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RESIDENT ALIENS AND THE FIRST AMENDMENT: THE NEED FOR JUDICIAL RECOGNITION OF FULL FREE SPEECH AND ASSOCIATION RIGHTS

Before the turn of the twentieth century, the United States Supreme Court announced an extremely deferential attitude towards legislative and executive branch decisions regarding the grounds for deportation of aliens. The Court's rationale for this hands-off approach rested on the prevailing international law concepts of sovereignty and the inherent powers of independent nations to control the presence of foreigners within their borders. The Court stated that the power over immigration vested in the political branches of government, and immediately characterized Congress' authority over the subject as plenary and largely unfettered by constitutional constraints. The Court also declared congressional actions taken pursuant to this power to be political questions, and thus, virtually unreview-

1. The Chinese Exclusion Case, 130 U.S. 581, 606-10 (1889) (establishing the government's power to exclude foreigners whenever it is in the public interest). Accord Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (holding that the right of a nation to deport foreigners is absolute and unqualified); Nishimura Ekiu v. United States, 142 U.S. 651, 659-61 (1892) (sovereign may "forbid the entrance of foreigners... in such cases... as it may see fit to prescribe").

2. See Fong Yue Ting, 149 U.S. at 705-07, 713. The early immigration cases endorsed broad congressional authority over exclusion and deportation, presuming the validity of unfettered power in this area rather than considering the merits. As one commentator explains, the concept of sovereignty in the immigration context "entailed the unlimited power of the nation... to decide whether, under what conditions, and with what effects it would consent to enter into a relationship with a stranger." Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 6 (1984). See also Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel, 69 YALE L.J. 262 (1959) (criticizing the Supreme Court's failure to consider the merits of constitutional challenges to deportation statutes); Scanlan, Symposium on Academic Freedom: Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act, 66 TEX. L. REV. 1481 (1988) (the Court's position assumes an absolute power to take any measure to ensure the nation's self-preservation).


4. The political question doctrine precludes judicial review of issues that are best suited to executive or legislative resolution. In general, the rationale of the doctrine is based upon due respect for a coordinate branch of government—recognition of the expertise of a certain branch in handling the issue or a constitutional grant of authority over the issue to a certain
The Supreme Court's deferential attitude has become ingrained in judicial analysis of United States immigration law, despite the fact that the Court failed to articulate clearly its reasoning. Moreover, the Court has demonstrated an alarming readiness to allow Congress to override first amendment freedoms, such as when it enacted legislation declaring resident aliens deportable for present or past beliefs and associations. Congress often enacted such statutes in the name of national security, yet typically there existed little evidence that resident aliens' exercise of free speech and association rights were inherently more dangerous than the exercise of those same freedoms by United States citizens. In recognition of the false premise that all aliens are subversive, the rationale underlying the ideological deportation of resident aliens, Congress recently enacted temporary legislation that partially eliminates ideology as a ground for deportation. Specifically, the recent legislation extends first amendment protection to certain classes of nonimmigrant aliens. Additionally, some federal courts have begun to subject various provisions of United States immigration law to meaningful analysis based upon the same standards of review applicable to citizens' first amendment challenges.

5. See 2 C. Gordon & S. Mailman, Immigration Law and Procedure § 4.3a (1989) (the political question doctrine blocked all attempted challenges to "legislative edicts").

6. The rationale possessed questionable validity even at its inception in view of the numerous, strong dissenting opinions submitted in the first cases considering the issue. See, e.g., Fong Yue Ting, 149 U.S. at 732-63 (Brewer, J., Field, J., and Fuller, J., dissenting). See also Scanlan, supra note 2, at 1499-1500 (noting the Court's continued use of deferential review).


This Comment documents the historical development of the Supreme Court's controversial, and at times inconsistent, position on the scope of resident aliens' constitutional rights. It next discusses the more liberal views of the federal courts in recent first amendment challenges to deportation orders based on ideological grounds. This Comment also examines the inadequacy of legislative solutions. In conclusion, the author of this Comment argues for placing the first amendment freedoms of resident aliens on solid constitutional ground by unequivocal judicial recognition of their free speech and association rights.

I. THE HISTORICAL DEVELOPMENT OF UNITED STATES IMMIGRATION LAW


In *Fong Yue Ting v. United States*, 12 the United States Supreme Court upheld the deportation of three Chinese laborers, lawfully admitted to the United States as resident aliens, based on their failure to obtain certificates of residence from internal revenue collectors as required by an 1892 law.13 Two of the laborers admitted that they had not sought a certificate.14 The third had attempted to obtain the necessary certificate. However, the internal revenue collector denied his application15 because he failed to produce any "credible white witness[es]"16 who could verify that he was a resident at the time Congress enacted the statute.17

Reaffirming its position in prior cases, the Supreme Court declared that the power to exclude and deport aliens flowed from the inherent power of a sovereign nation to conduct international relations.18 Accordingly, the Court declared that such power vested in the political branches of the gov-
ernment, and that Congress may exercise this power in an absolute, unqualified manner.\textsuperscript{19} Although the Court also stated that Congress' actions pursuant to this power were subject to constitutional limitations, and thus judicial review\textsuperscript{20} the Court failed to analyze the 1892 statute in any meaningful manner.\textsuperscript{21} Having decided that the power over immigration resided with the legislature, the Court characterized the determination of grounds for deportation as strictly a political question,\textsuperscript{22} and as such, "conclusive upon the judiciary."\textsuperscript{23}

The Court also relied on its view of the prevailing concepts of international law\textsuperscript{24} to conclude that resident aliens are entitled to certain protections of the host nation, including constitutional guarantees, but only so long as the host extends an invitation to remain.\textsuperscript{25} Thus, borrowing from the reasoning in an earlier Supreme Court decision,\textsuperscript{26} the Court indicated that Congress can summarily revoke whatever rights resident aliens may possess than any specific constitutional grant of authority. D. Martin, supra note 3, at 17-18; see also 2 C. Gordon & S. Mailman, supra note 5, § 4.3a.

\textsuperscript{19} Fong Yue Ting, 149 U.S. at 705, 706.

\textsuperscript{20} Id. at 711, 713.

\textsuperscript{21} Numerous writers criticize the Court's refusal to subject immigration law to more searching analysis. See, e.g., 2 C. Gordon & S. Mailman, supra note 5, § 4.3a (once the Court declared congressional powers over immigration plenary, it did not question the validity of specific legislation enacted pursuant to that power); D. Martin, supra note 3, at 17-19 (noting the Court's failure to discuss constitutional support for the proposition that the political branches possessed virtually absolute power over deportation); T. Aleinikoff & D. Martin, Immigration Process and Policy 562 (1985) (describing the excessive extent to which early Supreme Court decisions insulated deportation provisions from constitutional limitations); see also Nowak, supra note 4, § 14.11 (noting the Court's historic refusal to review immigration decisions); Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 Colum. L. Rev. 309, 319 (1956) (describing the Court's reluctance to question the validity of deportation provisions motivated by suppositions that aliens were inherently subversive).

\textsuperscript{22} Fong Yue Ting, 149 U.S. at 731. The Court first expressly articulated the political question doctrine (which precludes judicial review of matters essentially political in nature and leaves their resolution to legislative bodies) in Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). See also 2 C. Gordon & S. Mailman, supra note 5, § 4.3a; Nowak, supra note 4, § 2.15.

\textsuperscript{23} Fong Yue Ting, 149 U.S. at 706. See also 2 C. Gordon & S. Mailman, supra note 5, § 4.3a.

\textsuperscript{24} Fong Yue Ting, 149 U.S. at 707-10.

\textsuperscript{25} Id. at 724. The Court cited several international law authorities supporting a sovereign nation's broad power to control foreigners within its borders. Id. at 706-11. However, the dissenters in Fong Yue Ting emphasized that these principles did not confer an absolute authority to deport. Id. at 734-37, 756 (Brewer, J. and Field, J., dissenting). Cf. Schuck, supra note 2, at 6 (international law also recognizes a sovereign nation's duty to persons within its borders); Akehurst, A Modern Introduction to International Law 87 (5th ed. 1984) (a two hundred-year-old "minimum international standard" imposed on nations a duty to treat persons within their borders "in a civilised manner").

\textsuperscript{26} The Chinese Exclusion Case, 130 U.S. 581 (1889).
Not surprisingly, therefore, the Court upheld both the requirement that a Chinese laborer lawfully residing in the United States obtain a certificate to remain in the United States and that the laborer present a white witness to obtain the certificate.

The Court further indicated in Fong Yue Ting that the scope of congressional power in this area was so broad that Congress could provide for summary removal of resident aliens by officers of the executive branch without judicial trial or examination. Hence, the Court applied an extremely deferential review to both the procedures and grounds for deportation. Moreover, because the Supreme Court indicated that deportation was not the equivalent of criminal punishment, the Court concluded that deportation statutes and proceedings need not conform to the constitutionally guaranteed standards generally applicable to criminal proceedings. Thus, the majority opinion in Fong Yue Ting severely circumscribed resident aliens'

27. Fong Yue Ting, 149 U.S. at 723. For a strongly worded attack on this extreme judicial deference, see Schuck, supra note 2, at 14-16 (concluding that the Court abdicated its role to check congressional abuses of authority in the field of immigration law, and that the Court "reflexively" reaffirmed its extreme deference throughout its decisions).

28. Fong Yue Ting, 149 U.S. at 729.

29. Id. at 714, 728. As Professor Schuck relates, "the national government's consent to allow the alien to enter and remain . . . could be denied or withdrawn on the basis of arbitrary criteria and summary procedures that often transgressed liberal principles." Schuck, supra note 2, at 3. In Fong Yue Ting, the Court applied a deferential standard of review so extreme that it did not question Congress' findings that Chinese persons were undesirable solely on account of their race. Fong Yue Ting, 149 U.S. at 717.

30. Fong Yue Ting, 149 U.S. at 730. The Court simply made a brief statement characterizing deportation as a civil proceeding, and failed to demonstrate how it differs from a criminal penalty. Id. This same conclusory statement appears throughout the Court's later decisions, and immunizes deportation statutes and proceedings from the constitutional constraints of the ex post facto clauses and the prohibition against bills of attainder. See U.S. CONST. art. I, §§ 9-10. See also Schuck, supra note 2, at 25 (the Court's perfunctory characterization "possesses little logical power"); T. Aleinikoff & D. Martin, supra note 21, at 369 (labeling deportation a civil penalty is a "fiction").

31. Fong Yue Ting, 149 U.S. at 730. See also Mahler v. Eby, 264 U.S. 32, 39 (1924) (finding that deportation is not a criminal punishment even though it is severe). While the Court subsequently expanded resident aliens' due process rights, it has yet to recognize the full panoply of this constitutional guarantee. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984) (exclusionary rule does not operate in deportation hearing because it is a purely civil proceeding); Landon v. Plasencia, 459 U.S. 21, 28 (1982) (procedures afforded in exclusion proceedings are sufficient for determination of the question of what constitutes an entry into the United States, even if the alien claims to be a resident alien); Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (rejecting equal protection challenge and upholding statute that precludes citizen fathers from applying for the admission of their illegitimate alien children). Moreover, the Court's opinion in Fong Yue Ting set a dangerous precedent for future first amendment challenges. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 591-92 (1952) (rejecting first amendment challenge to a deportation order based upon past membership in the Communist Party).
constitutional rights to substantive and procedural due process in the deportation context.

However, three members of the Supreme Court submitted strong dissenting opinions in *Fong Yue Ting.* The dissenting Justices stated that Congress must distinguish between aliens lawfully residing within the country's borders and those seeking entry. The dissenters noted that according to both international law and United States constitutional law, resident aliens acquire a right to remain in the country that mere legislative fiat cannot revoke. In contrast to the majority's extremely deferential approach, each of the dissenters analyzed the statute and found that it did not comport with the due process guarantees of the fifth amendment. Two of the dissenting Justices further concluded that a constitutional guarantee that Congress could summarily revoke in this manner amounted to no guarantee at all, and imperiled constitutional safeguards for all persons, citizen and noncitizen, in all contexts.

Refuting the majority's reliance on an unfettered power over deportation derived from international law, Justice Brewer emphasized that the Constitution delineates the powers of the United States Government and, therefore, the government can exercise only those powers expressly or impliedly granted therein. Additionally, he noted that the exercise of both express and implied powers must conform to constitutional limitations. Justice Brewer thus concluded that the Constitution does not accord Congress an absolute power over deportation. Similarly, Justice Field found the Court's absolute deference to the congressional action unwarranted and dangerous. Justice Fuller reasoned that if resident aliens enjoy protection under the Constitution, as the majority conceded, then the question of

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32. 149 U.S. at 732, 734, 761 (Brewer, J., Field, J., and Fuller, J., dissenting).
33. *Id.* at 734, *passim.*
34. *Id.*
35. *Id.* at 739-41, 759, 762 (deportation approximated criminal punishment because it entailed arrest, detention, deprivation of property, and often separation from one's family; neither legislative fiat nor the arbitrary discretion of an executive official can impose it).
36. *Id.* at 743, 754 (Brewer, J. and Field, J., dissenting).
37. *Id.* at 737, 738 (Brewer, J., dissenting). Not only did the dissenters state that the Constitution imposed substantive limits on any authority granted by international law, but they disagreed with the majority's broad reading of international law principles. *Id.* at 734-37, 754-56 (Brewer, J. and Field, J., dissenting). Two of the dissenting Justices also objected to Congress' violation of existing treaty obligations with China, which guaranteed to Chinese residents the same privileges and immunities enjoyed by U.S. citizens. *Id.* at 733-34, 752.
38. *Id.* at 738 (Brewer, J., dissenting).
39. *Id.* at 737-38.
40. *Id.* at 754-55 (Field, J., dissenting).
41. *Id.* at 724.
whether Congress has acted in conformity with the Constitution properly lies with the judiciary.\textsuperscript{42}

The dissenters also recognized that many provisions of the Bill of Rights do not distinguish between citizens and other persons, and concluded accordingly that these provisions applied to all persons within the territorial boundaries of the United States.\textsuperscript{43} Two dissenting Justices also characterized deportation as a criminal punishment "most severe and cruel"\textsuperscript{44} that cannot be inflicted in a manner inconsistent with the constitutional guarantees applicable in criminal proceedings.\textsuperscript{45}

Hence, the early Supreme Court decisions addressing immigration law set the stage for deferential review of the constitutionality of the procedures and the grounds for deportation. The Court specifically stated that international law endowed Congress with virtually unreviewable power over deportation of resident aliens. The Court further indicated that resident aliens could not invoke the United States Constitution to challenge legislative provisions for deportation. In this manner, the Supreme Court firmly established that Congress could grant and revoke at will a resident alien's right to remain in the United States.

B. The Early History of Deportation Based on Ideology

1. Deportation Based Upon Political Beliefs

Building upon its premise that Congress' power over immigration will be subject only to the most deferential review, a unanimous Supreme Court upheld the deportation of an alien anarchist in 1904 in United States ex rel. Turner v. Williams.\textsuperscript{46} The Department of Commerce and Labor charged Turner, a national of Great Britain, with entering the United States in violation of the immigration laws that mandated the exclusion of anarchists.\textsuperscript{47}

\textsuperscript{42. Id. at 761 (Fuller, J., dissenting) (political question doctrine does not bar consideration of the constitutional limitations on Congress' authority). See infra note 106 and accompanying text.}

\textsuperscript{43. Fong Yue Ting, 149 U.S. at 739 (Brewer, J., dissenting). Justices Field and Fuller expressed similar views. Id. at 749, 762 (Field, J. and Fuller, J., dissenting).}

\textsuperscript{44. Id. at 740 (Brewer, J., dissenting).}

\textsuperscript{45. Id. at 741. Likewise, Justice Field found deportation to be a cruel and unusual punishment greatly disproportionate to the crime. Id. at 759 (Field, J., dissenting).}

\textsuperscript{46. 194 U.S. 279, 294 (1904).}

\textsuperscript{47. Id. at 281-84. Specifically, Turner fell within sections 2 and 38 of the Act of March 3, 1903, which listed anarchists and others who believe in the overthrow of organized government among the classes of aliens excludable and deportable. Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 162, ch. 1012, 32 Stat. 1213 (1903). Scholars note that the 1903 Act marks the beginning of an extensive history of congressional enactments declaring resident aliens disloyal and rendering them subject to deportation for their political beliefs and associations. T. Aleinikoff & D. Martin, supra note 21, at 351-52. Despite
The immigration officers who arrested Turner found anarchist literature in his possession, and Turner did not deny that he was an anarchist.\textsuperscript{48} Turner contended, however, that the law under which he was arrested violated the first amendment to the United States Constitution because the provisions proscribed a particular belief.\textsuperscript{49}

The Court found no first amendment violation in deporting Turner for being an anarchist.\textsuperscript{50} Once the Court determined that Turner fell within a class of persons Congress deemed deportable, its review ended.\textsuperscript{51} The Court concluded that an alien who entered or remained in the United States illegally, in this case an individual who met Congress' description of an undesirable alien, did not enjoy protection under the Constitution.\textsuperscript{52} Moreover, the Court stated that Congress could constitutionally decide which ideas are dangerous to the public interest, and enact legislation subjecting aliens who hold such ideas to deportation.\textsuperscript{53} Thus, the Court rendered deportation based upon ideological grounds immune from first amendment scrutiny.\textsuperscript{54}

One Justice, in concurrence, advocated restricting the applicability of this ground for deportation to alien anarchists who acted upon their beliefs.\textsuperscript{55} Nevertheless, while noting that the Court's opinion failed to distinguish between anarchists who actively foment revolution and those who merely hold such beliefs, the concurring opinion agreed with the majority that Turner actively sought the overthrow of the United States Government.\textsuperscript{56}

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\textsuperscript{48} Turner, 194 U.S. at 283.
\textsuperscript{49} Id. at 286.
\textsuperscript{50} Id. at 292. Many scholars have noted the Court's summary disposition of this issue. For example, Scanlan notes that the Court "summarily rejected" Turner's first amendment claim. Scanlan, supra note 2, at 1509. As other commentators explain, the Court apparently reasoned "that the expulsion statute is not a denial of free speech but is rather a removal from the country of aliens deemed obnoxious." 2 C. Gordon & S. Mailman, supra note 5, § 4.3d. See also Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 946 (1963) (neither Congress nor the Court ever clearly defined the public interest furthered by restrictions on aliens' free expression).

\textsuperscript{51} Tilner notes that in the wake of President McKinley's assassination by an alleged anarchist, President Theodore Roosevelt strongly encouraged Congress to enact measures imputing guilt by association aimed at alien anarchists. Tilner, supra note 8, at 27.
\textsuperscript{52} Turner, 194 U.S. at 292.
\textsuperscript{53} Id. at 294. Since Congress viewed revolutionary ideas as a foreign import, its solution for preventing internal dissension was to deport the perceived source of those ideas—resident aliens. Tilner, supra note 8, at 71.
\textsuperscript{54} See Tilner, supra note 8, at 34, 35 nn.237-38.
\textsuperscript{55} Turner, 194 U.S. at 296 (Brewer, J., concurring).
\textsuperscript{56} Id.
In *Turner*, therefore, the Supreme Court expressly and summarily con-
donned congressional enactment of legislation permitting deportation based on an alien’s ideology. The Court’s decision in *Turner* enabled Congress to restrict the content of a resident alien’s speech, free from first amendment restraints. Thus, after *Turner*, Congress could constitutionally declare a resident alien deportable for holding a belief that Congress deemed undesirable.

2. *Mere Association with a Proscribed Group Furnishes an Adequate Ground for Deportation*

Forty years later, in *Bridges v. Wixon*, the Supreme Court again consid-
ered a resident alien’s first amendment challenge to a deportation order based upon ideological grounds. In 1938, eighteen years after Bridges entered the United States, the government tried unsuccessfully to charge him with deportation on the grounds that he was currently a member or affiliate of the Communist Party of the United States (CPUSA), a group which advocated the violent overthrow of the United States Government.

The government’s initial failure to discover any evidence warranting deportation merely led to demands to change the deportation laws to find Bridges “and all others of similar ilk” deportable. As a result, Congress amended the Alien Registration Act in 1940 to provide for the deportation of any alien who was currently or had at any time in the past been a member of or affiliated with a group that advised, advocated, or taught the overthrow of the United States by force or violence.

By this time, Congress also had created the Immigration and Naturalization Service (INS), and placed the Attorney General in charge of the admin-
istration of immigration laws. In 1941, the INS charged Bridges with

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58. Id. at 137-38.
59. Id. at 157-59 (Murphy, J., concurring). See infra note 88. See also Hesse, supra note 2, at 270-71 (describing congressional attempts to render Bridges deportable); Maslow, supra note 21, at 335-36 (same).
60. *Bridges*, 326 U.S. at 138. See also Act of June 28, 1940, Pub. L. No. 670, 54 Stat. 673, repealed by Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163; T. ALEINIKOFF & D. MARTIN, supra note 21, at 355 (noting that Congress enacted the amendment in response to the Communist Party of the United States’ (CPUSA) expulsion of alien members attempting to “immunize” them from deportation). This amendment, commonly known as the Smith Act, abrogated the earlier Court decision in *Kessler v. Strecker*, 307 U.S. 22 (1939). In *Kessler*, the Court construed the deportation statute then in force to require present membership in or affiliation with a proscribed group. Lacking evidence of a clear congressional intent to the contrary, the Court held past membership or affiliation an insufficient ground. *Id.* at 30.
deportation pursuant to the amended statute.\textsuperscript{62} An immigration inspector conducted the subsequent deportation hearing and concluded that Bridges had been affiliated with groups advocating the overthrow of the government after entering the United States.\textsuperscript{63} The Board of Immigration Appeals reversed the inspector’s findings but the Attorney General, upon review, reaffirmed the inspector’s conclusion and ordered Bridges deported.\textsuperscript{64} Bridges challenged the legality of his detention through a writ of habeas corpus in federal district court.\textsuperscript{65} The district court denied his petition, and the court of appeals affirmed that decision by a divided vote.\textsuperscript{66} The Supreme Court granted certiorari because of the serious nature of the issues involved.\textsuperscript{67}

The Court held that Bridges’ conduct and speech did not rise to the level of that proscribed by the statute.\textsuperscript{68} The Court’s decision rested primarily upon statutory construction and a determination that Congress had not intended to equate the term “affiliation” with casual, innocent association.\textsuperscript{69} The majority opinion briefly mentioned Bridge’s free speech claim, and did not clearly define the scope of first amendment protection enjoyed by aliens.\textsuperscript{70}

In construing the word “affiliated,” the Supreme Court concluded that the term must mean more than mere sympathy or association with a group.\textsuperscript{71}

see Maslow, supra note 21, at 314. See 2 C. Gordon & S. Mailman, supra note 5, § 4.4 (explanation of authority delegated to the executive branch); T. Aleinikoff & D. Martin, supra note 21, at 403-04 (outlining the mechanics of instituting deportation procedures).

\textsuperscript{62} Bridges, 326 U.S. at 139, 159 (Murphy, J., concurring).

\textsuperscript{63} Id. at 139. See Maslow, supra note 21, at 310 (criticizing INS’ total control of the deportation process).

\textsuperscript{64} Bridges, 326 U.S. at 140. The opinion gives no reasons for the Board of Immigration Appeals’ reversal or the Attorney General’s deportation order. Id. For a discussion of the alarming lack of independence between the enforcement and adjudicatory functions of the INS, see Schuck, supra note 2, at 30-34 (noting that neither the agency’s enabling statute nor the Court’s decisions require an impartial decisionmaker to preside at deportation hearings). The Court in Marcello v. Bonds, 349 U.S. 302 (1955), permitted Congress to abrogate an earlier Supreme Court decision in which the Court suggested that the Constitution required an impartial decisionmaker. See Schuck, supra note 2, at 32-33 (questioning the Court's reasoning in Marcello, and criticizing the Court’s decision to allow Congress to defy constitutional limitations through legislative fiat).

