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THE CONSTITUTIONAL RIGHTS OF EXCLUDABLE ALIENS: HISTORY PROVIDES A REFUGE

The political traditions of the United States are steeped in the idea that the powers of government should be subject to careful constraint. Yet for more than three decades, the Supreme Court has carved out an area in which individuals may be subject to nearly unbridled governmental authority without judicial remedy. The treatment received by two groups of immigrants who arrived on the southern shores of Florida brings into sharp focus this contradiction in our traditions. The most renowned of the two migrations occurred in the spring of 1980 aboard the “freedom flotilla” which brought 125,000 Cuban nationals to our shore. The other migration occurred more gradually. Undocumented Haitians began to arrive in Florida in December 1972. By 1981 there were approximately 35,000 in the region. Instead of freedom, many of the Cuban and Haitian immigrants faced prolonged detention by the Immigration and Naturalization Service (INS). The incarceration of Cuban and Haitian refugees raised questions regarding the extent of the federal government’s power over excludable aliens and the constitutional rights that those aliens might possess.

The Supreme Court has repeatedly declared that Congress and the Executive have almost exclusive authority over decisions pertaining to the admission or exclusion of aliens. Although the Supreme Court has granted

1. Holtzmann v. Schlesinger, 414 U.S. 1304, 1315 (1973) (Marshall, J., in chambers) (“We have a government of limited powers, and those limits pertain to the Justices of this Court as well as to Congress and the Executive.”); The Federalist No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961) (“It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.”).
4. There are about 5,000 Cuban refugees being indefinitely detained in federal, state, or local prisons. N.Y. Times, Mar. 10, 1986, at A1, col. 1. Several hundred of the Cuban refugees have spent up to six years in federal prisons, not because of crimes committed in this country, but merely because the INS deemed them to be excludable upon arrival. Id.
5. See infra notes 14–20 and accompanying text.
6. Fiallo v. Bell, 430 U.S. 787, 792 (1977). “This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” Id. (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972) (“Plenary congressional power to make policies
deportable aliens some constitutional rights, excludable aliens have been placed almost entirely at the mercy of Congress and the Executive, without constitutional protection. The prolonged detention of the Cuban and Haitian refugees by the INS has produced a plethora of litigation challenging the Court's position. Although the Supreme Court recently had the opportunity to clarify questions regarding the extent of the government's exclusion power and the constitutional rights of excludable aliens in Jean v. Nelson, it declined to do so and disposed of the appeal without ruling on the constitutional issue.

This Comment will explore questions left unanswered by the Court in Jean v. Nelson. In examining the scope of the government's exclusion power and the constitutional position of the excludable alien, this Comment proposes a new framework for analyzing the government's authority over immigration law generally. The proposed framework consists of a two part test which is based on a reexamination of two early Supreme Court immigration decisions. The first prong of the test defines and limits the scope of the government's plenary power over immigration through a framework derived from Wong Wing v. United States. The second prong is based on Kaoru Yamataya v. Fischer (The Japanese Immigrant Case) and establishes constitutional limitations on the government's authority over immigration even when exercised within the scope established under the Wong Wing framework.

The proposed test reaches back beyond the past three decades of immigration law to precedent which is more consistent with our political traditions and the Supreme Court's constitutional jurisprudence. The decisions in Wong Wing and the Japanese Immigrant Case recognized that, although the federal government has broad authority in the immigration

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and rules for exclusion of aliens has long been firmly established.

See infra notes 31-52 and accompanying text.


7. See infra notes 21-30 and accompanying text.


10. See Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1389-96 (1953), arguing that the Supreme Court's decisions regarding the constitutional rights of excludable aliens during the 1950's were inconsistent with its earlier constitutional jurisprudence and should be abandoned.
field, its power is nevertheless subject to restrictions like any other governmental power. Unfortunately, these decisions have been narrowly construed. When examined in a broader context, *Wong Wing* and the *Japanese Immigrant Case* provide an excellent framework for evaluating the government’s prerogative over immigration.

I. BACKGROUND

A. The Cuban and Haitian Refugees

The incarceration by the INS of both the Cuban and Haitian refugees raises important questions regarding the constitutional rights of excludable aliens. However, the detention problems faced by the two groups differ somewhat. The Cubans in detention face indefinite, potentially permanent incarceration. The INS determined that they are inadmissible and detained them pending their return to Cuba. However, Cuba has refused to permit their return. The Cuban immigrants argue that their indefinite detention is without due process, and therefore, unconstitutional.

The plight of the Haitian refugees differs somewhat from that of the Cubans. First, the Haitians challenging detention have not yet been deemed excludable. Furthermore, unlike the Cubans, the Haitian refugees could return home if they desired. Haiti has not refused to accept them. Consequently, Haitian refugees do not face indefinite incarceration in the same way Cuban refugees do. Rather, the Haitians claim that a new

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15. In an agreement dated December 14, 1984, Cuba agreed to accept the return of 2746 of the incarcerated refugees. However, in May, 1985, only five months after the agreement had been reached, Fidel Castro abruptly cancelled it, protesting a decision by the Reagan Administration to begin sending Cuban propaganda broadcasts over Radio Marti. N.Y. Times, Mar. 10, 1986, at A1, col. 1. Talks between Cuba and the United States about reviving the immigration agreement are scheduled to resume. Washington Post, July 4, 1986, at A24, col. 4.


18. Unlike the Cuban refugees, the Haitian refugees in detention eventually will be released when they are either granted asylum in this country or deported back to Haiti. However, the chances that a Haitian refugee will be granted asylum in this country are slim. For an accounting of the many difficulties that Haitian refugees have encountered in applying for asylum in the United States, see *Note, The Discrimination Against Haitian Aliens Seeking Asylum in the United States*, 13 CUMB. L. REV. 593 (1983).

19. Although the Haitian refugees technically could go back to Haiti at any time, many had feared political persecution under the regime of President Jean-Claude Duvalier if they returned. *Note, supra* note 18, at 608. It is still unclear how the recent political changes in Haiti will affect the practical or legal positions of the Haitians. In February 1986, the repressive regime of President Jean-Claude Duvalier collapsed and a military government assumed power. Seattle Times, Feb. 7, 1986, at A1, col. 1.
detention/parole policy initiated by the INS in 1981 was applied to them in a discriminatory fashion. They allege they were denied parole and detained based on their race and national origin, and that their incarceration is an unconstitutional denial of equal protection.\textsuperscript{20}

**B. Distinguishing Excludable and Deportable Aliens**

In United States immigration law there are important distinctions between excludable and deportable aliens.\textsuperscript{21} The judicially created “entry” doctrine determines whether an alien will be classified as excludable or deportable.\textsuperscript{22} An alien who has “entered” the United States is subject to deportation, not exclusion, proceedings.\textsuperscript{23} An alien can accomplish an “entry” into the United States either legally through a grant of admission, or illegally through a clandestine border crossing.\textsuperscript{24} By contrast, an excludable alien is one who is requesting admission, but who has not yet

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\textsuperscript{20} Whether the new government will institute real political reform remains to be seen. Most Haitians are adopting a wait-and-see attitude to determine the nature of the new regime and its attitudes regarding political freedom or repression. Seattle Times, Feb. 9, 1986, at A1, col. 1; A12, col. 1. One hundred and one Haitian refugees applying for political asylum in the United States were deported back to Haiti following the events of February 7, 1986. Telephone interview with Father Jean-Juste, supra note 4.

