AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era – Individual Rights/Due Process

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

*In 1916, at the age of thirteen, Peter Harisiades came to the United States with his father from Greece. He later married an American citizen and had children in the United States. In 1925, he joined the Communist Party and assumed a leadership position in it. In 1939, the Party discontinued the formal membership of aliens, including Harisiades, but he remained involved its activities and committed to its principles. The Alien Registration Act of 1940 made more explicit preexisting federal policy that resident aliens were to be deported if they belonged to organizations advocating the unlawful overthrow of the American government. The Communist Party was such an organization.*

*In 1930, the federal government issued a warrant for his deportation, but the government had difficulty locating him given his use of numerous aliases. In 1946, he was arrested, and after a hearing he was deported for his being a member of an organization that advocated the overthrow of the American government. Harisiades petitioned a federal district court for a writ of habeas corpus, but was denied. That denial was affirmed by a circuit court. On appeal, the U.S. Supreme Court affirmed the lower courts in a 6-2 decision.*

JUSTICE JACKSON delivered the opinion of the Court.

. . . .

For over thirty years each of these aliens has enjoyed such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution he now invokes. Each was admitted to the United States, upon passing formidable exclusionary hurdles, in the hope that, after what may be called a probationary period, he would desire and be found desirable for citizenship. Each has been offered naturalization, with all of the rights and privileges of citizenship, conditioned only upon open and honest assumption of undivided allegiance to our Government. But acceptance was and is not compulsory. Each has been permitted to prolong his original nationality indefinitely.

So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.

The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. . . .

Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. *Yick Wo v. Hopkins* (1886). Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose. *Fong Yue Ting v. United States* (1893).

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. *Fong Yue Ting v. United States* (1893). Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

This brings us to the alternative defense under the Due Process Clause—that, granting the power, it is so unreasonably and harshly exercised by this enactment that it should be held unconstitutional.

In historical context the Act before us stands out as an extreme application of the expulsion power. There is no denying that as world convulsions have driven us toward a closed society the expulsion power has been exercised with increasing severity, manifest in multiplication of grounds for deportation, in expanding the subject classes from illegal entrants to legal residents, and in greatly lengthening the period of residence after which one may be expelled. This is said to have reached a point where it is the duty of this Court to call a halt upon the political branches of the Government.

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

These restraints upon the judiciary, occasioned by different events, do not control today's decision but they are pertinent. It is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution. Certainly, however, nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.

. . . .

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

. . . .

The First Amendment is invoked as a barrier against this enactment. The claim is that in joining an organization advocating overthrow of government by force and violence the alien has merely exercised freedoms of speech, press and assembly which that Amendment guarantees to him.

The assumption is that the First Amendment allows Congress to make no distinction between advocating change in the existing order by lawful elective processes and advocating change by force and violence, that freedom for the one includes freedom for the other, and that when teaching of violence is denied so is freedom of speech.

Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative— attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence.

True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable. *Dennis v. United States* (1951). We think the First Amendment does not prevent the deportation of these aliens.

. . . .

*Affirmed*.

JUSTICE CLARK took no part in the consideration or decision of this case.

JUSTICE FRANKFURTER, concurring.

It is not for this Court to reshape a world order based on politically sovereign States. In such an international ordering of the world a national State implies a special relationship of one body of people, *i.e.,* citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State. . . . Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary.

Accordingly, when this policy changed and the political and law-making branch of this Government, the Congress, decided to restrict the right of immigration about seventy years ago, this Court thereupon and ever since has recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the Judiciary. The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

. . . .

In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.

JUSTICE DOUGLAS, with whom JUSTICE BLACK joins, dissenting.

There are two possible bases for sustaining this Act:

(1) A person who was once a Communist is tainted for all time and forever dangerous to our society; or

(2) Punishment through banishment from the country may be placed upon an alien not for what he did, but for what his political views once were.

Each of these is foreign to our philosophy. We repudiate our traditions of tolerance and our articles of faith based upon the Bill of Rights when we bow to them by sustaining an Act of Congress which has them as a foundation.

The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate rests on *Fong Yue Ting v. United States*, decided in 1893 by a six-to-three vote. That decision seems to me to be inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens. We have long held that a resident alien is a "person" within the meaning of the Fifth and the Fourteenth Amendments. He therefore may not be deprived either by the National Government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws. . . .

An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.

The power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power "To establish an uniform Rule of Naturalization." The power of deportation is therefore an *implied* one. The right to life and liberty is an *express* one. Why this *implied* power should be given priority over the *express* guarantee of the Fifth Amendment has never been satisfactorily answered. . . .

The right to be immune from arbitrary decrees of banishment certainly may be more important to "liberty" than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the "liberty" they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

This drastic step may at times be necessary in order to protect the national interest. There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation due to the nature of his conduct. But unless such condition is shown, I would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees.

Congress has not proceeded by that standard. It has ordered these aliens deported not for what they are but for what they once were. Perhaps a hearing would show that they continue to be people dangerous and hostile to us. But the principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred.