. Does Boumediene imply that? It most certainly does. This disorders the alienage spectrum significantly more than ever before by providing aliens at the very beginning of the spectrum better rights than those at the opposite end. Chief Justice Roberts’ solution to this disorder is to deny rights to the first group to reorder the spectrum. The suggestion that follows is the opposite: to order the spectrum, which has always been disordered, by granting the same or better rights to those better placed on the spectrum. Boumediene must be read in that light. The next section outlines the merits of this suggestion in more detail.

IV. REORDERING THE SPECTRUM

The disorder in the spectrum is as old as the spectrum itself. As such, it is chronic. Treating a chronic problem would require addressing the many aspects of the disorder in a comprehensive manner. This part addresses some of the relevant and overarching jurisprudential quandaries and attempts to highlight some measures that would help reorder the disordered spectrum.

a. The Reverence for Ping

In the jurisprudence of aliens, no case seems to be as revered as Ping.405 A cursory review of Westlaw’s case citations shows about 1,968 documents immediately associated with Ping. Virtually all cite Ping with approval.406 Even in Zadvydas v. Davis,407 in which the Court seemed to have undermined the central holdings of Ping by creating an exception to Congress’s purported authority to indefinitely detain aliens ordered removed, it felt compelled to say that it was not dishonoring Ping.408 The Court noted that it was focusing on the following limitations: “[C]ongressional authority is limited ‘by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.’”409

A legal doctrine largely meant to exclude Chinese laborers from the West coast, linked to the social and political realities of the 1880s, became a revered legal concept vitiating decisions affecting the lives of millions of people over the last century-and-a-half. Mr. Ping was a day laborer. He probably did not care about notions of sovereignty and international treaty obligations. For him, the exclusion was about breaking promises. The Supreme Court’s description of the circumstances of the denial of entry expresses the broken promises very nicely:

On his arrival he presented to the proper custom-house officers his

405. See Ping or Chinese Exclusion case, 130 U.S. 581 (1889).
406. See Ping, 130 U.S. 581 (1889) (looking at Westlaw case citation history).
408. Id. at 695 (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)).
certificate and demanded permission to land [in San Francisco]. The collector of the port refused the permit, solely on the ground that . . . the certificate had been annulled, and the right to land abrogated, and he had been thereby forbidden to enter the United States. 410 Ping probably could not believe that the people of the United States, collectively acting through their representatives in Congress, would promise him that he could return after a short trip to his home country if he took out a certificate only to deny him entry, having changed the rules while he was away. He found this unjust.

In earnest, Ping was not about sovereignty or international relations. It was about promises, expectations, justice, and racial exclusion. There is nothing wrong in letting every nation decide whom to admit or exclude. That is a genuine exercise of sovereignty. But failing to honor promises is an arbitrary exercise of authority antithetical to the very notion of civilization that Congress and the Court purported to protect from “Oriental invasion.” 411 However, dishonoring Mr. Ping’s certificate of entry did not challenge Justice Field’s sense of justice as did the city of San Francisco’s disallowing of laundry permits to Chinese immigrants or the deportation of Ting for lack of a white witness. 412 At the risk of over simplification, this was the reality that originated and sustained the plenary power doctrine.

As indicated in the previous section, the Judiciary’s continuous struggle with this concept has led to the disorder in the alienage spectrum. As such, an effort to reorder the spectrum must begin by rejecting the plenary power doctrine as it is at the root of the problem. This doctrine has been subjected to serious criticism over the years. 413 Professor Henkin’s statement best summarizes this sentiment:

The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive shadow of a racist, nativist mood a hundred years ago. It was reaffirmed during our fearful, cold war, McCarthy days. It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects. Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint.

b. The Current State of Ping: To What Extent Does Boumediene

410. See Ping, 130 U.S. at 623 (emphasis added).
411. See id. at 626.
412. See Ting v. United States, 149 U.S. 698 (1893) (Field, J., dissenting) (opining that failure to provide a white witness, the only form of evidence that could be brought to avoid deportation, violated due process as the respondent had already been a resident).
Undermine It?