\textsuperscript{21} “Deportation” has two meanings. Substantively, it means the removal of aliens already within the United States, as contrasted with the “exclusion” of aliens at the border seeking entry. “Deportation” may also refer to the procedural action of physically removing an alien from the country, regardless of whether that alien is classified as “deportable” or “excludable.” See United States ex rel. Lue Chow Yee v. Shaughnessy, 146 F. Supp. 3, 5 (S.D.N.Y. 1956), aff’d, 245 F.2d 874 (2d Cir. 1957). See also Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (although the word “deportation” is a term of art, when used in the exclusion provisions of the INA it does not retain its technical gloss). The distinction between the two usages of “deportation” is one the reader should bear in mind.

\textsuperscript{22} See Landon v. Plasencia, 459 U.S. 21 (1982), where the determination of whether or not an alien had “entered” the United States was dispositive of whether the alien’s right to remain in this country would be adjudicated in exclusion or deportation proceedings.

\textsuperscript{23} Plasencia, 459 U.S. at 25; Garcia-Mir v. Smith, 766 F.2d 1478, 1484 (11th Cir. 1985).

\textsuperscript{24} Garcia-Mir, 766 F.2d at 1484; Leng May Ma v. Barber, 357 U.S. 185, 187 (1958); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). The fact that an alien has entered illegally does not alter his or her position as within United States borders in the eyes of the Court. This has created a peculiarity in the law with respect to the constitutional positions of excludable and deportable aliens: undocumented aliens, classified as deportable, are entitled to greater constitutional and statutory protections than excludable aliens. See infra and supra notes 21–30 and accompanying text.
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accomplished an "entry" into the United States. Physical presence within the country is not enough to constitute an "entry." An alien requesting admission is often physically within United States borders. However, from a legal standpoint the alien remains constructively stopped at the border outside of United States jurisdiction until granted admission.

The distinction between excludable and deportable aliens is crucial from both a statutory and constitutional perspective. Under the Immigration and Nationality Act (INA), Congress has clearly separated the two groups of aliens and granted deportable aliens important statutory rights that it denied excludable aliens. In addition, the Supreme Court has granted important constitutional due process rights to deportable aliens regarding their right to remain in this country which it has denied to excludables regarding their request for admission.


An alien requesting admission may be at a border crossing station just within United States territory. He or she may have been paroled into the United States pending an admission hearing. The alien may have been detained by the INS pending deportation after admission has been denied. Nevertheless, the Court views all these aliens to be outside United States borders. Leng May Ma v. Barber, 357 U.S. 185, 188, 190 (1957); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953); United States v. Ju Toy, 198 U.S. 253, 263 (1905); Ekiu v. United States, 142 U.S. 651, 661 (1892).

27. In discussing the distinctions between excludable and deportable aliens the Supreme Court has stated:

It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry." . . . The distinction was carefully preserved in Title II of the Immigration and Nationality Act.

Leng May Ma v. Barber, 357 U.S. 185, 187 (1958) (citations omitted).

28. The INS must determine whether an alien is to be admitted or excluded in accordance with sections 231–240 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1221–1230 (1982) (provisions relating to entry and exclusion). However, the right of a deportable alien to remain in this country is determined under sections 241–244 of the INA. 8 U.S.C. §§ 1251–1254 (1982) (provisions relating to deportation).

29. Leng May Ma, 357 U.S. at 187. See Landon v. Plasencia, 459 U.S. 21, 25–26 (1982), and Maldonado-Sandoval v. INS, 518 F.2d 278, 280 (9th Cir. 1975), for an enumeration of some of the differences in statutory rights between excludable and deportable aliens.

30. Once an alien has entered this country either legally or illegally, the alien is entitled to the full protection of due process under the fifth amendment before he or she can be deported. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953). However, the Court has repeatedly denied these same due process rights to excludable aliens. The Court insists that any procedure devised by Congress to handle the exclusion of aliens is due process as far as the excludable alien is concerned. Id.
C. Historical Development of the Exclusion Power

For nearly a century, the Supreme Court has insisted that the government’s plenary power over exclusion includes the determination of both the substantive and procedural criteria for entry. For nearly a century, the Supreme Court has insisted that the government’s plenary power over exclusion includes the determination of both the substantive and procedural criteria for entry.31 The government’s authority to establish the substantive standards for exclusion was initially announced by the Court in 1889 in Chae Chan Ping v. United States (The Chinese Exclusion Case).32 In Ekiu v. United States,33 the Supreme Court extended the government’s plenary control over exclusion to include procedural restrictions on admission.34 The Court declared that it was not the province of the judiciary to overturn the constitutional and lawful actions of the legislative and executive branches regarding exclusion.35

Although few, if any, restrictions have ever been placed on the government’s control over the substantive conditions of entry, the Court has been less consistent in the procedural sphere.36 Early in this century, the Court apparently began to take a more generous view of the procedural rights of excludable aliens. This relaxation began when the Court ruled that "aliens" at the border claiming United States citizenship were entitled to a fair hearing. In these situations the judiciary could examine the administrative proceedings for abuse of discretion or to ensure fairness.37 Procedural protections were soon extended to exclusion hearings in general.38

32. 130 U.S. 581 (1889). The Chinese Exclusion Case involved the exclusion of an alien on the basis of race. Although the Supreme Court ruled that there is no constitutional violation where the government seeks to exclude aliens on the basis of race, the INA statutorily prohibits discrimination based on either race or national origin in exclusion proceedings. 8 U.S.C. § 1152(a) (1982).
33. 142 U.S. 651 (1892).
34. The Court held that the decisions of executive officers to grant or deny admission were due process as far as the excludable alien was concerned. Ekiu, 142 U.S. at 660. See also Kleindienst, 408 U.S. at 766; Lem Moon Sing v. United States, 158 U.S. 538, 547 (1894). But see Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 173-74 (1983). Professor Martin takes issue with the Court’s interpretation of Ekiu. He argues that Ekiu does not stand for the proposition that excludable aliens are without procedural due process protections. Rather, he maintains that the issue decided in Ekiu was the forum required by due process, not whether due process principles applied at all.
35. Ekiu, 142 U.S. at 660.
36. See Hart, supra note 13, at 1390–91, where Professor Hart details the Supreme Court’s early expansion of procedural protections in both exclusion and deportation proceedings.
38. See Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 335–36 (1932), for a summary of the early procedural protections that were provided to an alien in exclusion proceedings.
After this initial broadening of procedural protections for excludable aliens, the Court faced the issue once again in the early 1950's. The Department of Justice had begun to exclude aliens who were deemed subversives without permitting the aliens an opportunity to refute the accusations. Whenever the information underlying the exclusion order was classified as prejudicial to the public interest, the Department of Justice claimed the authority to refuse disclosure and deny the alien a hearing.\textsuperscript{39}

When confronted with this challenge, the direction of the Court changed dramatically. It reasserted the government's complete plenary authority over the procedural aspects of exclusion. Two cases, in particular, are associated with this shift: \textit{United States ex rel. Knauff v. Shaughnessy}\textsuperscript{40} and \textit{Shaughnessy v. United States ex rel. Mezei}.\textsuperscript{41} In these decisions, the Court relied on the earliest exclusion decisions for its authority\textsuperscript{42} and apparently ignored the expansion of procedural due process rights for excludables that had occurred in the early 1900's. Language from \textit{Knauff} and \textit{Mezei} has been used by the government to argue that aliens detained at the border are completely devoid of constitutional rights.\textsuperscript{43} The decision in \textit{Mezei} was even more severe than \textit{Knauff} because \textit{Mezei} resulted not only in the alien being denied admission, but in his indefinite incarceration as well.\textsuperscript{44}

\textsuperscript{39} See \textit{United States ex rel. Knauff v. Shaughnessy}, 338 U.S. 537, 541, 542 n.3 (1950); Martin, supra note 34, at 165–66.