\textsuperscript{65} Bridges, 326 U.S. at 140.

\textsuperscript{66} Id.

\textsuperscript{67} Id.

\textsuperscript{68} Id. at 143, 147-49.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 148.

The Court stated that to fall within the Alien Registration Act of 1940, a resident alien must forge "bonds of mutual cooperation and alliance" through conduct that indicates a continuing relationship complete with "reciprocal duties and responsibilities." Moreover, the Court indicated that an alien who cooperates only in the lawful activities of an organization does not by implication share its unlawful objectives, and therefore is not "affiliated" in the statutorily proscribed manner. Ultimately, the Court concluded that the agency misinterpreted the statute, thereby rendering Bridges' hearing unfair, and thus the Court did not discuss the constitutional issue of whether Congress could declare mere association with a proscribed group a ground for deportation.

The Court's opinion in Bridges reflected a view of the nature of deportation markedly different from prior cases. Previously, in characterizing deportation proceedings as civil, the Court shut its eyes to the drastic consequences that attend an order of deportation. In Bridges, however, the Court repeatedly emphasized that deportation was tantamount to criminal punishment in that it "may result in the loss 'of all that makes life worth living.'" As a result, the Court's opinion suggested that the same standards of fairness required in a criminal proceeding ought to apply in the deportation context.

However, the Court devoted less than one paragraph to a cursory recognition that resident aliens enjoy rights of free speech and free press, and that Bridges' publications and statements had not crossed the line into advocacy of subversive conduct. The Court's opinion, however, arguably suggested that if Congress intended to enact a statute making mere association suffi-

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72. Bridges, 326 U.S. at 142.
73. Id. at 143-44, 146. Underlying the Court's emphasis that the government must show a consistent course of conduct to further the unlawful aims of the group is the principle that it is unconstitutional to impute guilt by mere association, even in the deportation context. See 2 C. Gordon & S. Mailman, supra note 5, § 4.10a; Comment, supra note 8, at 1909.
74. Bridges, 326 U.S. at 156.
75. Cf. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (rejecting the argument that deportation is tantamount to criminal punishment).
76. Id.
77. Bridges, 326 U.S. at 147, 153-54.
78. Id. at 147 (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).
79. Id. at 153-54. See also Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating that because deportation is a severe penalty, deportation statutes must be construed in favor of the alien); T. Aleinikoff & D. Martin, supra note 21, at 372 (holding that Congress has a duty to provide notice to aliens of the grounds for deportation). But see 2 C. Gordon & S. Mailman, supra note 5, § 4.1c (express legislative intent contrary to a favorable construction overrides the principle of most favorable construction).
cient grounds for deportation, it would violate the first amendment. In construing the statute to avoid constitutional conflict, the Court in effect based its interpretation on constitutional grounds. Unfortunately, the majority's opinion left the door open for Congress to enact subsequent legislation subjecting aliens to deportation on purely ideological grounds.

In contrast to the majority opinion in *Bridges*, the concurring opinion evinced a much stronger commitment to protecting the free speech and association rights of resident aliens. The concurrence found the 1940 Alien Registration Act facially invalid for two reasons. The opinion identified the statute's first fatal flaw as its substitution of guilt by mere association for a finding of personal guilt, in violation of the fundamental principles underlying United States law. Second, the concurrence asserted that the Court should have subjected the statute to the prevailing first amendment scrutiny, namely, the "clear and present danger" test, rather than sidestepping the issue through statutory construction.

The concurrence indicated that the decision to institute deportation proceedings against Bridges rested not upon national security reasons but rather upon an undifferentiated fear of Bridges' successful union activities. Reminiscent of the concerns the dissenters expressed in *Fong Yue Ting*, the concurring opinion further noted that although Congress enacts immigration legislation pursuant to a plenary power, the legislation is not immune from judicial review and does not thereby pass outside the ambit of the Constitu-

81. *See* 2 C. Gordon & S. Mailman, *supra* note 5, § 4.10a; Comment, *supra* note 8, at 1908-09 (in construing the statute to avoid constitutional conflict, the Court based its decision on constitutional law principles).


84. *Bridges*, 326 U.S. at 157, 159-60 (Murphy, J., concurring) (when the government blatantly ignores the Bill of Rights, "the full wrath of constitutional condemnation descends upon the action").

85. *Id.* at 162-64.

86. *Id.* at 163.

87. *Id.* at 164. In *Schenck v. United States*, the Court held that Congress cannot constitutionally restrict speech unless the speech presents "a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent." 249 U.S. 47, 52 (1919).

88. *Bridges*, 326 U.S. at 157-59 (Murphy, J., concurring). The House of Representatives passed a special bill declaring Bridges' presence in the United States "hurtful" and mandating his deportation. *Id.* at 158.

89. *Fong Yue Ting* v. United States, 149 U.S. 698 *passim* (1893) (Brewer, J., Field, J., and Fuller, J., dissenting).
tion. The concurrence also stated that if an alien's constitutional rights vanish "when deportation officials encircle him" then the constitutional guarantees possessed by an alien are meaningless.

Notably, the concurrence made no distinction between citizens and resident aliens when determining the standard of review applicable to their first amendment challenges. Reasoning that INS should only order deportation when a real and imminent threat to national security exists, the concurring Justice determined that the liberties of resident aliens could not depend on conformity with Congress' declaration of the mainstream views and beliefs of United States society. The concurrence also stated, without elaboration, that Congress possessed ample means to protect the public interest without resorting to infringement of speech and association rights. In conclusion, the concurrence added that to diminish the constitutional rights of an individual, even a resident alien with possibly radical views, strikes a blow against the right of free speech for all.

Despite the promising tone of Bridges, the Court remained unwilling to make a strong commitment to the free speech and association rights of resident aliens. In Harisiades v. Shaughnessy, decided less than a decade after Bridges, the Court retreated from its requirement that the government show proof of a current, meaningful association with a proscribed group to sustain a deportation order. In Harisiades, the Court consolidated three cases for review. Each case dealt with the constitutional question that the Court left unresolved in Bridges: specifically, whether Congress could constitutionally subject a resident alien to deportation based upon the alien's membership in a proscribed group, even though the alien terminated that membership prior to enactment of the Alien Registration Act of 1940.

90. Bridges, 326 U.S. at 160-61 (Murphy, J., concurring).
91. Id. at 162.
92. See Comment, supra note 8, at 1908-09.
93. Bridges, 326 U.S. at 165 (Murphy, J., concurring).
94. Id. at 166. As one commentator observed, Congress consistently designed deportation statutes to effect precisely this result. Scanlan, supra note 2, at 1502-03. See also Comment, supra note 8, at 1922 (the Court should not allow Congress to define acceptable beliefs).
95. Bridges, 326 U.S. at 165 (Murphy, J., concurring). See also Maslow, supra note 21, at 323 (consular and immigration officials can scrutinize applications for admission; the government can impose criminal sanctions for criminal conduct).
96. Bridges, 326 U.S. at 166 (Murphy, J., concurring). See also Nowak, supra note 4, §§ 16.2, 16.6 (the free exchange and competition of ideas reveals the ideas of the greatest truth and validity, and truth will prevail over falsehoods).
98. Id. at 581.
In Harisiades, each resident alien entered the United States as a child, married another resident alien, or in one case a United States citizen, and all had children who were United States citizens. Additionally, each resident alien admitted joining the CPUSA for varying periods of time, although each alien denied personal belief in the use of force or violence to overthrow the Federal Government. The INS conducted administrative hearings and ordered all three resident aliens deported for their post-entry membership in an organization that advocated the violent overthrow of the government. The Court affirmed the deportation order of all three persons.

The Court began its analysis in Harisiades by reaffirming its earlier position that Congress' authority to expel and deport is an inherent power bestowed upon sovereign states by international law. The Court stated that Congress, therefore, may terminate at will the resident alien's right to remain in the United States in peace or wartime. Following its own precedent, the Court declared that the development and implementation of an immigration policy is an exercise of the power to conduct foreign relations, which rests with the political branches of government, and thus is virtually immune from judicial review. The Court further noted that Congress passed the Alien Registration Act of 1940 just prior to United

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100. Harisiades, 342 U.S. at 581-83.
101. Id. Harisiades was a member from 1925 until 1939, when the CPUSA terminated all alien memberships. Mascitti joined the CPUSA in 1923 and resigned due to his personal lack of interest in 1929. Coleman was an intermittent member, spending a total of four to five years in the CPUSA. Id.
102. Id. at 582-83. With respect to the Communist Party, section 22 of the Subversive Activities and Control Act of 1950 eliminated the requirement that the government demonstrate that the organization to which an alien belonged advocated the overthrow of the government by force. Pub. L. No. 83-1, ch. 1024, 64 Stat. 1006. Mere membership in or affiliation with the Communist Party remains a ground for deportation. 8 U.S.C. § 1251(a)(6)(C) (1988).
103. Harisiades, 342 U.S. at 582-83.
104. Id. at 596.
105. Id. at 586-87. See Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893); The Chinese Exclusion Case, 130 U.S. 581, 603-06 (1889).
106. Harisiades, 342 U.S. at 587. In this regard, the Court failed to separate the international law issue (whether Congress has the inherent power derived from international law to deport aliens) from the domestic, constitutional law issue (whether Congress exercised its power to deport consistent with first amendment limitations). See Hesse, supra note 2, at 282 (dispensing with the issue on the basis of international law merely avoided the issue).
107. See Fong Yue Ting, 149 U.S. at 730-31.
109. Id. at 589. Hesse maintains that Harisiades presented a constitutional question of first impression and that the prior cases the Court cited in support of its decision were not on point. Hesse further asserts that the Court's focus on international law as the source of the power to deport simply evaded the issue of whether Congress constitutionally exercised its authority. He also criticized the Court for basing its opinion on summary declarations and assumptions. Hesse, supra note 2, at 271-75, 282.
States involvement in World War II, in response to evidence that Communists within the United States were actively thwarting the country's preparations for war.\footnote{Harisiades, 342 U.S. at 590. But see Scanlan, supra note 2, at 1518 ("The national security argument for the ideological provisions masks their true purpose . . . . Thus, the threat particular Communists posed in Harisiades and Dennis was not to America's nuclear secrets, but to the prevailing American political ideology.").} In this context, the Court concluded that "it would be rash and irresponsible . . . to deny or qualify the Government's power of deportation."\footnote{Harisiades, 342 U.S. at 591.}

In contrast to the Court's lengthy discourse on the broad scope of congressional authority over immigration matters, the Court only briefly discussed first amendment limitations on that authority.\footnote{Id. at 591-92.} The Court did state that the first amendment prohibited Congress from repressing all speech that Congress found distasteful.\footnote{Id. at 592.} The Court further noted that it had a duty to distinguish protected advocacy of radical doctrines from unprotected incitement of violence.\footnote{Id.}

Thus, while the Court acknowledged in a perfunctory manner that the Constitution protects the advocacy of Communist political doctrine,\footnote{Id.} it clearly did not distinguish between such advocacy and actual incitement to lawless action.\footnote{Id. at 591-92.} As a result, the Court rejected the aliens' first amendment challenge by simply stating that Congress can prohibit inciting the overthrow of the government by force, especially in view of the fact that our system of government allows for peaceful change through the electoral process.\footnote{Id. at 592.} Hence, while Harisiades can arguably be read to apply the same

\footnote{Harisiades, 342 U.S. at 591. The Court cited its recent decision in Dennis v. United States, 341 U.S. 494 (1951), without elaboration. In Dennis, the Court held that intentionally advocating and conspiring to bring about the overthrow of the government presented an imminent threat that Congress had a right to prevent. Some commentators conclude that the Court misapplied Dennis. See Comment, supra note 8, at 1910 (noting that the Supreme Court never indicated how the past affiliation of the resident aliens with the CPUSA posed a security threat); Hesse, supra note 2, at 285 (the Court failed to explain how the pattern in Harisiades met the test set forth in Dennis).}