To what extent does Boumediene undermine Ping? This is a difficult question, as it would directly ask about the status of the plenary power doctrine after the Guantanamo cases. Even before that, the status of the plenary power doctrine had been a subject of great controversy. For purposes of the spectrum analysis, however, the answer depends on the position of the alien on the spectrum. The previous sections provided a lengthy account of the spectrum. The spectrum ranges from enemy aliens to natural born citizens with some caveats relating to Korematsu, Hamdi, and Padilla. As indicated in the previous section, in Boumediene the Court showed no reverence for Ping. It categorically declared that “enemy aliens” detained outside the United States are entitled to challenge their combatant status through constitutional habeas corpus, and that the process Congress accorded them was inadequate and unconstitutional. Boumediene could be reasonably read to provide the minimum levels of acceptable due process applicable to enemy aliens, who are at the very beginning of the alienage spectrum. This reading of Boumediene would indeed reorder the alienage spectrum by providing almost full scale constitutional protection to all other categories of aliens better positioned on the alienage spectrum based on the ascending scale of rights analysis. Viewed in this light, Boumediene might be interpreted to have undermined Ping in at least two important respects: (1) the decisions of the political branches of government affecting the rights of aliens, in whatever context, are reviewable by the courts for constitutionality; and (2) as the protections deemed inadequate for the enemy aliens in Boumediene are similar to those of lawful permanent residents and citizens like Hamdi in the ordinary operation of the pre-Boumediene alienage jurisprudence, all non-confirming procedures affecting non citizens must be upgraded to comply.

Although such reading of Boumediene vis-à-vis the alienage spectrum is not at all unreasonable, the history of immigration law suggests that it probably will not enjoy such an expansive interpretation. There are two main reasons. (1) Boumediene relates to the liberty interest of aliens as opposed to the admission and exclusion of aliens, which is traditionally the domain of immigration law, while Ping

---


416. This constitutional decision is unique because it is a departure from the Court’s usual ways of relying on statutory grounds. See generally, Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990) (noting the Court’s repeated avoidance of constitutional determinations in favor of statutory construction).

417. Although the plenary power doctrine originated in the admission and exclusion context, as discussed in may parts of this article, it gradually pervaded almost every area of law regulating the conditions of aliens including substantive and procedural due process in non-immigration context, equal protection including education and public benefits, searches and seizures etc. The justification for every denial of right by the federal government in all of these contexts has been the plenary power doctrine. As such, any decision affecting this doctrine in any context must affect its meaning in all other areas as the Court itself has always made it adoptive.
in essence relates only to the latter. This argument suggests that the Boumediene Court did not face a Ping problem. In other words, it did not have to release the Boumediene petitioners into the United States, as they did not seek admission; they only wanted to go home. As convincing as this argument might be, it does not resolve the Zadvydas and Clark problem.

(2) The Guantanamo cases are quite unique in many ways, including the special status of the island and the long-term detention of the enemy aliens that the Court considered excessive. Aside from these considerations, however, there is no doubt that Boumediene has significantly undermined Ping and added a remarkable momentum to the movement for the demise of Ping. As such, it will surely remain a milestone in the jurisprudence of alienage. By noting this reality, the following subsections provide a more realistic approach to the reordering of the alienage spectrum disorder.

c. Some Philosophical Hurdles

As indicated earlier, the spectrum approach itself is almost as old as the plenary power doctrine. It is predicated on the assumption that the more people stay in the country the more social and economic ties they form, and thus, the decision to sever such ties must not be made as casually as the decision to deny entry to total strangers. For the purpose of protecting reasonable expectations, it is fair to say that the spectrum approach is essentially a principle of equity, in the sense of fairness and justice.