\textsuperscript{40} 338 U.S. 537 (1950). \textit{Knauff} involved the exclusion of an alien war bride. \textit{Id.} at 539. The Department of Justice claimed her admission would be prejudicial to the public interest and refused to grant her a hearing or disclose the basis of its exclusion order. \textit{Id.} The Court declared that "\textit{w}hatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned." \textit{Id.} at 544. Furthermore, the Court made clear that, unless authorized by statute, it was not the province of the judiciary to review the determination of the political branches of the government to exclude an alien. \textit{Id.} at 543.

\textsuperscript{41} 345 U.S. 206 (1953). Like \textit{Knauff}, \textit{Mezei} also involved the exclusion of an alien who was declared to be a security risk by the Department of Justice based on confidential information. \textit{Id.} at 208. Mezei had been a resident alien in the United States for 25 years. In 1948, he traveled to Eastern Europe to see his dying mother. When he attempted to return to his home in New York, the Department of Justice labeled him a security risk. \textit{Id.} They refused to permit his admission or provide for a hearing on the grounds that revealing the basis of the exclusion order would be adverse to the interests of the United States. \textit{Id.}

\textsuperscript{42} For example, \textit{Knauff} relies heavily on Ekiu v. United States, 142 U.S. 651 (1892), and Fong Yue Ting v. United States, 149 U.S. 698 (1893); the latter is a deportation case but contains extensive discussions of the power to exclude. \textit{See Knauff}, 338 U.S. at 542, 543, 544. \textit{Mezei} also relies heavily on Ekiu. \textit{See Mezei}, 345 U.S. at 212, 213, 215.


\textsuperscript{44} \textit{Mezei}, 345 U.S. at 209. After the Department asserted that Mezei's admission would be adverse to the interests of this country, other countries were unwilling to accept him. \textit{Id.} at 208–09. Therefore, the Department of Justice was unable to deport Mezei. At the time of the decision, Mezei had been incarcerated for 21 months with no end in sight. \textit{Id.} at 209.

In his dissent, Mr. Justice Jackson stated that:

Government counsel ingeniously argued that Ellis Island is his [Mezei's] 'refuge' whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keep him as
Knauff and Mezei reasserted the government’s nearly exclusive control over exclusion.45 Contrary to prior developments, the judiciary was left with little, if any, role in the admission process.46 The doctrine has been severely criticized by both academic47 and judicial authorities.48 Although there have been recent indications that the Supreme Court may be re-evaluating the validity of the doctrine,49 it has not yet been repudiated.50 The detention of Cuban and Haitian excludables in the present decade has once again focused attention on the doctrine of the government’s plenary power over excludable aliens. The validity of this doctrine in the 1980’s, however, remains unclear because of conflicting lower court decisions51 and the recent refusal of the Supreme Court to rule on the issue in Jean v. Nelson.52
D. Rationales Underlying the Government’s Plenary Power Over Exclusion

Over the years, the Supreme Court has delineated three distinct rationales on which to base the doctrine of the government’s unconstrained plenary power over exclusion. The first rationale is based on the distinction between a “right” and a “privilege.” An alien who seeks admission to the United States is in the position of requesting a privilege, not asserting a right. Therefore, the government argues that it can grant or deny this privilege under any conditions it sees fit to impose. The second rationale is founded on the idea that the power of the Constitution does not extend beyond our borders. Because the Court adheres to the legal fiction that excludable aliens are legally positioned outside United States borders, it considers excludables to be beyond the protective reach of the Constitution. Because the first two justifications focus on the idea that the status or position of the alien obviates any check on the government’s power to exclude, they are limited in scope. Where the petitioner is not within the required status or position, the first two rationales do not apply. Therefore, they cannot explain all of the Court’s decisions regarding the government’s exclusion authority.

The third rationale is based on the theory that the nature and source of the government’s exclusion authority places that authority beyond constitutional restraint. This power-based rationale focuses not on the position of the alien, but on the nature of the government’s authority. Therefore, unlike the first two rationales, this rationale operates whenever the government exercises its exclusion power. Because it is the most significant and

53. The primary rationales underlying the government’s plenary power were first delineated and analyzed in Note, Constitutional Limits on the Power to Exclude Aliens, 82 COLUM. L. REV. 957 (1982). See also Developments, supra note 31, at 1314–22.
55. For a detailed analysis and critique of the use of the right/privilege distinction as a rationale for the government’s plenary power over exclusion, see Note, supra note 53, at 975–77, and Developments, supra note 31, at 1318–20, where the commentators argue that the use of the right/privilege distinction in the immigration field should be abandoned.
56. For a detailed analysis and critique of the Court’s territorial rationale for the government’s plenary exclusion authority, see Note, supra note 53, at 978–82, and Developments, supra note 31, at 1320–22, where the commentators argue that this rationale is inconsistent with the Court’s reasoning in a variety of other situations where it held, without hesitation, that the Constitution operates extraterritorially to protect individual rights. See also Comment, The Constitutional Rights of Excludable Aliens: Proposed Limitations on the Indefinite Detention of Cuban Refugees, 70 GEO. L.J. 1303, 1323 (1982).
58. Id. at 965.
59. Id. at 966, 975.
comprehensive of the Court's rationales, it should be addressed in greater detail.

Nothing in the text of the Constitution expressly confers on the federal government the power to exclude aliens. However, the Supreme Court has repeatedly asserted that the government possesses this power as one inherent in sovereignty. By describing the power to exclude as one that flows directly from sovereignty rather than a constitutional grant, the Court attempts to rationalize an unlimited power, beyond constitutional restraint.

The power-based rationale for the government's plenary authority over exclusion has been criticized as an aberration in the Court's constitutional jurisprudence on several grounds. First, it is inconsistent with the natural law theory of the Bill of Rights. The Bill of Rights is not a governmental grant of rights, but rather is a written recognition of some of the individual rights that exist in nature, independent of any governmental authority or document. Therefore, the Bill of Rights is a limit on the exercise of all government power whether derived from the text of the Constitution or, in the case of the government's immigration authority, derived independently of the Constitution.

Second, the Executive's foreign affairs power, like the exclusion power, has also been characterized as one inherent in sovereignty. However, unlike the exclusion power, the Supreme Court has demonstrated its willingness to subject the foreign affairs power to the constitutional limitations in the Bill of Rights.