\footnote{Harisiades, 342 U.S. at 592. See also T. Aleinikoff & D. Martin, supra note 21, at 351 (discussing Justice Jackson's "cursory treatment" of the first amendment issue); Scanlan, supra note 2, at 1510 (same).}

\footnote{Harisiades, 342 U.S. at 592. One commentator concludes that the Court's opinion neatly divided all speech into that which is related to the lawful political process and is therefore protected, and that which incites violence and therefore does not enjoy protection. Scanlan, supra note 2, at 1510. Professor Hesse adds that the Court failed to explain how the resident aliens' past activities met the Dennis test. Hesse, supra note 2, at 285 n.153.}

\footnote{Id. at 591-92.}
scope of first amendment protection to resident aliens as then applied to citizens, it clearly made no explicit recognition of this principle.\textsuperscript{118}

In \textit{Harisiades}, the Court also retreated from its brief characterization in \textit{Bridges} of deportation as a criminal punishment.\textsuperscript{119} Specifically, the Court's opinion in \textit{Harisiades} emphasized that deportation was a civil proceeding, and thus foreclosed any argument that the amended statute violated the ex post facto clause of the Constitution,\textsuperscript{120} which the Court traditionally had construed as applicable only to criminal proceedings.\textsuperscript{121} In addition, the Court in \textit{Harisiades} failed to address the issue of personal guilt even though the majority opinion in \textit{Bridges} indicated that only a meaningful relationship and conduct demonstrating that the alien shared the illegal aims of the group rendered the alien deportable under the Alien Registration Act of 1940.\textsuperscript{122} Nowhere in the \textit{Harisiades} opinion did the Court consider whether any of the resident aliens ever believed in the propriety of violent overthrow of the United States Government, let alone whether they actively sought to further that illegal aim.\textsuperscript{123} In effect, the Court concluded that because Congress had determined that the CPUSA promoted the overthrow of the government, any resident alien who had ever been a member of the CPUSA necessarily advocated that unlawful aim and could be deported.\textsuperscript{124}  

\begin{itemize}
\item \textsuperscript{118} While the precise scope of resident aliens' first amendment rights in the deportation context remains unclear, \textit{Harisiades} indicates that a less searching inquiry applies, and the case represents the latest Court decision on this issue. Scanlan, supra note 2, at 1510-11. See also Maslow, supra note 21, at 337 (recognizing an "ever widening gulf" between citizens' and resident aliens' first amendment protection).
\item \textsuperscript{119} See \textit{Bridges}, 326 U.S. at 147, 153; Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1947). Several commentators conclude that the permanent disabilities accompanying an order of deportation render it more drastic than many criminal penalties. See, e.g., Schuck, supra note 2, at 26-27; 2 C. GORDON & S. MAILMAN, supra note 5, § 4.6d; C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW § 4.1b (1985); Maslow, supra note 21, at 321.
\item \textsuperscript{120} U.S. CONST. art. I, § 9, cl. 3. See Hesse, supra note 2, at 285-86 (asserting that the Court's conclusion that ex post facto analysis had no application rested on an erroneous reading of prior cases and an artificial distinction between criminal penalties and deportation).
\item \textsuperscript{121} \textit{Harisiades}, 342 U.S. at 594-95. But see Maslow, supra note 21, at 330 (noting that the Court "brushed aside" four authoritative opinions holding the ex post facto clause applicable to civil legislation).
\item \textsuperscript{122} \textit{Bridges}. 326 U.S. at 142. Notably, the Court's opinion in \textit{Harisiades} omits any reference to \textit{Bridges} even for the purpose of distinguishing the prior case.
\item \textsuperscript{123} Perhaps the Court failed to address the issue because "there was no ground for concluding that their involvement had ever approached the level of advocacy, much less incitement." Scanlan, supra note 2, at 1518.
\item \textsuperscript{124} Scholars have criticized the Court's tolerance of guilt by association no matter how brief or innocent as "indubitably severe." 2 C. GORDON & S. MAILMAN, supra note 5, § 4.10a. See also C. GORDON & E. GORDON, supra note 119, § 4.16 (1985); Maslow, supra note 21, at 335 (recommending the elimination of mere membership in a totalitarian party as grounds for deportation).
\end{itemize}
Justice Douglas, author of the majority opinion in *Bridges*, filed a strong dissent in *Harisiades*.\(^{125}\) Emphasizing the absence of a distinction between citizens and noncitizens, Justice Douglas reasoned that the Bill of Rights does not allow Congress to label a former member of the CPUSA "forever dangerous," nor does it allow punishment by banishment for one's past political beliefs.\(^{126}\) In addition, he indicated that the position the majority opinion expressed in *Fong Yue Ting* that Congress has completely unfettered power to deport resident aliens conflicted with the constitutional guarantees of free speech and due process.\(^{127}\) Similarly, Justice Douglas argued that because congressional authority over deportation was implied from the express power to "establish an uniform Rule of Naturalization,"\(^{128}\) whereas an individual's free speech and due process rights are expressly granted,\(^{129}\) the express rights should take precedence over the implied congressional power to deport.\(^{130}\) Justice Douglas concluded that unless some demonstrable threat to national security existed, Congress exceeded its powers when it revoked at will an alien's constitutionally guaranteed rights.\(^{131}\)

The Supreme Court's opinion in *Galvan v. Press*,\(^{132}\) decided shortly after *Harisiades*, further illustrates the Court's reluctance to afford resident aliens' first amendment rights the same degree of constitutional protection as that of citizens. Although *Galvan* arose as a fifth amendment due process challenge, it nonetheless typified the Supreme Court's readiness to tolerate the restriction of resident aliens' association rights\(^{133}\) in the deportation con-

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\(^{125}\) *Harisiades*, 342 U.S. at 598-601 (Douglas, J. joined by Black, J., dissenting).

\(^{126}\) Id. at 598 (Douglas, J., dissenting). Cf. Aptheker v. Secretary of State, 378 U.S. 500, 510-11 (1964) (mere membership in the CPUSA is not conclusive proof that a person adheres to the unlawful aims of the group). See infra notes 153-69 and accompanying text. Maslow sees the statute's punishment of past beliefs as completely unnecessary and counterproductive. He writes that former members "are often the most effective exposer of [communist propaganda] because they have been immunized by disillusion. But as a result of the existing law, ex-Communists cannot reveal their past membership without running the risk of deportation." Maslow, supra note 21, at 336-37 (footnotes omitted). See also Hesse, supra note 2, at 287 (questioning the Court's unreasoned acceptance of an irrebuttable presumption of subversiveness based on past conduct); Nowak, supra note 4, § 16.6 (suppression of speech simply drives it underground and creates martyrs).

\(^{127}\) *Harisiades*, 342 U.S. at 598-99 (Douglas, J., dissenting). See also *Fong Yue Ting*, 149 U.S. at 705-06, 713.

\(^{128}\) U.S. Const. art. I, § 8, cl. 4.

\(^{129}\) See id. amends. I, V.

\(^{130}\) *Harisiades*, 342 U.S. at 599 (Douglas, J., dissenting). See also Nowak, supra note 4, § 16.7(a) (the right to free speech ranks first among equals).

\(^{131}\) *Harisiades*, 342 U.S. at 601 (Douglas, J., dissenting).


\(^{133}\) As early as 1937, the Supreme Court began to link the rights of free speech and assembly, and suggest that an implied right of association existed. De Jonge v. Oregon, 299 U.S. 353, 364 (1937). The Supreme Court expressly recognized the right of association as a right
text. Galvan presented the Supreme Court with another challenge to a statutory scheme whereby group membership rendered resident aliens deportable. The Internal Security Act of 1950 (the 1950 Act) gave the United States Attorney General the authority to deport any alien who, at any time before or after entry into the United States, had been a member of or affiliated with the CPUSA. Thus, the 1950 Act did not require current membership in the CPUSA. In addition, in the 1950 Act Congress statutorily defined the CPUSA as a group that advocated the violent overthrow of the United States Government.

Galvan entered the United States in 1918 and maintained continuous residence except for short, intermittent trips to his native country of Mexico. In 1950, the INS ordered Galvan deported on the grounds that, subsequent
to his entry, he had been a member of the CPUSA. Galvan challenged the order as a violation of his fifth amendment right to due process.

Using a deferential standard of review, the Court held that there was no violation of due process where Congress, pursuant to findings, made the determination that past or present membership in the CPUSA without more rendered a resident alien deportable. Accordingly, the Court rejected Galvan’s argument that the 1950 Act should reach only those aliens who knowingly joined the CPUSA with the intent to further its unlawful aims. Instead, the Court found that neither the language of the statute nor the congressional intent expressed in the legislative history distinguished between CPUSA members who joined the party knowing of its purpose to overthrow the Government by force and those members who joined unaware of its illegal aim. The Court stated that sufficient grounds for deportation existed where a resident alien willingly joined the CPUSA. The Court thereby condoned guilt by mere association as a constitutional grounds for deportation.

In a peculiar twist, the Court suggested in the latter portion of its Galvan opinion that the 1950 Act trammled upon fifth amendment due process rights because it failed to distinguish between knowing and innocent membership, especially when the alien committed the proscribed conduct before membership in the CPUSA constituted grounds for deportation.

140. Id. At his deportation hearing, Galvan denied any participation in the CPUSA, except as related to union activities. However, his prior admission of membership during pre-hearing interrogation and the testimony of a single witness convinced the Hearing Officer that Galvan had been a member from 1944 to 1946. Id. at 524.

141. Id. at 525.

142. Id. at 529. Specifically, the Court deferred to congressional findings that communism was a subversive, worldwide movement with the purpose of establishing a Communist dictatorship through covert and violent operations. The Court made no further analysis of a link between mere membership and promotion of the unlawful aims of the CPUSA. In view of the findings, the Court simply declared that the classification of past and present members as deportable was not “so baseless” that it violated due process. Id.

143. Id. at 529-30.

144. Id. at 525-26.

145. Id. at 526, 528. An assumption that Congress has completely unfettered authority to deem certain categories of aliens deportable underlies the Court’s unquestioning acceptance of the statute’s validity. Hesse, supra note 2, at 288.

146. Galvan, 347 U.S. at 528.

147. Justices Black and Douglas strongly contested this conclusion arguing instead that the government must show evidence that Galvan knew of the CPUSA’s illegal purposes and that he had an intent to further them. Id. at 532-34 (Black, J. and Douglas, J., dissenting).

148. Id. at 530-31. The dissenters emphasized that at the time of Galvan’s membership it was lawful to join the CPUSA and concluded that Galvan’s deportation constituted a punishment for his past political beliefs, which violated his fifth amendment due process rights. Id. at 532-34 (Black, J. and Douglas, J., dissenting). The INA of 1952, 8 U.S.C. §§ 1101-1157
Court also referred to its own recent extension of substantive due process as a limit on the exercise of all congressional powers, implying that such a constraint should also apply in the immigration context. Likewise, the Court characterized deportation as the near equivalent of criminal punishment, and suggested, therefore, that ex post facto analysis could apply to deportation statutes. Thus, the Court in *Galvan* impliedly recognized that earlier Supreme Court decisions rested on questionable analytical foundations. However, the Court remained unwilling to reverse the long established deferential review of deportation statutes.

After *Turner*, *Harisiades*, and *Galvan*, extensive precedent and legislative practices giving Congress exclusive, virtually unreviewable power to develop and implement immigration policies burdened the Court. The Supreme Court's decisions left the resident alien largely outside the protection of the first amendment. Furthermore, while the Court after *Harisiades* has not directly addressed a resident alien's first amendment challenge to a deportation order, the Court has continued to cite *Turner*, *Harisiades*, and *Galvan* in its most recent opinions addressing other aspects of immigration law. Thus, the Court's decisions upholding the constitutionality of ideological provisions for deportation remain binding precedent.