418. Courts have already started making this point. The most notable appeals court case is, Kiyemba v. Obama, 555 F.3d 1022 (2009). In Kiyemba, the Court of Appeals for the D.C. Circuit reversed the District Court, which allowed the release of seventeen Chinese citizens who were wrongfully held at Guantanamo Bay as enemy combatants. See 555 F.3d. at 1023-26. In denying their release into the United States, the Court distinguished Boumediene by saying that the fact that the Court has habeas jurisdiction and that it could order their release, does not mean that it has the authority to have them released into the United States. It added that only the political branches have the authority to do the latter. If they refuse to do so, the Court must recognize that. See id. at 1028-30. Over a vigorous dissent, it expressly said that Boumediene is limited to the Suspension Clause. Id. at 1032. In that sense, it is fair to say that the D.C. Circuit has already indicated that it views Boumediene as a case that carved out a limited exception to Ping rather than directly contradicting or undermining it. In fact, the court relied on many of the usual Ping era and Cold War era cases including Ping itself, Ting, Ekiu, Knauff, Harisiades, and Mezei. See id. at 1025-27, and attempted to diminish the applicability of Zadvydas and Clark v. Martinez, 543 U.S. 371 (2005) (extending Zadvydas to excludable aliens.) See 555 F.3d. at 1027-28. This obviously raises more complicated issues that cannot be fully addressed here and will be a subject of future writing.

419. Professors Legomsky and Rodriguez suggest that this is perhaps the most convincing of all arguments distinguishing the Cold War era indefinite detention cases including Mezei. See LEGOMSKY & RODRIGUEZ, IMMIGRATION LAW AND POLICY (5th ed), supra note 364, at 169-171.

420. Zadvydas, 533 U.S. 678 (holding indefinite detention impermissible and allowing the release of an alien into the United States when there is no country that would accept the deportee.)


422. See Kiyemba v. Obama, 555 F.3d 1022, 1037 (2009) (Rogers, J., dissenting in part, concurring in the judgment)("But the Supreme Court makes clear that a district court has exactly the power that the majority today finds lacking – the power to order an un admitted alien released into the United States when detention would otherwise be indefinite.").

423. See, e.g., Yamataya v. Fisher, 189 U.S. 86 (1903) (making a clear distinction of constitutional significance between newly arriving aliens seeking admission at the ports of entry and those who had already entered). See also Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a state many not discriminate against aliens who are already in the country).
This notion is sometimes characterized in two alternative ways: (1) “membership in the community” or (2) “community ties.” The “membership” approach is all about the community and not the individual. The community is said to have the collective right, privilege, and ability to exclude non-members and these non-members must comply with the community’s rules and earn their privileges. The “community ties” approach views the issue differently by focusing on the individual and the community’s considerations of the individual’s ties and expectations. Under this approach, the community’s rules are influenced by the reality of the aliens’ conditions.

It appears that the alienage jurisprudence began with the “membership notion” in the exercise of sovereignty emphasized in Ping, and evolved to include considerations of the alien’s community ties in determining the exact nature of the rights due to him. In fact, community ties are important for many forms of relief under existing immigration rules.

Professor David Martin, the principal proponent of the notion of a distinctive “community” populated primarily by citizens, and others with an ascending scale of rights, proposes that that his recommended alienage spectrum be utilized in determining the nature and extent of aliens’ rights. Although he wrote about this proposal before the Guantanamo cases, the spectrum he outlines and the arguments he makes are very informative.

Professor Martin’s spectrum has five layers. As citizenship is most central for his analysis, his hierarchy of membership contains the following in a descending scale of rights: citizens, lawful permanent residents (immigrants), admitted non-immigrants, entrants without inspection (EWI), parolees, and applicants at the border. This appears to be an ordered spectrum with some basis in jurisprudence. The problem, however, is that the largely positive law approach dismisses the most serious problem: the problem of EWIs or undocumented persons with long-term residence and extensive community ties. Professor Marin argues that “[a]n initial response might be to say that migrants consider themselves settled here but [those] who lack LPR [lawful permanent residency] status developed expectations that are not legitimate.” He adds that not only are the expectations illegitimate but also incredible. He writes that “[f]rom the standpoint of the long-staying migrant who lacks legal status, the issue is not solely the legitimacy of any expectations or permanence or rootedness, but also the credibility of those expectations.” He finds the expectations not credible because those who overstay are told that they must leave on certain dates, and those who enter without inspection, “sneaking across-a border at night, often with the aid of a paid smuggler” and worry


425. See, e.g., T. Alexander Aleinikoff, Aliens, Due Process and ‘Community Ties’: A Response to Martin, 44 U. PITT. L. REV. 237, 243 (1983). This was written in response to Professor Martin’s earlier piece on a related subject. See David Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. PITT. L. REV. 165 (1983).