The third criticism relates to the inconsistency between the constitutional rights the Court has granted to deportable aliens and those granted to excludable aliens. This inconsistency exists despite the Court's assertion of unity between the power to exclude and the power to expel. If the two

61. See, e.g., Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698, 706-07 (1893); Ekiu v. United States, 142 U.S. 651, 659 (1892); The Chinese Exclusion Case, 130 U.S. 581 (1889); Developments, supra note 31, at 1315.
62. For a more detailed discussion, see Note, supra note 53, at 966-69.
63. For a more detailed discussion of this argument, see Note, supra note 53, at 971-74.
64. Id. at 972.
65. Id. at 972-73.
For a detailed discussion of examples where the Court has subjected the Executive's foreign affairs power to constitutional limitations, see Note, supra note 53, at 973-74.
68. In Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893), the Court initially declared that: "The power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same
powers rest upon the same foundation, then logically the power to expel should be just as immune from constitutional limitation and judicial scrutiny as the power to exclude. However, Kaoru Yamataya v. Fisher (The Japanese Immigrant Case)\(^6^9\) has been traditionally interpreted as limiting the government's power to expel by extending due process rights to deportable aliens prior to expulsion.\(^7^0\) Despite the fact that the Court has based the government's immigration authority over deportation on sovereignty and not an explicit constitutional grant, the Court still found that the deportation authority was subject to constitutional limitation.\(^7^1\) Therefore, the fact that the power to exclude is likewise grounded on sovereignty should not bar constitutional limitations.

Finally, an unrestrained exclusion power stands in direct conflict with a number of limitations the Court has placed on the power to exclude. First, the Court has held that the Constitution forbids the government from enforcing its immigration policies by subjecting excludable aliens to punishment at hard labor.\(^7^2\) Second, despite the firm assertion in the Immigration and Nationality Act that the decision of executive officers regarding the exclusion of aliens is final,\(^7^3\) the Court has long recognized review of the immigration official's decision through habeas corpus proceedings.\(^7^4\) Finally, the Court's assertion that the sovereign exclusion power is without constitutional limitation cannot be squared with many of its early decisions which granted excludable aliens some procedural due process protections.\(^7^5\)

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69. 189 U.S. 86 (1903).
71. For a more thorough discussion of this argument, see Developments, supra note 31, at 1315–16.
72. Wong Wing v. United States, 163 U.S. 228, 237 (1896). Although Wong Wing was a deportation case, it applies with equal force in the exclusion setting. It explicitly refers to both deportation and exclusion. Id. at 237. Furthermore, Wong Wing was decided prior to The Japanese Immigrant Case, 189 U.S. 86 (1903), which marked the point when the Court began to consider the power to exclude separately from the power to deport. See infra notes 94–95 and accompanying text. In addition, the Tenth Circuit has applied Wong Wing while reasoning that the indefinite detention of excludable aliens is impermissible punishment and violative of the fifth amendment. Rodríguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (1981).
73. Immigration and Nationality Act of 1952 (INA) § 236(c), 8 U.S.C. § 1226(c) (1982).
75. See supra notes 36–38 and accompanying text.

For a more thorough discussion of the various conflicts in this area, see Developments, supra note 31, at 1317–18.
II. ANALYSIS

The concept of the government's plenary power over excludable aliens as expounded by the Court since the 1950's has been severely criticized in both academic and judicial forums. Its development was an historical aberration and the rationales used to justify the power's breadth and lack of constitutional restraint are inadequate. It should be abandoned.

If the doctrine of plenary power as elaborated today is abandoned, then the Court must find an adequate replacement. Any new proposal to restructure the government's power over exclusion will undoubtedly entail far-reaching changes throughout immigration law. However, the Court need not create an entirely new doctrine to fill the void. The foundations for a sound immigration doctrine, consistent with our political traditions and the Court's constitutional jurisprudence, had already been formed early in this century. The Court has only to reexamine existing but neglected precedents. Two decisions in particular, Wong Wing v. United States and Kaoru Yamataya v. Fisher (The Japanese Immigrant Case) provide excellent guidance in the search for a rational immigration doctrine. Reevaluation of these cases reveals a sound structure that can be utilized in defining the government's immigration authority and its limitations.

The structure that can be derived from Wong Wing and the Japanese Immigrant Case consists of a two part test. First, the Court's decision in Wong Wing provides a framework for defining the scope of the government's plenary power over immigration. Under this framework, a narrow range of specific immigration actions fall within the core of the government's plenary authority and are, therefore, ordinarily subject to minimal judicial review. However, immigration actions not within the core of the government's plenary authority are subject to a higher level of judicial scrutiny. The second portion of the test is based on the Japanese Immigrant Case and requires the government to act in accord with fifth amendment due process requirements if the government's actions affect an alien's liberty interest. This second criteria applies regardless of whether the government's action falls within or outside the core of its immigration authority as defined by the Wong Wing framework. It is the only exception

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76. See supra note 47 and accompanying text.
77. See supra note 48 and accompanying text.
78. See supra notes 31–52 and accompanying text.
79. See supra notes 53–75 and accompanying text.
80. 163 U.S. 228 (1896).
81. 189 U.S. 86 (1903).
82. See infra note 142 (discussing which government immigration actions implicate an alien's liberty interests).
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to the standard of minimal judicial review for actions which fall within the core of the government’s plenary power.

A. Wong Wing and the Scope of the Government’s Exclusion Authority

One of the primary deficiencies in Supreme Court discussions of the government’s plenary power over exclusion is the Court’s failure to analyze the scope of the power. In evaluating the scope of the government’s exclusion authority three issues must be addressed. The threshold issue is the validity of the Court’s assumption that there can be no judicial review of government action when the government purports to be exercising its plenary authority over exclusion. Once the propriety of judicial review is established, the second issue to examine is when heightened review is appropriate. Finally, the last issue involves determining the precise level of scrutiny to be employed when the judiciary reviews government action toward excludable aliens.

1. The Foundations of Judicial Review

If there is no judicial review of the government’s power over immigration, the government would be able to promote any policy or take any action toward excludable aliens that it desired. Yet common sense and judicial precedent indicate that there must be some limit beyond which the government exceeds its broad exclusion authority and its actions become subject to judicial review and limitation.

In his dissent to Shaughnessy v. United States ex rel. Mezei, Justice Jackson used common sense to criticize the Court’s failure to establish limits on the scope of the government’s exclusion power. He queried whether the government’s plenary power over exclusion included actions such as ejecting an alien into the sea or confiscating all of an alien’s valuables. Certainly, these actions would promote the government’s ability to exclude. Yet, Justice Jackson believed the Supreme Court would intervene and condemn such actions as the deprivation of life or the taking of property without due process.

Moreover, Supreme Court precedent indicates that government actions need not be as outrageous as those suggested by Justice Jackson to exceed the scope of the government’s plenary power and induce judicial scrutiny. Even before the turn of the century, in Wong Wing v. United States, the Court had

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84. Id. at 226–27 (Jackson, J., dissenting).
85. 163 U.S. 228 (1896).
begun to review government actions in the immigration area and define the scope of the government's plenary authority. In Wong Wing, a Chinese alien challenged the constitutionality of an act which provided that prior to deportation all persons of Chinese descent found to be illegally within the United States were to be imprisoned at hard labor for up to one year. The act provided that the decision to imprison the alien was to be made entirely by executive officers without judicial trial. The government sought to justify the statute as within its plenary power over immigration. The Court, however, struck the statute down. Wong Wing, therefore, indicates that although the Court described the government's power over immigration as "plenary," there is a role for judicial review in immigration matters when government action exceeds the scope of its plenary authority.