**C. The Gulf Between the Constitutional Rights Accorded Citizens and Resident Aliens Widens**

Contemporaneous with the Supreme Court's continued restriction of resident aliens' speech and association rights, the Court expanded various constitutional rights of citizens even where Congress based its restrictions of citizens' fundamental freedoms on national security interests. For exam-

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149. *Galvan*, 347 U.S. at 530.

150. *Id.* at 531.


152. *See Scanlan, supra* note 2, at 1508-09 (noting that the Court has recognized only "nominal" free speech and association rights). *See also T. ALEINIKOFF & D. MARTIN, supra* note 21, at 351.


154. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (first amendment right to receive Communist literature and similar information); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (Congress violated the equal protection component of fifth amendment due...
ple, in *Aptheker v. Secretary of State*,\(^{155}\) native born United States citizens who were members of the CPUSA challenged section 6 of the Subversive Activities and Control Act of 1950 (Subversive Activities Act)\(^{156}\) as violating their first amendment guarantees of free speech and association, and infringing their fifth amendment right to travel.\(^{157}\) The statement of congressional findings in the Subversive Activities Act indicated that Congress believed that a worldwide Communist movement existed in the 1950's. Congress also determined that the Communist movement's aim of achieving world domination posed a threat to the national security of the United States.\(^{158}\) The congressional findings further stated that travel by Communist Party members and agents furthered the objective of world domination.\(^{159}\) Thus, section 6 of the Subversive Activities Act made it unlawful to issue a passport to any member of a "Communist-action organization."\(^{160}\)

In *Aptheker*, the Court did not reach the merits of the CPUSA members' first amendment challenge, but struck down the statute as an overly broad, indiscriminate restriction on a citizen's right to travel, a right implicit in the liberty guaranteed by the fifth amendment.\(^{161}\) Recognizing that domestic laws and regulations made it illegal for a United States citizen to travel to certain foreign countries without a passport, the Court determined that section 6 effectively precluded travel by members of any Communist organization as defined by the Subversive Activities Act.\(^{162}\) Reasoning that a citizen could not be forced to surrender one constitutional right (freedom of association), to exercise another (the right to travel), the Court rejected the Government's argument that a citizen could restore his right to travel by relinquishing his membership in the proscribed group.\(^{163}\) The Court indi-

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158. 50 U.S.C. § 781 (statement of congressional findings).
159. *Id.*
160. *Id.* In relevant part, section 3(3) of the Subversive Activities Control Act of 1950 defined a "Communist-action organization" as:

(a) any organization in the United States (other than a diplomatic representative or mission . . . ) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operates primarily to advance the objectives of such world Communist movement . . . and

(b) any section . . . or cell of any organization defined in subparagraph (a) . . .

162. *Id.* at 507. *See also* 50 U.S.C. § 782.
icated that where a fundamental right is at stake, the legislature must narrowly draft its statute to achieve even a substantial, concededly legitimate end such as national security.\textsuperscript{164} The Court, therefore, determined that section 6 swept impermissibly broad because the provision made no distinction between citizens who knowingly joined and knowingly furthered the illegal aims of the CPUSA and unwitting members.\textsuperscript{165}

The Court recognized yet another flaw in the Subversive Activities Act, namely, its failure to recognize that the extent and the nature of a given member’s activities on behalf of the group indicated whether travel by that individual would result in the harm Congress intended to prevent.\textsuperscript{166} Therefore, contrary to the language of section 6, the Court concluded that mere membership was not conclusive evidence that a person adhered to the unlawful aims of a group, nor was it proof that a person posed a danger to national security.\textsuperscript{167} The Court noted that in hearings before the House Un-American Activities Committee prior to enactment of section 6, the Justice Department argued against branding as disloyal a member of a group based merely on the fact of membership, and characterized section 6 as unnecessary.\textsuperscript{168} The executive branch expressed a similar view that the use of less drastic measures which preserved individual freedoms would not compromise national security.\textsuperscript{169} Declaring that “precision must be the touchstone of legislation so affecting basic freedoms,”\textsuperscript{170} the Court determined that the overbroad language of section 6 could not be construed to avoid constitutional conflict, and thus struck down the statute as facially invalid.\textsuperscript{171}

Shortly after its decision of \textit{Aptheker}, the Court considered a challenge to the constitutionality of section 5 of the Subversive Activities Act of 1950\textsuperscript{172} in \textit{United States v. Robel}.\textsuperscript{173} Section 5 made it unlawful for any member of a Communist action group\textsuperscript{174} to hold any employment in any defense facil-
Robel, a United States citizen and member of the CPUSA, continued to work as a machinist at a Seattle, Washington shipyard one year after the Secretary of Defense, in accordance with his statutory authority, declared the shipyard a defense facility. The government charged Robel with "unlawfully and willfully engag[ing] in employment at the shipyard with knowledge of the outstanding order against the Party and with knowledge and notice of the shipyard's designation as a defense facility . . . ."  

Unlike the deference the Court accorded to early congressional exercises of foreign affairs and national security powers, the Court in Robel declared that Congress' passage of a particular statute pursuant to its war power or in the name of national defense did not free Congress from constitutional limitations. Expressing a position remarkably similar to Justice Douglas' dissent in Harisiades, the Court recognized that national defense included the defense of the individual's rights of free speech and association, and that unnecessary derogation of those rights in the name of national security subverted the public interest.

Thus, while the Court conceded that the Federal Government had a substantial interest in safeguarding the nation's defense facilities, the Court also stated that Congress remained obliged to draft narrowly the statute so as to achieve its goal without infringing first amendment rights. Accordingly, in Robel, the Supreme Court concluded that section 5 was fatally flawed in its failure to distinguish between an individual who joined a Communist group cognizant of the group's unlawful aims and actively sought to promote those ends, and an individual who unknowingly joined a Communist front organization without any intent to further its illegal aims. The Court determined that section 5 stifled even the legitimate exercise of first amendment rights because it imputed guilt by mere association.

The Court further noted that less drastic alternatives existed in legislation that already proscribed the conduct Congress sought to deter by this provi-

175. 50 U.S.C. § 784.
177. Id. at 260-61.
178. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 705-06, 713 (1893); United States ex rel. Turner v. Williams, 194 U.S. 279, 294 (1904).
179. Robel, 389 U.S. at 263-64.
182. Id. at 264, 268 n.20.
183. Id. at 265-66.
184. Id. at 265.
sion, and that the implementation of screening processes by the Department of Defense ensured that those individuals with access to sensitive information did not pose security risks. The Court, therefore, held that the overbroad, indiscriminate reach of section 5 rendered it a violation of the first amendment right of association. Thus, the Court determined that mere association with a radical group did not constitute proof that a citizen shared the unlawful aims of the group. In upholding Robel’s first amendment challenge, the Court restricted Congress’ authority to declare citizen members of a radical group subversive based on the mere fact of membership.

In concurrence, one Justice added that while Congress ordinarily can make broad delegations of power to the executive branch to implement general directives, and realistically must do so, the Constitution limits Congress’ license to delegate power where the statute prescribes criminal penalties and implicates fundamental liberties. The concurrence also indicated that Congress neglects its duty to formulate clear, precise policies when it grants unfettered discretion to executive agencies, which are frequently less accountable to the people than is Congress.

Two Justices dissented in Robel, declaring that the Court had overstepped its authority and substituted its own judgment for that of Congress in deciding which individuals and groups constitute security threats to the United States. The dissenters implicitly condoned the statute’s substitution of guilt by association for a finding of personal guilt. The dissenting Justices reasoned that Congress deserved the utmost deference where, as here, Congress made extensive findings regarding the threat to national security posed by the world Communist movement and the practices the movement used to

186. Robel, 389 U.S. at 267 nn.18-19. Early in the opinion, the Court also observed that President Truman had vetoed the Subversive Activities and Control Act based upon advice he received from the Departments of Justice, Defense, and State, as well as the CIA, concluding that the bill would affect adversely their security and intelligence missions. Id. at 259 n.1.
187. Id. at 261-62. However, the recognition that an individual possesses constitutionally protected rights and liberties does not prevent Congress or the executive branch from regulating the exercise of those rights to protect legitimate public interests. See, e.g., Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (rejecting a first amendment challenge to the authority of the executive branch to deny passports to U.S. citizens for travel in Cuba as a necessary restriction on freedom of action). See also Comment, supra note 8, at 1919-21 (application of prevailing first amendment standards of review affords adequate protection of national security interests).
188. Robel, 398 U.S. at 274-75 (Brennan, J., concurring).
189. Id. at 276-77.
190. Id. at 285, 288 (White, J., dissenting). Justice White’s opinion was joined by Justice Harlan.
191. Id. at 287.
carry out its objective of establishing worldwide domination. The dissenters concluded that on the basis of these findings, Congress need not await the realization of the threat that Communist action groups posed before taking action against individual members of Communist organizations by severely restricting their freedom of association.

II. THE LEGISLATIVE EXPANSION OF THE SCOPE OF RESIDENT ALIENS' FIRST AMENDMENT RIGHTS AND THE RESPONSE OF THE FEDERAL COURTS

A. The Temporary Elimination of Deportations Based on Ideology: Section 901 of the Foreign Relations Authorization Act

Recently, Congress and the lower federal courts have begun to realign the scope of first amendment protections afforded resident aliens with that guaranteed to citizens. In 1987, Congress enacted temporary legislation, section 901 of the Foreign Relations Authorization Act (FRAA), which partially eliminated ideology as a grounds for deportation. In relevant part, section 901(a) provides that "[n]otwithstanding any other provision of law, no alien may be . . . subject to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States." However, section 901(b) denies this protection to several categories of aliens. Section 901(a) does not apply to any alien who the executive branch finds poses a threat to foreign policy or national security, or any alien who the Attorney General or consular officials reasonably believes has engaged in, or is likely to engage in, a terrorist activity after entry. In addition, members of the Palestine Liberation Organization (PLO) fall outside the protection of section 901(a) based strictly upon their membership in the

192. Id. at 285-86.
193. Id. at 287.
194. FRAA, supra note 9, § 901, 101 Stat. 1331, 1399-1400.
195. Id. As originally enacted in 1987, section 901(a) applied only to deportations based on activities occurring during 1988. The 1988 amendment extends the application of section 901 to deportation proceedings instituted between December 31, 1987 and January 1, 1991. See Act of Oct. 1, 1988, Pub. L. No. 100-461, 101 Stat. 2268. The legislative history of section 901 emphasized that the protection afforded to aliens was based solely upon the statute, and that section 901 did not confer a constitutional right. S. REP. NO. 75, 100th Cong., 1st Sess. 5, reprinted in 1987 U.S. CODE CONG., & ADMIN. NEWS 2314, 2425.
196. FRAA, supra note 9, § 901(b)(1) - (2), 101 Stat. at 1399-1400.
197. Id.
PLO. Congress also amended section 901(a) in 1988 to restrict its application to nonimmigrant aliens, leaving immigrant aliens fully exposed to deportation based on ideological grounds.

Rafeedie v. INS, one of the first cases construing the unamended version of section 901, presented the question of whether the institution of summary exclusion procedures against Fouad Rafeedie, a resident alien allegedly affiliated with the PLO, violated his rights under Section 901(a). In 1975, Rafeedie, an eighteen-year-old native of Jordan, immigrated lawfully to the United States. After his initial entry, he actively promoted Palestinian and Arab-American causes, writing articles and making radio and television appearances, which were often critical of United States policies in the Middle East.

In April 1986, Rafeedie obtained a reentry permit from the INS to visit his ailing mother in Cyprus and shortly thereafter obtained a visa to Syria from the Syrian Embassy in Washington, D.C. Suspicious of Rafeedie's purpose in traveling, the INS questioned him and two alleged traveling companions, Tarak Mustafa and Sulieman Shihadeh, upon their return to the United States. According to the INS and FBI agents who questioned him, Rafeedie denied knowing Mustafa and Shihadeh and denied any knowledge of the Popular Front for the Liberation of Palestine (PFLP) or the

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198. FRAA, supra note 9, § 901(a)(3), 101 Stat. at 1399-1400. See also 22 U.S.C. § 2691(c) (1988) (PLO members ineligible for nonimmigrant visas); 22 U.S.C. §§ 5201-5203 (congressional findings regarding the terrorist activities of the PLO and its affiliates; prohibitions regarding the activities of individuals connected with the PLO).