426. One of the leading textbooks on immigration, which he co-authors, begins with a chapter on citizenship. See ALEINKOFF, ET AL., supra note 334, at chapter I. Compare with the other leading textbook, LEGOMSKY, at chapter 13 (ending with citizenship). See also INA at title III (placing citizenship and naturalization towards the end of the statute).

427. Martin, supra note 424, at 92.

428. See id. at 107.
that “la migra will discover them” hardly create credible expectations of rootedness worth honoring. He also considers the expectations of the receiving society and cites to Alan Wolfe’s book summarizing the society’s sentiment as “overwhelmingly support[ing] legal immigration and express[ing] disgust with the illegal variety.”

The arguments relating to the credibility of the expectations of aliens as well as society’s expectations rest on factual contentions. With respect to the expectations of the individual aliens, it is extremely difficult to doubt the credibility of the expectations of a seventeen year-old high school senior, who was brought in at age one and led a normal life like the rest of his classmates, to be considered a member of the community. In fact, the proposed Dream Act, which intends to legalize young people in this situation, is predicated on this and similar assumptions.

Two things can be said about the expectations of the society. First, like every contentious political issue, the answer depends on whom you ask. There are as many, if not more, supporters of legalization as there are opponents. It is fair to say that no one group represents the expectations of society at large. Second, the same issue of credibility of expectations may be raised with respect to the credibility of expectations of the “society.” Apart from the precedence of Yick Wo and Plyler v. Doe, and occasional legalization regimes that have sufficiently upset the segment of society that is “disgusted with the illegal variety,” the likelihood of the United States deporting all illegal aliens is not very credible. Professor Peter Schuck summarizes the inherent dilemma relating to this issue in the following passage:

Today, large numbers of migrants can easily, inexpensively, and surreptitiously enter United States territory, where they can readily form social and economic attachments that the government cannot easily sever . . . . These brute facts present liberalism with a poignant predicament. Committed to the rule of law but confronted by individuals who, sociologically speaking, have found community in America only after flouting that law, liberalism cannot legitimate their presence. Committed to the moral primacy of consent, liberalism cannot embrace those who enter by stealth. Committed to universal human rights, liberalism cannot secure those rights in the real world without rooting itself in political institutions that are actually capable of instantiating its values.

429. See id.
430. See id. (quoting ALAN WOLFE, ONE NATION, AFTER ALL 147 (1998) (emphasis added); Peter Skerry, Why Amnesty Is the Wrong Way to Go, WASHINGTON POST (Aug. 12, 2001)).
431. The Development, Relief and Education for Alien Minors Act of 2009 called the Dream Act has been proposed in different forms at different times, the latest version was proposed on March 26, 2009, and is still pending in both houses of Congress. For the details and progress of the current version of the see Proposed Dream Act (2010), http://www.dreamact2009.org/. See also Michael A. Olivas, IIRIRA, The Dream Act, and Undocumented College Students Residency, 30 J.C. & U.L. 435 (2004) (predicting that a combination of state and federal laws will eventually address the issue of access to higher education for the large numbers of undocumented young high school graduates). For legislative history and overview, see Jeffrey N. Poulin, The Piecemeal Approach Falls Short of Achieving the Dream of Immigration Reform, 22 GEO. IMMIGR. L.J. 353 (2008).
432. Peter H. Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 87 (1984). Although this was written before major immigration reforms including the 1986 legalization
Professor Martin's spectrum analysis seems to be constrained by this dilemma. Certainly, any action that would undermine the very laws and institutions that would secure rights and privileges in the first place, as Professor Schuck suggests, seems to be antithetical to the concept of the rule of law. However, ignoring the glaring sociological realities in the interest of principles that are supposed to aid the protection of liberty and the promotion of rights is anomalous.