In Mezei, the Court ignored the precedential authority of Wong Wing. Wong Wing involved a challenge to a statute that permitted the government to imprison aliens at hard labor prior to deportation. Mezei also involved the authority of the government to incarcerate an alien prior to deportation. Therefore, of all the precedent available to the Court, Wong Wing would appear to be the closest on point. Yet Mezei never mentions Wong Wing.

The Mezei Court may have ignored Wong Wing for two reasons, neither of which will withstand close scrutiny. First, the aliens involved in Wong Wing were deportable, not excludable. As previously noted, the rights of these two groups can vary dramatically. Therefore, at first glance, it appears that the Mezei Court had a valid reason for ignoring Wong Wing. However, at the time Wong Wing was decided the Supreme Court did not make constitutional distinctions between deportable and excludable aliens. Distinctions between the two groups did not arise until after the Japanese Immigrant Case which was decided some years later. Therefore, Wong Wing should apply with equal force in

86. Wong Wing v. United States, 163 U.S. 228, 235 (1896).
87. Id at 237.
88. Id. at 237–38. Despite its many statements that the government may exercise its immigration authority without judicial interference, the Court found this immigration law in violation of the fifth and sixth amendments to the Constitution. Id. at 238.
89. In addition, see supra notes 34–36 and accompanying text, discussing other early immigration decisions where the Court has claimed a limited role for the judiciary in reviewing government exclusion determinations.
90. Wong Wing, 163 U.S. at 235.
92. Wong Wing, 163 U.S. at 229.
93. See supra notes 21–30 and accompanying text.
94. 189 U.S. 86 (1903). The Japanese Immigrant Case was the first to grant due process rights to aliens in deportation proceedings.
95. Developments, supra note 31, at 1316 n.20.

The Wong Wing Court's lengthy analysis of Lem Moon Sing v. United States, 158 U.S. 538 (1895), supports the conclusion that Wong Wing did not distinguish between deportable and excludable aliens.
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either deportation or exclusion settings.

The second reason the Mezei Court may have overlooked Wong Wing is that Wong Wing has been narrowly construed as standing solely for the proposition that the criminal prosecution or punishment of any alien without judicial trial is unconstitutional.96 Mezei, however, involved a deportation which was incident to an exclusion order. Deportation, no matter how severe its consequences, has always been classified by the Court as a civil, not a criminal action.97 Because Mezei's incarceration was arguably incident to his order of deportation and not a punishment specifically legislated by Congress, the Court in Mezei may have believed that Wong Wing was inapplicable.

Despite the apparent criminal/civil distinction, Wong Wing is applicable to the situation faced in Mezei. One may accept the Court's definition of deportation as a civil rather than criminal action, and therefore, accept the validity of temporary confinement without judicial trial in order to facilitate an exclusion or expulsion order. However, accepting the validity of temporary confinement does not mean that any imprisonment the government sees fit to impose on excludables is valid so long as the government couches it in civil and not criminal terms. Wong Wing specifically forbids the punishment of aliens without a trial.98 The government should not be able to do what Wong Wing specifically forbids, merely by categorizing its action as civil, rather than criminal. The issue faced in both Wong Wing and

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98. Wang Wing, 163 U.S. at 237. Moreover, the only confinement expressly approved in Wang Wing was one that was temporary and necessary in order to give effect to an exclusion or deportation order. Id. at 235. The confinement in Mezei, however, was of indefinite, potentially permanent, duration. Mezei, 345 U.S. at 217 (Black, J., dissenting); id. at 220 (Jackson, J., dissenting). Furthermore, the confinement could not be justified as necessary in order to give effect to an exclusion order because the order was unenforceable. For all practical purposes, the order was defunct. See supra note 44. In fact, Mezei's detention had become an end in itself. Mezei, 345 U.S. at 227 (Jackson, J., dissenting).
Mezei was the extent of the government’s authority to imprison an alien without due process, regardless of whether the action was categorized as civil or criminal. The Mezei Court, therefore, should have considered Wong Wing in its analysis. If it had, immigration law may not have taken the course it has since the 1950’s.

2. Determining When the Government Has Exceeded the Scope of Its Plenary Authority and Heightened Judicial Review Is Appropriate: The Wong Wing Framework

Contrary to the idea advanced in Mezei, Wong Wing holds that the government’s power to exclude does not extend to any and all action the government might take toward excludables. At some point government action goes beyond the scope of its plenary power. When it does, the judiciary must step in to review the government’s action and, if appropriate, invalidate it. Wong Wing stands for far more than is implied by the narrow construction it has traditionally been given. Wong Wing provides a framework for discerning when government action is within the scope of its plenary power and when it has passed beyond that scope.

In Wong Wing, the Court reaffirmed the plenary power of Congress to define the terms and conditions under which aliens may enter or remain in this country, to exclude or deport aliens that fail to meet those terms, and to commit the enforcement of these policies to executive officers.99 Wong Wing did not challenge those tenets, but presented a new problem. According to the Court:

The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge, or commissioner of the United States without a trial by jury.100

For the first time, therefore, the Court faced the issue of the scope of the government’s plenary authority over immigration.

A framework for defining the scope of the government’s plenary power can be drawn from the Court’s decision in Wong Wing. The Court drew a line between government actions aimed specifically at the exclusion or expulsion of aliens and those which reach beyond exclusion or expulsion. The Court stated, “‘t’here is . . . a distinction between those provisions of

99. Wong Wing v. United States, 163 U.S. 228 (1896). “The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled . . . .” Id. at 233.
100. Id. at 235.
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the statute which contemplate only the exclusion or expulsion of Chinese persons and those which provide for their imprisonment at hard labor . . . ."101

The Court specifically approved a narrow range of three core immigration actions as within the scope of the government's plenary power and, therefore, subject to limited judicial review. First, the Court reiterated the constitutional validity of legislation calling for the exclusion or expulsion of certain classes of immigrants.102 Therefore, under the proposed framework, Congress would continue to have nearly complete discretion under its plenary authority regarding the substantive determinations of exclusion or expulsion. Second, the Wong Wing Court protected the government's procedural power to deport aliens in order to enforce exclusion or expulsion orders.103 Finally, the Court included the temporary confinement of aliens within the government's plenary authority, where that confinement is necessary to accomplish the deportation.104

The three core immigration actions approved in Wong Wing as within the government's plenary authority relate specifically to exclusion or expulsion and are essential to the government's interest in controlling the nation's borders. The Wong Wing Court's decision to scrutinize closely the government's policy of imprisoning aliens prior to deportation indicates that the scope of the core actions is to be narrowly construed. Certainly, the challenged action promoted the government's policy of discouraging the immigration or settlement of Chinese nationals. However, imprisonment for one year at hard labor prior to deportation did more than contemplate the mere exclusion or expulsion of aliens. When the government attempted to promote its immigration policy through actions that went beyond the core of its immigration authority, the Court found those actions to be subject to its power of review and limited them accordingly.105 The Court stated that "when Congress sees fit to further promote [its immigration] policy by subjecting . . . aliens to infamous punishment at hard labor, or

101. Id. at 236.
102. Id. at 230-33 (reviewing previous challenges to legislation requiring the exclusion or expulsion of aliens and affirming the constitutionality of such legislation).
103. We regard it as settled by our previous decisions that the United States can, as a matter of policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials. Id. at 237.
104. Id. at 235 ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for exclusion or expulsion of aliens would be valid.").
105. Id. at 237.
by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.”