199. The INA of 1952 defines nonimmigrant aliens as representatives of foreign governments and international organizations, aliens temporarily in the United States for work or study who have no intent to abandon their foreign residences, and aliens in transit through the United States. 8 U.S.C. § 1101(a)(15) (1988).


201. FRAA, supra note 9, § 901, 101 Stat. at 1399-1400.


203. Although the INS contended that Rafeedie must exhaust his administrative remedies, the district court held that Rafeedie had standing to bring suit. The court reasoned that constitutional questions are beyond the scope of administrative proceedings, especially where one challenges the very application of those proceedings, and further noted that recourse to judicial review is presumed when constitutional questions arise. Rafeedie, 688 F. Supp. at 738-40. See generally 3 C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE §§ 8.4a, 8.4b (1989) (standing contingent upon exhaustion of remedies).

204. Rafeedie, 688 F. Supp. at 731.

205. Id. at 732. Rafeedie claimed that INS initially informed him that he was ineligible for citizenship because of his political beliefs and associations, then later reversed its decision. The court noted that INS never completed his application for naturalization or made a final determination of his eligibility. Id. at 732, & n.7.

206. Id. at 732.

207. Id. at 732-33.
Palestine Youth Organization (PYO). Shihadeh and Mustafa, however, admitted knowing Rafeedie, acknowledged attending a meeting of the PYO, and admitted that the PYO was affiliated with the PFLP. In addition, the agents confiscated photographs and literature linking the three individuals to the PYO.

In March 1987, after the INS made repeated requests to Rafeedie to appear at its district office to substantiate his claimed purpose in traveling abroad, the INS formally charged Rafeedie with exclusion under sections 212(a)(27) and (28)(F) of the Immigration and Nationality Act of 1952 (INA). In essence, section 212(a)(27) renders an alien excludable if a consular official or the Attorney General knows or reasonably believes that the alien will engage in activities adverse to the public interest or security of the United States. Section 212(a)(28)(F) calls for the exclusion of aliens who advocate the violent overthrow of the United States Government or other unlawful action including the destruction of property and sabotage, or who are members or affiliates of any group which advocates those positions.

208. Id. at 733.
209. Id.
210. Id.
211. Id. at 733-34. The relevant portions of the INA provide:

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States . . . .

(28) Aliens who are, or at any time have been, members of any of the following classes:

. . . .

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer . . . . of the Government of the United States or of any other organized government . . . . or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage . . . .

(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or control or the overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50 . . . .

213. Id. § 1182(a)(27), (28). For the text of these provisions, see supra note 211.
After assignment of Rafeedie's case to an immigration judge, the INS successfully moved to close the immigration hearing and instituted summary exclusion procedures pursuant to section 235(c) of the INA against Rafeedie. The INS took summary action based on confidential information, the disclosure of which the INS alleged would undermine national security. Specifically, the INS asserted that classified information indicated that Rafeedie was a high ranking member of the PFLP who had fought for the PFLP in Lebanon in 1982. Based on such information, the immigration judge determined that Rafeedie's readmission to the United States was adverse to national security. Rafeedie, who continued to deny any affiliation with the PLO, or the PFLP, or any involvement in terrorist activities, challenged the use of such summary procedures against resident aliens as a deprivation of due process and free speech rights.

In analyzing Rafeedie's claim that the application of the INA summary procedures violated his first amendment rights of free speech and association, the United States District Court for the District of Columbia first considered whether Rafeedie's activities and affiliations fell within the protection of section 901 of the FRAA. As noted above, section 901 does not extend to any alien who holds membership in or acts as a member of any organization, and thereby eliminates any constitutionally permissible exercise of free speech and association as a legitimate ground for deportation. However, the protection of section 901 does not extend to any alien who holds membership in or acts as a member of any organization.

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214. 8 U.S.C. § 1225. The relevant portion of section 1225(c) provides that:
[i]f the Attorney General is satisfied that the alien is excludable under [8 U.S.C. §§ 1182(a)(27), (28) or (29)] on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may . . . order such alien to be excluded and deported without any inquiry or further inquiry . . . .
8 U.S.C. § 1225(c).
216. Id. The Reagan administration increased the use of ideological provisions for exclusions and deportations. Scanlan, supra note 2, at 1496.
218. Id.
219. Id. at 731, 737. Rafeedie did not deny his association with the PYO. Id. at 752.
220. The court concluded that Rafeedie could not base his challenge to section 1225(c) on statutory construction grounds because the provision by its terms clearly applies to resident as well as entrant aliens. Notably, the court read several Supreme Court decisions as grounded in constitutional law, not statutory construction, despite language in the opinions to the contrary. Id. at 743. See Comment, supra note 8, at 1909. The INA of 1952 defines the exclusive procedures by which an alien can seek judicial review of a deportation order. 8 U.S.C. § 1105(a) (1982). See also 3 C. Gordon & S. Mailman, supra note 203, § 8.9Ab (1989).
221. Rafeedie, 688 F. Supp. at 751. See also FRAA, supra note 9, § 901, 101 Stat. at 1399.
222. Rafeedie, 688 F. Supp. at 751.
representative of the PLO or who engages in any statutorily defined terrorist activity.\footnote{223}

Relying on Supreme Court precedent,\footnote{224} the district court reasoned that the government bore the burden of showing that an alien joined a group, even a group that advocates violence or terrorism, knowing of its unlawful objectives and intending to act in furtherance of those objectives.\footnote{225} The court concluded that mere membership in the PFLP would not strip an alien of the first amendment's protection of speech and association.\footnote{226} The court based its conclusion on the principle that deportation statutes must be construed in the alien's favor,\footnote{227} and that section 901(a) does not expressly include groups affiliated with the PLO while other sections of the FRAA explicitly do cover such groups.\footnote{228} Conversely, the court recognized that the legislative history of section 901 supported the INS's claim that Rafeedie's fund-raising and recruiting activities for the PFLP barred him from invoking the protection of section 901(a).\footnote{229}

In view of the important governmental and individual interests at stake in Rafeedie, the court did not consider whether the INS excluded Rafeedie based on protected, innocent activities or because of legitimately proscribed terrorist related activities. Rather, the Rafeedie court stated that the court record required development on this issue.\footnote{230} The district court further determined that both parties should present evidence on the question of whether the government or the alien has the burden of proof in showing that a particular activity falls within the protection of section 901.\footnote{231} Accordingly, the district court granted a preliminary injunction to Rafeedie to enable the parties to prepare arguments on both issues.\footnote{232}

The court's opinion in Rafeedie also noted that subsequent to denying Rafeedie reentry, the INS released Rafeedie on parole.\footnote{233} Moreover, the

\footnote{223. FRAA, supra note 9, § 901(b)(2), 101 Stat. at 1400.}
\footnote{224. Rafeedie, 688 F. Supp. at 752. The Court cited Brandenburg v. Ohio, 395 U.S. 444 (1969) (the first amendment protects advocacy of subversive ideas so long as the speaker does not intend the speech to incite imminent lawless action and the speech is unlikely to produce such action). See also NOWAK, supra note 4, § 16.15.}
\footnote{225. Rafeedie, 688 F. Supp. at 752.}
\footnote{226. Id. at 752-53.}
\footnote{227. Lenon v. INS, 527 F.2d 187, 193 (2d Cir. 1973) (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1947)).}
\footnote{228. Rafeedie, 688 F. Supp. at 752-53. See also FRAA, supra note 9, § 901, 101 Stat. at 1399-1400.}
\footnote{230. Rafeedie, 688 F. Supp. at 753-54.}
\footnote{231. Id. at 753.}
\footnote{232. Id. at 753-54.}
\footnote{233. Id. at 754.}
court emphasized that in the two years following that release the INS never claimed that Rafeedie engaged in any activity detrimental to national interests.\textsuperscript{234} Thus, the court concluded that the INS must not have considered Rafeedie a security threat.\textsuperscript{235}

The government appealed the district court's decision to grant a preliminary injunction to Rafeedie.\textsuperscript{236} Rafeedie also cross appealed the district court's denial of his motion for summary judgment.\textsuperscript{237} The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's injunctive relief, holding that the government could apply INA summary procedures only to exclude entrant aliens and not to deny reentry to resident aliens, such as Rafeedie.\textsuperscript{238} However, it indicated that the INS could proceed to deny Rafeedie reentry pursuant to formal exclusion procedures of the INA.\textsuperscript{239} The Court of Appeals also remanded the case to consider whether the procedural protections of the INA exclusion provisions violate fifth amendment due process requirements.\textsuperscript{240} The appellate court did not mention Rafeedie's first amendment claim. To date, the district court has made no final decision in Rafeedie, leaving open the question of the scope of free speech and association rights protected under section 901(a).

B. The Federal Courts Seize the Opportunity to Recognize Resident Aliens' Full First Amendment Protection

The decision of the United States Court of Appeals for the District of Columbia Circuit, in \textit{Palestine Information Office v. Shultz}, forcefully confirmed that according resident aliens the same speech and association rights as citizens does not undermine legitimate national security interests.\textsuperscript{241} Although the case did not involve a challenge to a deportation order, the court's discussion of the competing interests of the parties demonstrates that courts can ably apply the same standard of review to citizens' and resident aliens' first amendment claims.

The Palestine Information Office (PIO) operated in Washington, D.C. from 1978 until 1987 with an eight-member staff composed of United States citizens and resident aliens seeking to promote Palestinian views on Middle

\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} Rafeedie v. INS, 880 F.2d 506, 507 (D.C. Cir. 1989).
\textsuperscript{237} \textit{Id.; see also Rafeedie}, 688 F. Supp. at 753-54.
\textsuperscript{238} Rafeedie, 880 F.2d at 525.
\textsuperscript{239} \textit{Id.; see also} 8 U.S.C. § 1226 (1988) (delineating formal procedures for exclusion).
\textsuperscript{240} Rafeedie, 880 F.2d at 525.
\textsuperscript{241} 853 F.2d 932 (D.C. Cir. 1988).
East issues. Although the PIO’s director maintained that the PLO did not control the office, the PIO did register each year with the Department of Justice as an agent of the PLO, and the director conceded that he did discuss Middle East issues with the PLO on a regular basis. Additionally, the PLO financed at least part of the PIO’s 1987 budget. As a result, the State Department in 1987 designated the PIO a foreign mission acting on behalf of the PLO, and after expressly referring to United States concern over terrorism, decided that the office must cease functioning as a mission to protect United States foreign policy interests. The PIO and its director challenged the State Department action as an infringement of the free speech and association rights of PIO members.

The court began its analysis of the closure order in Shultz by citing the extensive control which the executive and legislative branches of government possess in matters relating to the conduct of foreign relations, especially where the two branches jointly exercise such power. The court sustained the State Department’s authority under the Foreign Missions Act (FMA) to designate the PIO a foreign mission, and found that the PIO did operate as a representative of the PLO, thereby upholding the State Department’s determination on that factual question.

Furthermore, the court found that in acting as a mission, the PIO’s activity comprised both speech and conduct elements. Accordingly, the court applied a less stringent standard of review which the Supreme Court had previously established for cases in which the regulated activity included both speech and conduct components. Specifically, the court inquired whether the government’s interest in regulating the conduct element, representation of a foreign entity, justified the incidental restriction on speech promoting Palestinian issues. Reiterating the established principle that the government’s interest in regulating the conduct element, representation of a foreign entity, justified the incidental restriction on speech promoting Palestinian issues.