Sometimes, the rhetoric follows the idea that “the law is the law, and they broke the law.” Although this statement makes it sound like these undocumented immigrants committed crimes against humanity, existing law considers illegal crossing in a similar fashion to a misdemeanor for a first time offender. The Plyler Court did not choose to ignore the sociological reality. It recognized that the presence of millions of undocumented children is a fact and that the country has to deal with the issue in a manner that does not involve denying them basic education. The Court was concerned about the children, not the parents who broke the law and said, “the inability to read and write will handicap the individual deprived of basic education each and every day of his life.” In fact, Justice Brennan suggested that although the children’s parents broke the law, their fault is shared by society:

[L]ax enforcement of the laws barring into this country, coupled
with the failure to establish an effective bar to employment of
undocumented aliens . . . encouraged by some to remain here as a
source of cheap labor, but nevertheless denied the benefits that our
society makes available to citizens and lawful permanent
residents.

The expectations of undocumented children are more credible today than in 1982, when Plyler was decided. Today nearly 65,000 undocumented children graduate from the nation’s high schools every year. Most of them have lived in the U.S. almost their entire lives. Strictly speaking, they are not “aliens” to U.S. society but they lack legal status. Ignoring this glaring sociological reality on the basis of a completely positivist view of the “law is the law,” and placing undocumented children towards the unfavorable end of the spectrum does not resolve the problem in any meaningful and realistic way. Instead, it will continue to disorder the alienage spectrum. The following section makes some pragmatic suggestions on reordering the spectrum.

d. A Pragmatic Approach to Reordering the Spectrum

No legalization regime or amount of enforcement is likely to resolve the issue of undocumented immigrants. Undocumented status will continue to complicate the immigration debate for the foreseeable future. It is a geo-political and socio-economic reality.

A pragmatic approach to the problem would recognize the objective reality and the available options. Every time a comprehensive immigration reform or

---

433. See INA sec. 275 (citing that penalty is less than 6 months.).
434. See Plyler, 457 U.S. at 222.
435. Id. at 218-19.
legalization regime is contemplated, the most common proposed requirement is the length of stay of the beneficiaries. The 1986 legalization regime, for instance, required about four years of residency as a condition for legalization. The proposed Dream Act contains similar provisions, but links length of residency with age at the point of entry. More specifically, it couples entitlement to legal status with entry before the age of sixteen and five years of continuous residency.

This approach of age plus length of residence is a logical formula to determine the position of the individual on the alienage spectrum and provide benefits commensurate with that position. For one thing, it would resolve the enduring problem of the education of undocumented minors under Plyler. Applying a similar formula to the adult population may also have significant benefits by balancing the degree of culpability with the nature of community ties that develop later. Additional revisions to existing law can further this objective, perhaps even after a possible comprehensive immigration reform resolves the existing caseload of undocumented immigrants.

i. Registry

One important and familiar way of avoiding the unnecessary accumulation of undocumented immigrants is the system of registry. Currently, the Attorney General has the discretion to legalize a long-term resident who entered illegally before a specified date. That date used to be June 30, 1948, but a revision in 1986 extended it to January 1, 1972.

A change to the registry system can address the current problem; moving from the specific-date-based-registry system, which currently benefits those who can demonstrate that they entered the United States before January 1, 1972, to a system based on the number of years of unauthorized stay. A formula taking into account the alien's age and length of illegal residency may also accomplish the objective of recognizing the community ties that ordinary people are expected to accumulate. It can also prevent unnecessary suffering of people who have lived here under a complex mix of social, legal and economic circumstances. Coming up with the required level of political compromise might be difficult at this time; however, all this requires is coming to terms with reality. The current cut-off date of January 1, 1972 obviously does little to address the current problem.