If there is to be a meaningful limit on the government’s plenary power over immigration, the framework derived from Wong Wing must be narrowly drawn. Government actions which go beyond the three areas which the Wong Wing framework designates as within the government’s plenary power should be subject to judicial scrutiny. The Court adequately ensured the government’s ability to protect United States borders, by granting the government plenary authority with minimal judicial scrutiny in the substantive determination of who may enter and who may remain in the United States, and by likewise approving the government’s power to deport and temporarily detain aliens to enforce those substantive determinations. Because the Court has adequately provided for the government’s legitimate interest in protecting our borders, it is appropriate that actions beyond the core approved in Wong Wing should be subject to a higher level of judicial scrutiny than those actions within the core. Of course, this does not mean that the government is precluded from furthering an immigration policy by pursuing actions outside its plenary authority. It simply means that those actions, like most governmental actions, would be subject to the Court’s review.

In Mezei, the Court completely ignored the framework that can be derived from Wong Wing. In fact, it failed to recognize any perimeters on the scope of the government’s exclusion power. Because of this, it might be argued that Mezei overruled Wong Wing. Yet, Wong Wing continues to be cited with favor. Mezei, on the other hand, has been the object of widespread criticism. The Supreme Court should accept the criticism that Mezei has received and reject its doctrine, which permits the government to exercise nearly unbridled power over excludable aliens.

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106. Id. Although the statute would have furthered the government’s immigration policies regarding Chinese aliens, this was not enough to justify the action, place it within the government’s plenary authority, or permit it to escape judicial scrutiny. The Court held the government’s action to be unconstitutional. Id. at 237–38.

107. In Wong Wing, the Court implied that although the government’s actions were not within the scope of its plenary power over immigration, it would be possible for the government to promote its immigration policy through legislation which provided for the imprisonment of aliens. However, the Court made clear that this type of legislation would be subject to judicial review. The Court determined that in order for the legislation to be valid, provisions for judicial trial were necessary. Id. at 237.


109. See supra notes 47–48 and accompanying text.

110. If the Supreme Court does not abandon Mezei, the very least it should do is adopt a narrow reading which would limit Mezei to a confined set of circumstances. This is the course argued by Justice Marshall in his dissent to Jean v. Nelson, 105 S. Ct. 2992, 3005, 3007 (1985) (Marshall, J., dissenting).
3. Determining the Appropriate Level of Judicial Review for Actions Which Fall Outside the Core of the Government’s Plenary Power Over Immigration

After determining that there should be increased judicial scrutiny of action which falls outside the scope of the government’s plenary power under the Wong Wing framework, the next issue to address is the precise level of heightened judicial scrutiny that is appropriate. Because the courts have refused to review federal action toward excludable aliens, there is no judicial precedent directly on point. However, the Supreme Court has been willing to review state action toward aliens. The structure of the Court’s analysis in this area can be used as an instructive analogy in determining the appropriate level of judicial scrutiny when the federal government’s actions toward aliens fall outside its plenary power as defined by the Wong Wing framework.

State governments do not stand in the same position as the federal government regarding aliens. They do not possess plenary power over matters of immigration.¹¹¹ State laws regarding aliens are sometimes invalidated, in part because the federal government’s immigration power is said to be so pervasive that state governments are preempted from acting in the area.¹¹² Because of this fundamental difference, decisions reviewing state action toward aliens should not be directly applied to federal action. However, analogies can be drawn between the structure of the Court’s analysis regarding the level of review to be applied to state actions involving aliens and the level of review that should be applied to federal actions.

In recent years, the structure of the Court’s analysis regarding the level of judicial review that is appropriate when state legislation discriminates on the basis of alienage has fallen into two lines of cases. The first subjects discrimination by the state to a strict level of scrutiny. For example, in Graham v. Richardson¹¹³ the Court dealt with the power of the state to retain certain economic benefits for its citizens by denying those same benefits to otherwise-qualified resident aliens. The Court applied a strict

Justice Marshall argues that the narrow question addressed in both United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950), and Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), was whether the denial of a hearing regarding exclusion or parole violates due process where the government raises national security concerns. Jean, 105 S. Ct. at 3007 (Marshall, J., dissenting). Justice Marshall noted that broad dicta from these two decisions could be used to support a lack of restraint on the government’s authority over excludables. However, he argued that these dicta are contrary to logic and principle, and should be ignored. Id. at 3005 (Marshall, J., dissenting).

¹¹¹ Truax v. Raich, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.”); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).


level of scrutiny and held that the state could not constitutionally distinguish between aliens and citizens in the distribution of state welfare benefits.\footnote{114} Since \textit{Graham}, however, the Court has distinguished between the economic and sovereign functions of state governments.\footnote{115} The Court has determined that although citizenship is not a relevant factor in the distribution of economic benefits, it is relevant in determining membership in the political community.\footnote{116} The Court has recognized that a state has a fundamental, sovereign interest in limiting governmental decision-making and participation to citizens, and has acknowledged a state’s broad authority to do so without judicial interference.\footnote{117} The state’s interest applies not only to voter qualification, but also to elective or important nonelective governmental offices that participate in the formulation or execution of broad public policy or which “go to the heart of representative government.”\footnote{118} Therefore, legislation which excludes aliens from positions intimately related to the process of democratic self-government need only pass a rational basis test.\footnote{119}

However, the Court has not abandoned the \textit{Graham} rule. When a state discriminates against aliens and the discrimination does not involve the state’s interest in protecting political participation, then the \textit{Graham} rule of increased scrutiny applies.\footnote{120} Indeed, the Court has been careful not to permit the government to rely upon the political participation justification when its actions fall beyond this interest. For example, the Court has rejected the argument that the state is exercising its sovereign right to protect participation in political processes when it restricts aliens from positions as attorneys,\footnote{121} civil engineers,\footnote{122} and notaries public.\footnote{123} In all of these decisions, the Court applied strict scrutiny to the statutes and invalidated them.\footnote{124}

\footnotesize{\textit{Washington Law Review} Vol. 61:1449, 1986

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\item \textit{Graham}, 403 U.S. at 375-76.
\item \textit{Ambach}, 441 U.S. at 74 (quoting \textit{Sugarman v. Dougall}, 413 U.S. 634, 647 (1973)).
\item \textit{Bernal v. Fainter}, 104 S. Ct. 2312; \textit{Ambach}, 441 U.S. at 74; \textit{Foley}, 435 U.S. at 295-96.
\item \textit{Examing Bd. v. Flores de Otero}, 426 U.S. 572 (1976).
\item \textit{In re Griffiths}, 413 U.S. 717 (1973).
\item \textit{In re Griffiths}, 413 U.S. 717 (1973).
\item \textit{Bernal v. Fainter}, 104 S. Ct. 2312; \textit{Flores de Otero}, 426 U.S. at 601-02, 606; \textit{In re Griffiths}, 413 U.S. at 721.
\end{itemize}}

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State action which seeks to protect participation in the political processes can be analogized to federal action which falls within the scope of the government's plenary power over immigration as defined by the *Wong Wing* framework. In both situations, the respective government seeks to further a fundamental interest. The state seeks to protect its democratic functions, and the federal government seeks to protect national borders. Like state action that seeks to protect political processes, federal action falling within the core of the government's immigration authority should be subject to a standard of mere rationality.\(^\text{125}\)

In determining the level of heightened scrutiny that should be applied to federal actions beyond the scope of the government's plenary power under the *Wong Wing* framework, an analogy to state cases continues to be instructive. Initially, it appeared that whenever states discriminated against aliens in areas other than the protection of their political processes, the Court would apply strict scrutiny.\(^\text{126}\) However, in *Plyler v. Doe*,\(^\text{127}\) the Court made clear that it would not automatically apply strict scrutiny to all classifications based on alienage. Rather, the Court would evaluate the precise classification involved and the interest or right that was affected in determining the appropriate level of review.