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242. Id. at 935.
244. Shultz, 853 F.2d at 935.
245. Id. The PIO’s total budget for 1987 was $350,000. Id.
246. Id. at 935-36.
247. Id. at 936. Plaintiffs also challenged the State Department’s authority under the Foreign Missions Act to designate the PIO a foreign mission, and on Fifth Amendment due process grounds. Id.
248. Id. at 934, 937.
249. Id. at 937-39.
250. Id. at 939.
251. United States v. O’Brien, 391 U.S. 367, 377 (1968) (holding that the regulation must lie within the government’s constitutional power, further an important or substantial government interest, which is unrelated to restriction of free speech, and there must be no less drastic alternative).
252. Shultz, 853 F.2d at 939-40.
ment enjoys broad power in the area of foreign relations, the court stated that closing a foreign mission certainly falls within the government’s constitutional powers.\textsuperscript{253} The court reasoned that the mission’s closing only required the PIO to cease functioning as a foreign agent of the PLO and did not restrict the individuals involved from advocating the Palestinian cause. Therefore, the action only incidentally restricted speech.\textsuperscript{254}

The court also acknowledged the government’s substantial, nonspeech related interest in closing the missions of foreign entities to which the United States does not extend diplomatic recognition.\textsuperscript{255} In addition, the court found that the State Department had available to it no less drastic alternatives to closing the PIO by which to foreclose the unauthorized representation of the PLO.\textsuperscript{256} The court, therefore, concluded that the State Department action taken pursuant to the FMA did not unduly impair the plaintiffs’ exercise of free speech.\textsuperscript{257}

In considering the PIO’s free association claim, the court held that the closing of the mission did not violate the individuals’ association rights because they remained free to associate together in order to promote the same causes and positions that they advocated prior to closing.\textsuperscript{258} Moreover, recognizing that the closing order prevented the individuals from representing the PLO and thereby restricted their right to associate with the PLO, the court stated that the right to free association is not absolute and does not include the right to represent a foreign entity.\textsuperscript{259} The court reasoned that even if the closing incidentally impaired association rights, the government’s strong interest in demonstrating a clear policy against international terrorism justified the restriction.\textsuperscript{260}

Notably, the court did not consider the question of whether the State Department’s action to close the PIO, so integrally related to the conduct of foreign affairs, was immune from review. The court likewise did not apply a different standard of review for the first amendment claims of the resident aliens and United States citizens. Rather, the court showed great deference to the government’s policy decision regarding nonrecognition of the PLO, yet remained willing and able to balance the state and individual interests at stake in evaluating the State Department’s action. Thus, the court rejected a

\begin{footnotes}
\footnote{253. Id. at 940.}
\footnote{254. Id. at 939.}
\footnote{255. Id. at 940.}
\footnote{256. Id.}
\footnote{257. Id.}
\footnote{258. Id.}
\footnote{259. Id. at 940-41.}
\footnote{260. Id. at 941-42.}
\end{footnotes}
blanket characterization of executive and congressional exercises of authority in the area of foreign affairs as political questions.

Similarly, once the federal courts began to subject provisions of the INA to meaningful review, various provisions of the Act could not withstand the scrutiny of first amendment challenges. For example, in *American-Arab Anti-Discrimination Committee v. Meese* the INS charged two resident aliens with deportation pursuant to the 1952 INA based on the aliens' participation in the Popular Front for the Liberation of Palestine (PFLP). In response, the resident aliens facially challenged several provisions of the INA and section 901 of the FRAA as contrary to the first amendment. Six other resident aliens and several organizations joined the suit as plaintiffs.

The relevant sections of the INA provide for the deportation of any resident alien who at any time after entry advocated the doctrines of world communism, the unlawful destruction of property, the opposition to all organized government, or who were members or affiliates of a group that taught or advocated any of those doctrines. Section 901(b) of the FRAA denies constitutional protection to several classes of aliens including aliens who pose a threat to national security or foreign policy interests, aliens who consular officials or the United States Attorney General reasonably believe have engaged in or are likely to engage in terrorist activity (either as individuals or as members of an organization), and aliens who are members of the PLO. Section 901(a) as amended affords constitutional protection only to nonimmigrant aliens.

The court in *American-Arab* began its opinion in a remarkable manner, holding that aliens within the United States enjoy the full protection of the first amendment, and that notwithstanding the government's plenary power over immigration, this protection does not vanish in the deportation con-
Moreover, the court found that the resident aliens were entitled to first amendment guarantees independent of section 901(a). Accordingly, the court proceeded to determine the constitutionality of the relevant provisions of the INA by applying traditional first amendment principles in its review without differentiating between the scope of protection enjoyed by resident aliens and citizens.

First, the court turned to the issue of the plaintiffs' standing, noting that in a preenforcement first amendment challenge, the law must expose the challenger to a real threat of prosecution which both subjectively and objectively chills the challenger's exercise of first amendment rights. Factors the court considered in making this determination included "the government's interest in enforcing the challenged statute, along with its past enforcement patterns, and the party's interest in engaging in the prohibited activity." The court noted that the government had pursued past prosecutions and had not disavowed an intent to enforce the provisions in the future. Thus, the court determined that the government possessed a strong, continuing interest in prosecuting members of the PFLP under the INA's ideological deportation provisions.

In addition, the court found that the plaintiffs evidenced a genuine interest in participating in the PFLP, and that but for the challenged provisions, they would engage in the proscribed expressive activities. With respect to the two resident aliens charged with deportation, the court held that the two resident aliens lacked standing to challenge the provisions because they had not exhausted their administrative remedies. However, the court recognized the standing of the organizational plaintiffs and the six other resident aliens. Furthermore, the court ruled that the plaintiffs did not have to be under a final order of deportation in order to make a facial challenge to a

271. American-Arab, 714 F. Supp. at 1063. Cf. Hesse, supra note 2, at 282-87 (Haristiades marks the divergence in the standards of review applicable to resident aliens' and citizens' first amendment claims). See also 2 C. GORDON, IMMIGRATION LAW AND PROCEDURE § 4.3d n.27c (Cum. Supp. Aug. 1989) (noting the district court's ruling that citizens and aliens enjoy the same first amendment protection and concluding that an appeal is inevitable).
273. Id. at 1063, 1079-82.
274. Id. at 1064-65.
275. Id. at 1066.
276. Id. at 1066-68.
277. Id. at 1067. Although some commentators have observed a decreased use of the ideological provisions for deportation over the last two decades, Scanlan notes that the Reagan administration stepped up the use of ideological provisions for deportation. Scanlan, supra note 2, at 1496.
279. Id. at 1064.
280. Id. at 1070-71.
statute which potentially renders them deportable. Instead, the court may review the law even if the two resident aliens who lacked standing were currently involved in deportation proceedings in another forum.\textsuperscript{281} The court emphasized that its concurrent review was appropriate because a delay in hearing the case could result in suppression of protected speech.\textsuperscript{282} Thus, influenced by the fact that the resident aliens' first amendment interests were at stake, the \textit{American-Arab} court resolved the question of standing in favor of the organizational plaintiffs and the six resident aliens who were not charged under the challenged provisions.\textsuperscript{283}

Next, the court addressed the merits of the plaintiffs' claim that the INA provisions violated their first amendment rights. Surprisingly, the court considered the notion that resident aliens enjoy first amendment protection equal in scope to the protection afforded United States citizens a long settled issue.\textsuperscript{284} The court relied primarily upon the concurrence in \textit{Bridges v. Wixon}\textsuperscript{285} and an expansive reading of the Supreme Court's opinion in \textit{Harisiades v. Shaughnessy}\textsuperscript{286} to reach this conclusion.\textsuperscript{287} In particular, the \textit{American-Arab} court's analysis of \textit{Harisiades} focused solely on the Supreme Court's cursory reference to prior precedent\textsuperscript{288} to conclude that the Supreme Court had applied the same standard of review then existing for a citizen's first amendment challenge.\textsuperscript{289} The district court's reading of \textit{Harisiades} attributed a much stronger commitment to the first amendment rights of aliens than the full \textit{Harisiades} opinion indicated.\textsuperscript{290}

The district court in \textit{American-Arab} also distinguished the Supreme Court's decision in \textit{Galvan v. Press}\textsuperscript{291} as not presenting a first amendment claim.\textsuperscript{292} Yet, the Supreme Court in \textit{Galvan} upheld mere membership in a proscribed organization as constitutional grounds for deportation.\textsuperscript{293} The \textit{Galvan} decision, therefore, had adverse implications for future defendants'
first amendment challenges to similar provisions. The district court also distinguished other Supreme Court decisions in which the Court applied a deferential standard of review to ideological provisions for deportation. With respect to those decisions, the district court stated that none of the cases involved a first amendment challenge in a deportation setting. Through selective use of precedent, the district court concluded that citizens and resident aliens possess the same first amendment freedoms.

Having thus rejected the government's argument that resident aliens in a deportation context do not enjoy the same first amendment protection as citizens, the court stated that no rational reason existed to subject resident aliens to deportation for advocating certain positions while allowing citizens and United States corporations to advocate the same positions. Likewise, the court explicitly recognized that aliens contribute to the marketplace of ideas valued by the first amendment and that to restrict resident aliens' rights in a deportation setting diminished the integrity of their rights in all contexts. Accordingly, the court determined that first amendment principles do not vary for a resident alien challenging a statutory scheme. Rather, what will vary is whether the government interest under a given set of circumstances outweighs the claimed first amendment interest.

Furthermore, in view of the inapplicability of the ex post facto clause, the court considered recognition of the full constitutional scope of resident aliens' first amendment rights essential to protect their free speech rights. Without the full protection of the first amendment, the government could enact a statute rendering aliens deportable for past speech, and as a result chill free expression because an alien could not predict whether his speech might subject him to deportation in the future.

Additionally, the court determined that application of the same first amendment review for both citizens and resident aliens adequately protected the substantial interests of the government in the areas of national security and foreign policy. The court specifically noted that prevailing first amendment principles would allow the government to deport aliens for ad-

294. American-Arab, 714 F. Supp. at 1075. The Government argued that aliens do not possess such rights in the deportation context. Id. See Hesse, supra note 2, at 289.
296. Id.
297. Id. at 1075-76.
298. Id. at 1079.
299. Id. at 1081.
300. Id. at 1082 n.18.
301. Id. at 1081-82.
302. Id. at 1082.
303. Id. n.18.
vocating unlawful conduct or even for affiliation with a group, provided that
the government showed that such affiliation presented a legitimate threat.\textsuperscript{304}

The court then analyzed whether the deportation provisions of the INA
were overbroad. Relying upon the Supreme Court’s established test for
overbreadth,\textsuperscript{305} the court first addressed the question of whether the provi-
sions reached a substantial amount of constitutionally protected activity.\textsuperscript{306}
The court noted that the INA provisions at issue went far beyond prohibit-
ing advocacy “‘directed to inciting or producing imminent lawless action
and... likely to... produce such action.’”\textsuperscript{307} In fact, the court found that
the provisions “proscribe almost exclusively” protected activity through the
broad curtailment of dissemination and possession of literature that esp-
poused prohibited ideas.\textsuperscript{308}

Reasoning from prior Supreme Court decisions,\textsuperscript{309} the court stated that
Congress could not constitutionally equate advocacy or teaching of a pro-
scribed doctrine with incitement to unlawful action.\textsuperscript{310} The court further
noted that the INA provisions impermissibly imputed guilt by mere associa-
tion, and in this manner reached a substantial amount of innocent, protected
free speech and association.\textsuperscript{311} As a result, the court held each of the chal-
 lenged INA provisions facially invalid.\textsuperscript{312} However, the court did not
address the constitutionality of section 901, having decided that all aliens
within the United States enjoy constitutional protection independent of that
statute’s provisions. Thus, whether Congress can constitutionally limit the
scope of first amendment protection accorded to immigrant aliens based on
mere association remains open to speculation.

C. The Uncertain Status of Resident Aliens’ First Amendment Freedoms

The Supreme Court’s initial review of United States immigration law
firmly established a deferential analysis of deportation statutes. The Court
declared that Congress possessed an inherent power, derived from interna-

\textsuperscript{304} Id.

\textsuperscript{305} Id. at 1082-83. See NOWAK, supra note 4, § 16.8 (noting that an overbroad statute
reaches constitutionally protected activities as well as activities which legislatures legitimately
can proscribe).