A more acceptable proposal would probably look at a five to ten year range of continuous residency. It could, of course, be subjected to some conditions of inadmissibility unrelated to the illegal entry. This would have the potential of reordering the spectrum by giving long-term residents the same legal status that persons with fewer attachments and ties may be entitled to because of their lawful presence.

437. See IRCA, amending INA sec. 245A(a)(2)(A).
438. See INA sec. 249.
439. See id.
440. In fact, the authors of the leading immigration law treatise have long suggested this modification, albeit not in the context of the alienage spectrum. See Gordon, Mailman & Yale-Loehr, 54.01 (cited in LEGOMSKY, supra note 364, at 607).
ii. Adjustment of Status

Adjustment of status is the principal way of acquiring lawful permanent residency for individuals who have been inspected and admitted and later acquire community ties by marrying citizens or obtaining job offers. This form of relief is currently not available for those who have entered illegally. This has been a significant obstacle preventing perhaps millions of people with extensive ties from assuming their rightful position in the spectrum.

Recognizing the severity of this obstacle, Congress has on a couple of occasions allowed those who entered without inspection to adjust status upon payment of some penalty. The last time this happened was April 2001. Permanently eliminating the “inspected and admitted” requirement from the adjustment of status provision would help reorder the spectrum by allowing those who have substantial attachments, by way of marriage or jobs, to assume their rightful position on the spectrum.

iii. Cancellation of Removal

Cancellation of removal, as a defense from deportation, works more or less like registry, but has distinct features and advantages. It excuses some grounds of deportability and also preserves or confers lawful permanent residence. In its current formulation, it has two separate applications. The first relates to lawful permanent residents who are deemed deportable. They may seek cancellation of their removal in removal proceedings if they can establish that they have resided in the U.S. for seven continuous years, five of which must be as lawful permanent residents. The only exception is if the person has a conviction for an aggravated felony. This rule is a classic spectrum rule, which assumes that seven years of residence would enable the person to accrue substantial community ties, which would be unfair to sever even if the person has been convicted of a minor crime. The second cancellation of removal rule is more like registry than the first. It allows for the cancellation of removal and status adjustment if the alien can demonstrate four things: ten years of physical residence, good moral character, no convictions, and “exceptional and extremely unusual hardship to the alien’s spouse, parent or child, who is a citizen or an alien admitted for lawful permanent residence.” This is also a classic spectrum rule; however, it is encumbered almost to the point of irrelevancy. The standard, “exceptional and extremely unusual hardship,” cannot be met by the vast majority of claimants. Any reform effort genuinely attempting to make this form of relief available for persons who have established significant

441. See INA sec. 245(a) (requiring lawful entry for adjustment).
442. See id.
443. See INA sec. 245(i).
444. Other requirements include having an approved petition for an immigrant visa, which must be available at the time of adjustment and, of course, the alien must be admissible. See INA 245(a).
445. See INA sec. 240A(a) & (b).
446. See INA sec. 240A(a).
447. See INA sec. 240A(b).
community ties for ten years and who show good moral character would eliminate the showing of a hardship element entirely. 449 That would allow the beneficiaries of this provision to assume their rightful place in the alienage spectrum.

The three simple and effective administrative legal reforms discussed above would not only help reorder the current disordered spectrum, but would also give immigration laws continued viability. The proposed reforms achieve this goal by eliminating or at least minimizing the need for a major legalization program every two or three decades, and thereby avoiding the attending costs and the inevitable political turmoil.