In asserting that undocumented aliens should not be considered a “suspect” class, the *Plyler* Court found two factors to be relevant. First, the fact that the presence of undocumented aliens in this country had been procured illegally could not be considered a “constitutional irrelevancy.”\(^\text{128}\) Second, the Court found it significant that entrance into the class of undocumented aliens is a “voluntary action.”\(^\text{129}\) However, the Court also deemed a rational basis test to be inappropriate because, although the action of adults entering this country was voluntary, the action of their children was not.

\(^\text{125}\) Actions that fall within the scope of the government's plenary power according to the *Wong Wing* framework, and therefore are subject to a standard of mere rationality, include: (1) substantive determinations regarding who may enter or remain in the United States, (2) the ability to deport aliens who fail to meet those substantive requirements, and (3) the ability to detain aliens temporarily where necessary to effect their deportation. See supra notes 102-04 and accompanying text.

\(^\text{126}\) *Plyler v. Doe*, 457 U.S. 202 (1982), was the first Supreme Court decision to apply a level of scrutiny lower than strict when a state acted to discriminate against aliens in an area outside its interest in protecting political participation.

\(^\text{127}\) 457 U.S. 202 (1982). *Plyler* involved a Texas statute which denied local school districts the use of state funds for the education of children of illegal aliens and permitted public schools to deny enrollment to the children as well. Id. at 205.

\(^\text{128}\) *Id.* at 219 n.19, 223.

\(^\text{129}\) *Id.* at 219 n.19, 220. Although the illegality of undocumented aliens' presence in the United States may indeed have some “constitutional relevancy” regarding the level of scrutiny the Court should apply, it is unclear how the voluntariness of their entrance into the class of undocumented aliens distinguishes them from the resident aliens in *Graham v. Richardson*, 403 U.S. 365 (1971). The entrance of individuals into the class of resident aliens is equally voluntary; nevertheless, the resident alien class remains subject to strict judicial review.
The Court found that punishing the child for the parent’s misconduct “does not comport with fundamental conceptions of justice.” 130

After evaluating the classification involved, the Plyler Court examined the interest or right affected by the government’s action. The Court did not consider education to be a fundamental right that would trigger strict scrutiny. 131 However, the Court did consider education to be more important than other social welfare benefits. 132 Taking into consideration all these factors, the Court rejected both the standards of mere rationality and strict scrutiny and applied an intermediate level of review. 133

The Plyler Court’s method of determining the appropriate level of judicial scrutiny by closely evaluating both the government classification involved and the individual right or interest that is affected should be applied to federal immigration actions which fall outside the scope of the government’s plenary power. A blanket application of strict scrutiny would have the practical effect of precluding the government from ever acting beyond the core of its immigration authority. However, the intent behind the Wong Wing framework is not to completely disable the government from acting beyond the core actions within its plenary power. Rather, the intent of the framework is to bring those actions, unlike actions within the scope of the government’s plenary power, within the ambit of the Court’s heightened judicial scrutiny. 134

B. Constitutional Limitations on Actions Within the Scope of the Government’s Plenary Power: The Japanese Immigrant Case

Although the Supreme Court had provided a framework for defining the scope of the government’s plenary power over immigration in Wong Wing, the existence of any constitutional limitations on the government when it acted within the core of its plenary power remained unclear. Any confusion that may have persisted should have been resolved by the Court’s decision in Kaoru Yamataya v. Fisher (The Japanese Immigrant Case). 135 However, like Wong Wing, the Japanese Immigrant Case typically has been construed too narrowly. 136

131. Id. at 223.
132. Id at 221.
133. Id. at 223-24.
134. See supra note 107 and accompanying text.
135. 189 U.S. 86 (1903). The Japanese Immigrant Case involved an attempt by the government to deport an alien on the ground “that she was a pauper and likely to become a public charge.” Id. at 87. Kaoru Yamataya claimed that the administrative hearing which determined her right to remain in the United States was inadequate and a denial of due process. Id. at 88.
136. The Supreme Court has construed the Japanese Immigrant Case as standing for the narrow
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1. Due Process and the Government's Plenary Power Over Immigration

Although the Japanese Immigrant Case has been traditionally viewed as applying only to cases of deportation, the Court’s analysis makes clear that much of what is said in that decision applies with equal force in both deportation and exclusion settings. In Shaughnessy v. United States ex rel. Mezei, the Court cited the Japanese Immigrant Case as standing for the narrow proposition that an alien who had entered the country could not be deported without due process of law. As such, the decision applies only to deportable aliens and offers little, if any, assistance to the excludable alien. However, the Mezei Court failed to recognize the broader holding of the Japanese Immigrant Case that applies to government action toward both deportable and excludable aliens: that whenever government officials, acting within the scope of their authority, carry out provisions of a statute that affect the liberty of individuals, they must abide by the principles embodied in due process.

The Court firmly declared that it had never held otherwise: “[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’. . . .” Therefore, the excludable alien is entitled to due process if the government’s action, whether within the scope of its plenary authority or not, implicates a liberty interest of the alien.


137. The Court first reasserted the identity of the powers to exclude and expel. It stated that both powers belonged to the political branches of the government and that the judiciary was limited in its ability to review government decisions in either realm. Japanese Immigrant Case, 189 U.S. at 100. However, after affirming the existence of and connection between the two powers, the Court held that notwithstanding the government’s broad authority over both exclusion and expulsion, administrative officers, acting within the scope of their immigration authority, must act in accord with due process when their actions impact the liberty of individuals. Id. Therefore, when read in context, the holding clearly applied to both the deportation and the exclusion power.

138. See Mezei, 345 U.S. at 212.

139. See Japanese Immigrant Case, 189 U.S. at 100.

140. Id.

141. When viewed in light of the two-part test advocated by this Comment, the Japanese Immigrant Case reconciles the apparent inconsistency between granting the government plenary power over deportation, on the one hand, yet holding that an alien subject to deportation must be granted procedural due process rights prior to deportation, on the other. See supra notes 66–69 and accompanying text. Although deportation falls within the scope of the government’s plenary power as defined by Wong Wing under the first prong of the proposed test, deportation also affects a liberty interest of the alien, and therefore, is subject to due process restrictions under the second prong of the proposed test, based on the Japanese Immigrant Case.