\textsuperscript{306} American-Arab, 714 F. Supp. at 1083.

\textsuperscript{307} Id. at 1082-83 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)); see also
NOWAK, supra note 4, § 16.15.

\textsuperscript{308} American-Arab, 714 F. Supp. at 1083.

\textsuperscript{309} Id. Specifically, the district court relied upon the standards of review the Supreme
Court set forth in Noto v. United States, 367 U.S. 290 (1961), and Yates v. United States, 354

\textsuperscript{310} American-Arab, 714 F. Supp. at 1083.

\textsuperscript{311} Id. at 1083-84.

\textsuperscript{312} Id. at 1084.
tional law, to deport resident aliens. The early Court opinions also charac-
terized congressional exercise of the power to deport as a political question
and thus virtually immune from judicial review and constitutional con-
straints. Accordingly, congressional enactments of deportation provisions
based on ideological association escaped meaningful judicial review.

Only recently, Congress granted free speech and association rights to cer-
tain classes of aliens, and almost immediately thereafter began to constrict
those freedoms. However, in the last two years, two federal courts have
recognized the full constitutional scope of resident aliens' first amendment
rights, independent of any statutory grant from Congress. Thus, the stan-
dard of review of resident aliens' first amendment claims is currently in a
state of flux.

III. RESIDENT ALIENS: STRANGERS TO THE FIRST AMENDMENT

A. The Absence of a Rationale for Deferential Review of United States
   Immigration Law

A false premise supports the Court's excessively deferential review of im-
migration law. The Court in Fong Yue Ting v. United States\(^{313}\) presumed
that Congress had absolute power over deportation derived from the inher-
et powers of sovereign nations to control the presence of foreigners within
their borders.\(^ {314}\) Assuming that the majority's interpretation of interna-
tional law principles was correct,\(^ {315}\) this conclusion nonetheless ignored the
fact that the Constitution imposes limits on Congress' powers, express and
implied, in the realm of international affairs. Thus, contrary to the implicit
assumption in Fong Yue Ting,\(^ {316}\) the fact that Congress possesses a given
power does not resolve the question of whether Congress has exercised its
power in a manner consistent with the Constitution.\(^ {317}\) Nonetheless, the
Court's earliest decisions established that the constitutional guarantee of due
process provided no protection to resident aliens faced with deportation, and
also set a dangerous precedent for future first amendment challenges.

\(^{313}\) 149 U.S. 698 (1893).
\(^{314}\) Id. at 698, 705-07, 713.
\(^{315}\) Id. at 732-63 (Brewer, J., Field, J., and Fuller, J., dissenting). See also Scanlan, supra
note 2, at 1499-1500.
\(^{316}\) Fong Yue Ting, 149 U.S. 698.
\(^{317}\) See Schuck, supra note 2, at 14; Hesse, supra note 2, at 282, 287. See also American-
Arab, 714 F. Supp. at 1077-82.
B. The Extension of Deferential Review to First Amendment Challenges in the Deportation Context

Without further analysis of the presumption that Congress possessed plenary power over deportation, the Court extended its deferential review of resident aliens' first amendment challenges to deportation orders. After the Supreme Court declared that Congress had free reign over immigration, the Court further presumed in *United States ex rel. Turner v. Williams* that legislative enactments in the area of immigration were simply policy decisions. The Court, therefore, labeled the ideological grounds for deportation unreviewable political questions. Thus, in *Turner*, the Court permitted Congress to decide which ideas were inimical to the public interest and to render resident aliens who held such ideas deportable.

The Court's subsequent decision in *Bridges v. Wixon* reflected a temporary departure from the Court's absolute deference in reviewing immigration law. The Court narrowed mere affiliation as a ground for deportation by requiring that the government demonstrate that Bridges had engaged in meaningful association with the CPUSA and that he shared its unlawful aims. The Court also equated deportation with severe criminal punishment. Yet, the Court's decision in *Bridges* represented a short-lived, incomplete change in the Court's position regarding Congress' plenary power over immigration matters. Moreover, a majority of the Court in *Bridges* primarily based its conclusion on statutory construction, reflecting its hesitancy to afford a resident alien's free speech and association rights full constitutional protection. Only Justice Murphy's concurrence strongly supported unequivocal recognition of resident aliens' first amendment freedoms.

In contrast, the Court's later opinion in *Harisiades v. Shaughnessy* typified its extreme deference towards legislative decisions infringing upon first amendment freedoms in the deportation field. Again, the Court declared that Congress could revoke at will the resident alien's right to remain in the United States. The Court also condoned guilt by mere association, no matter how innocent or brief the resident aliens' association with a legislatively proscribed group. *Harisiades* marked the Court's permanent retreat from any first amendment limitation of Congress' plenary power to define the grounds for deportation.

318. 194 U.S. 279 (1904).
319. See *Fong Yue Ting*, 149 U.S. at 705-06; *The Chinese Exclusion Case*, 130 U.S. 581 (1889), aff'g, *Chae Chan Ping*, 36 F. 431 (C.D. Cal. 1888).
320. 194 U.S. at 279.
323. *Id.* at 592.
Thus, the Court rendered Congress' assumptions regarding the foreign source of radical ideas and the undesirability of resident aliens possessing such ideas immune from constitutional challenge. In this manner, the Court's rationale conflicts with the basic function of the Constitution to define the legitimate scope of congressional authority.\footnote{324} Instead of the Constitution placing a limitation on Congress, the Court has permitted Congress to redefine constitutional guarantees and to ignore the first amendment when legislating in the deportation field.

C. Recent Attempts to Realign the Scope of Citizens' and Resident Aliens' Free Speech and Association Rights

Congress recently took steps to eliminate ideology as grounds for deportation of resident aliens. However, legislative solutions are inherently inadequate because Congress can easily modify and repeal its immigration legislation. Furthermore, the recent amendments to section 901 of the FRAA\footnote{325} indicate that Congress intends to continue constricting resident aliens' first amendment protections based upon mere association with disfavored groups. For example, Congress specifically barred members of the PLO from invoking the protection of section 901 for their free speech and association activities.\footnote{326} Similarly, Congress limited the protection of section 901 to nonimmigrant aliens while immigrant aliens, who by definition want to stay in the United States, remain subject to ideological deportation.\footnote{327} Thus, legislative solutions represent inadequate remedies because they leave resident aliens dependent upon the ever changing, seemingly unreviewable political process.

The federal courts, recognizing the lack of a rational basis in distinguishing between the scope of citizens' and resident aliens' first amendment freedoms, have begun to subject deportation statutes and other laws affecting the free speech rights of resident aliens to meaningful review.\footnote{328} In the process, these courts have demonstrated their ability to balance the competing individual and state interests at stake without impairing legitimate national security interests. Thus, the court in Palestine Information Office v. Shultz accorded due deference to the government's authority to close foreign missions of unrecognized foreign entities finding it a foreign policy determina-
tion. In contrast, the court closely reviewed the closing of the PIO, a specific action taken pursuant to the policy determination, to decide whether that action violated the first amendment. Although the court concluded that the government could constitutionally close the PIO, it reached that result only after determining that the closing had merely an incidental impact on the free speech and association rights of the resident aliens and citizens involved, and that the government's interest outweighed the incidental restriction.

In addition, the court in *American-Arab* determined that characterizing Congress' power over deportation as plenary did not exempt the exercise of that power from the limits of the first amendment. While the *American-Arab* court's interpretation of prior Supreme Court decisions is questionable, the court's reasons for applying the same standard of review to citizens' and resident aliens' first amendment claims, and its analysis of the merits of each party's arguments constitutes a superior treatment of those issues. Furthermore, the district court's reasoned analysis affords meaningful first amendment protection and promotes the underlying values of the first amendment.

IV. Comment

Although the Supreme Court has stated that resident aliens enjoy the protection of the first amendment, the Court's characterization of Congress' deportation power as plenary preempts any meaningful consideration of the scope of resident aliens' free speech and association rights. Under the Court's most recent pronouncements, the first amendment protection afforded resident aliens remains, at best, nominal. The viability of a protection that vanishes in the deportation context is troublesome. Under this rationale, as soon as Congress determines that a given class of resident aliens is deportable, apparently on whatever ideological basis it chooses, the resident aliens cannot invoke the Constitution to challenge the congressional decision. The Court thus permits Congress to inflict a drastic punishment for the mere exercise of what would otherwise be constitutionally protected free speech.

Furthermore, the Court's continued reluctance to recognize the full scope of resident aliens' first amendment rights reflects a flawed analysis of constitutional law. Over one hundred years ago, the Court declared that Congress possessed an extra-constitutional, virtually unreviewable power over immigration. The Court announced its position without analyzing the merits of resident aliens' claims of protection under the first amendment. The Court also failed to consider whether Congress had any basis for deeming entire classes of resident aliens subversive because of views they espoused or be-

cause of views imputed to them through past or present affiliations with disfavored groups. Instead, the Court throughout its decisions simply accepted Congress' assumptions concerning the undesirability of aliens who possess views not shared by mainstream society. Thus, the Court allowed Congress to define acceptable beliefs and make resident aliens' right to remain in the United States contingent upon conformity with those beliefs.

The result of the Supreme Court's decisions concerning ideological deportation is completely at odds with the underlying values of the first amendment. A truly free exchange of ideas includes all ideas, not merely those Congress statutorily defines as acceptable. The ideological provisions for deportation embody fears of revolution instigated and imported from abroad and a presumption that aliens are disloyal. However, the threat that Congress perceived from the various groups that it deemed radical has never materialized. Additionally, Congress' attempt to control the domestic dialogue does not achieve its stated purpose of preserving democratic institutions. Deporting a resident alien who espouses a radical idea will not prevent internal dissension because revolutionary ideas are not simply foreign imports. Moreover, if dissension manifests itself in a constitutionally permissible exercise of free speech, Congress has no authority to prevent that dissension.

On the other hand, under prevailing first amendment standards, Congress does possess the authority to regulate conduct and speech which threatens imminent harm. The ability to regulate and punish individuals whose conduct or speech threatens a legitimate public interest makes it unnecessary to deny resident aliens the full protection of the first amendment. Any disparity in treatment of citizens' and resident aliens' claims is devoid of merit because neither the Court nor the Congress ever demonstrated or even clearly articulated how the exercise of free speech and association rights by resident aliens poses a greater threat than the exercise of those same rights by citizens. Therefore, the Court should cease its application of a deferential standard of review where deportation statutes adversely affect the exercise of first amendment freedoms by resident aliens.

V. CONCLUSION

Congress has yet to demonstrate that resident aliens' exercise of free speech and association rights is more dangerous than citizens' exercise of those same first amendment freedoms. Accordingly, a false premise underlies the disparity in treatment of their respective first amendment challenges.

330. Tilner, supra note 8, at 34-35.
331. Tilner, supra note 8, at 79-80.
First amendment principles should not vary based upon the plaintiff's status as a citizen or resident alien. The prevailing first amendment standards of review applicable to citizens' first amendment challenges adequately protect legitimate national security and foreign policy interests, and the federal courts have proven their ability to assess the competing interests of the Federal Government and resident aliens in the immigration context. The courts can accord due deference to policy determinations while reviewing closely the actions taken pursuant to those determinations for infringements of resident aliens' first amendment freedoms.

Moreover, legislative solutions are inherently inadequate because they subject the resident alien to the whim of the political process. The ease and frequency with which Congress has amended the United States immigration laws over the last century illustrates the inadequacy of a legislative guarantee. The Supreme Court's failure to recognize that the United States Constitution protects resident aliens' first amendment freedoms permits Congress to limit legislative grants of free speech and association rights to certain categories of aliens. Conversely, judicial recognition that all persons lawfully residing within the United States enjoy the full scope of constitutional protection of first amendment freedoms effects a uniform standard more in keeping with the spirit of the first amendment. Accordingly, the Court should seize the first opportunity presented to recognize the full scope of resident aliens' free speech and association rights.

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