V. CONCLUSION

The awkward position in which Ping puts aliens vis-à-vis the Constitution caused an enduring tug-of-war between those who view the Constitution as a pact among a select group of people with the authority to exclude all others450 and those who view the Constitution as a grand norm that enshrines the principle of mutuality, restraint on the exercise of government power, and recognition of God-given rights.451 While for the former, some special provisions have been preserved for the “people” as opposed to “all persons,”452 for the latter “bestowing rights and delineating protected groups would have been inconsistent with the Drafters’ fundamental conception of a Bill of Rights as a limitation on the Government’s conduct with respect to all whom it seeks to govern.”453 In the alienage jurisprudence of the last century, neither of these two schools of thought has consistently prevailed and this has caused an enduring disorder in the spectrum. The spectrum itself originated as a reaction to the sweeping plenary power doctrine. The perceived injustice of subjecting those who had already established roots in the community to swift deportation rules brought about a move towards according them better rights. The jurisprudence that began by making a distinction between those who just arrived and those who have some roots became entangled with addressing the nature of the claimed rights and variations in rootedness.

At times, the disorder took the shape of provisions that applied to one group but not another, unless certain conditions were met. Other inconsistencies are typified when a court applies the Fifth Amendment but not the Fourth, because the Fifth says “person” while the Fourth is limited to the “people.”454 Ordinarily, the several states cannot discriminate on the basis of alienage, 455 but the federal government may.456 Nonetheless, the states may also discriminate on the basis of
alienage if the area of regulation involves the political process, which may occupy almost every area of regulation such as the position of fire fighters. The federal government may detain an alien indefinitely, but only if the alien is not a permanent resident. However, in other cases even an arriving alien may not be detained indefinitely. Still, if the alien is still in deportation proceedings, he may be detained without considering his dangerousness or likelihood of absconding.

What began as an equitable and humanitarian principle of sparing those with community ties from brutal rules of exclusion has grown into a complex and uncertain legal labyrinth. The introduction in recent decades of the concept of “community consent” to “community ties or rootedness” disconnected the law from the sociological reality and exacerbated the disorder in the spectrum, which was originally meant to preserve social attachments, community ties, and rootedness. Moreover, the notion of consent never completely replaced the notion of rootedness. Rather, the two coexist, preventing the emergence of coherent and predictable alienage jurisprudence.

As discussed throughout this article, the result of this back and forth movement was a disordered spectrum. Today, the state of the disorder is such that those who are supposed to be at the very beginning of the spectrum, i.e., “enemy aliens,” may be entitled to more rights than those at the opposite end of the spectrum, i.e., lawful permanent residents or even citizens. Although the recognition of the rights of ‘enemy aliens’ is a welcome development, its impact in exacerbating the disorder cannot be ignored. As indicated in a previous section, however, reordering the spectrum must not be accomplished by reducing the rights of those who are better positioned on the spectrum, as Chief Justice Roberts suggests, but by according the others better rights. That would in turn require the overruling of Ping. While Ping is a Plessy-era law, it is still alive and well. Over the last century, Ping perpetuated the disorder by vitiating judicial and political decisions. It has been undermined over the years but has not yet received the final blow. The Guantanamo cases, particularly Boumediene, came close, but Boumediene is not Brown. However, it appears that it has properly paved the way for the Brown equivalent of the alienage issue. Until the Brown equivalent arrives, however, some modest modifications may be made to the existing rules to better manage the disorder. These changes include amending some of the requirements of the familiar remedies of registry, adjustment of status, and cancellation of removal in a manner that takes into account the alien’s position on the alienage spectrum, as manifested by the age-to-residence ratio, community ties, and other indicators of rootedness.

The exercise of absolute power by one branch of government without checks, balances, or judicial oversight is exactly the kind of tyranny that necessitated the inclusion of the Bill of Rights in the Constitution. For anyone who wonders what the conditions of the U.S. citizenry would have looked like without the Bill of Rights, there can be no better illustration than the conditions of aliens under the

457. See Sugarman v. Dougall, 413 U.S. 643 (1073) (carving out a political participation exception).
462. See Boumediene, 128 S. Ct. at 2287 (Roberts, J., dissenting).
plenary power doctrine. There is no longer any justification for maintaining a pre-rights era rule of exclusion. Alienage must stop being an excuse for the denial of rights. "One law shall there be, the same for those who are home-born and for the sojourners among us."463

463. Exodus, 12:49.