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2. **Does Detention by the INS Violate a "Liberty" Interest of the Fifth Amendment?**

If excludable aliens are entitled to due process when the government’s action impacts their liberty, then the next analytical step is to determine whether the detention of excludable aliens by the INS implicates a liberty interest. In *Rodriguez-Fernandez v. Wilkinson*, the Tenth Circuit Court of Appeals determined that the temporary detention of an alien pending deportation does not constitute a deprivation of liberty in violation of the fifth amendment. This determination was based on the judiciary’s characterization of deportation as a civil rather than a penal action, and on the fiction that temporary detention is merely an extension of exclusion or expulsion. However, the court distinguished between the typical detention of excludable aliens, which is of short duration pending prompt deportation, and detention that continues for many months or years because deportation has become impossible. The court went on to indicate that the prolonged detention experienced by Cuban refugees was of a fundamentally different nature than the temporary detention approved by the judiciary. The court drew an analogy between detention pending deportation and incarceration pending trial. Both were justifiable only as necessary, temporary measures. The Tenth Circuit noted that incarceration pending trial would acquire a new, unauthorized character if there was to be no trial; the same would be true of an alien’s detention where deportation could not be accomplished. The court properly considered this type of detention to be a deprivation of liberty under the fifth amendment.

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142. In the *Japanese Immigrant Case* the Court did not provide a list of which immigration actions implicate an alien's personal liberty. The only immigration action considered by the Court was that of deportation. The Court ruled that deportation did impact an alien's liberty interest. Therefore, an alien must be assured due process protections regarding his or her right to remain in the United States. *Japanese Immigrant Case*, 189 U.S. at 101. However, the Court did not touch upon whether decisions to exclude or detain implicate a liberty interest. Whether the decision to exclude involves a liberty interest is beyond the scope of this Comment. The central issue involving Cuban and Haitian refugees is not the validity of their exclusion, but rather the validity of their detention. See, e.g., *Jean v. Nelson*, 105 S. Ct. 2992, 2995 (1985) (question of exclusion was unchallenged because determinations regarding the admissibility of the Haitian petitioners were still pending); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386 n.2 (10th Cir. 1981) (Cuban petitioners do not challenge order of exclusion).

143. 654 F.2d 1382 (10th Cir. 1981).

144. *Rodriguez-Fernandez*, 654 F.2d at 1382. Although the Court in *Rodriguez-Fernandez* discussed the constitutionality of the detention of Cuban refugees in depth, the discussion was dictum because the court had disposed of the appeal by construing applicable statutes to require the release of the aliens. *Id.* at 1386.

145. *Id.* at 1387.

146. *Id.*

147. *Id.*

148. *Id.*
3. **What Process Is Due?**

Once it is determined that a liberty interest has been affected by the government's action, the next issue to address is the types of procedural protections that are due the alien. The Court has recognized that due process is a flexible concept, adapting and changing according to the particular dictates of time, place, and circumstances.\(^{149}\) In *Mathews v. Eldridge*,\(^{150}\) the Supreme Court articulated a balancing test to determine the necessary contours of due process in various situations. According to the *Eldridge* test, a procedural safeguard to which the petitioner claims entitlement will only be granted if the government's interest in the challenged action is outweighed by: (1) the petitioner's interest in the outcome of the government's decision, and (2) the likelihood that different or additional procedures would reduce the risk of an erroneous deprivation of the petitioner's interest.\(^{151}\)

C. **Applying the Two-Part Test to the Haitian and Cuban Situations**

Applying the principles derived from *Wong Wing* and the *Japanese Immigrant Case* involves a two-step process. The first step is to determine whether the government's action is within the scope of its authority over excludable aliens according to the framework derived from *Wong Wing*. If the action does not fall within the core of the government's plenary exclusion authority, it is subject to judicial review and possible limitation.\(^{152}\) If the action falls within the core of this authority, it is normally subject to minimal judicial review or the rational relation test. The second step of the process is to determine whether the government's action implicates a liberty interest of the alien. The *Japanese Immigrant Case* requires the government to act in accord with the principles of due process if its actions implicate an alien's liberty interest, regardless of whether the action falls within the core of the government's plenary authority or not.\(^{153}\) This is the only exception to minimal judicial review where the government's action falls within the core of its plenary power.


\(^{151}\) *Eldridge*, 424 U.S. at 335. The government's interests include minimizing the fiscal and administrative costs of granting the additional procedures. *Id.*

See Comment, *supra* note 56, at 1327, arguing similarly that the *Eldridge* test should be applied to determine the process due to Cuban detainees.

\(^{152}\) See *supra* notes 83–134 and accompanying text for a more detailed explanation of *Wong Wing*'s portion of the proposed test.

\(^{153}\) See *supra* notes 135–51 and accompanying text for a more detailed discussion of the *Japanese Immigrant Case* portion of the proposed test.

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The Haitians, awaiting determination of their admissibility, allege that the government is discriminating against them by incarcerating them and denying parole based solely on their race and national origin. Applying racially discriminatory standards to the determination of whether Haitians should be detained or paroled is not an action that falls within the narrow scope of the government's plenary power according to the *Wong Wing* framework. This is true whether the regulations are discriminatory on their face or facially neutral but applied in a discriminatory manner. Detention that is based solely on race or nationality is not necessary to effect exclusion. The relationship, if any, between race and the necessity of temporary detention is too tenuous to fall within the realm of the government's plenary power. Therefore, under the first prong of the proposed test the government's action would be subject to heightened judicial scrutiny.

The precise level of scrutiny that is appropriate regarding the government's actions toward Haitian refugees is determined, according to *Plyler*, by examining the particular government classification involved and the individual right or interest that is affected. The class implicated by this government action involves excludable aliens who are Haitians. The fact that the class involves alienage should not, in and of itself, result in strict scrutiny. However, the class also involves discrimination based on race and nationality. Classes based on race or nationality are inherently suspect and typically subject to strict scrutiny.

The interest or right that is implicated by the decision to detain or parole is the alien's desire to be free from restraint. Temporary detention does not impinge upon the alien's fundamental right to liberty. However, freedom from even temporary detention, particularly where it is imposed due to race or nationality, is a significant interest. In light of these factors, the

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154. *See Jean v. Nelson*, 105 S. Ct. 2992, 2995 (1985). In *Jean*, the Supreme Court disposed of the detention issue by ruling that the INS regulations were facially neutral, and therefore, did not permit discrimination in a parole determination. *Id.* at 2998–99. The Supreme Court remanded the case to determine whether the neutral regulations were being enforced in a discriminatory manner. *Id.* at 2999.

155. *See supra* note 125.

156. *See supra* notes 111–34 and accompanying text for a more detailed explanation of how the appropriate level of scrutiny is determined.


158. The "suspect" classification doctrine was first enunciated by the Court in *Korematsu v. United States* (The Japanese Exclusion Case), 323 U.S. 214 (1944). The Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect... [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Id.* at 216. See also *Bolling v. Sharpe*, 347 U.S. 497 (1954), where the Court held that racial classifications are constitutionally suspect under equal protection and due process rights of the fifth amendment.

159. *See supra* notes 143–44 and accompanying text.

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government’s action should be subject to strict judicial scrutiny. If the Haitians can establish that the government is intentionally acting in a racially discriminatory manner, then the government would have to prove a compelling interest in continuing the racial discrimination to maintain the Haitians’ detention.

The Cuban situation is somewhat different. The Cubans do not allege that the government has incarcerated them because of their race or national origin. The government has detained them for a variety of arguably legitimate reasons pending the determination of their admissibility or their deportation.161 This type of action, detention or temporary confinement, was expressly approved in *Wong Wing* as a means necessary to give effect to statutory provisions requiring the exclusion or expulsion of aliens.162 In this situation, the government’s action in detaining Cuban refugees appears to fall within the scope of its exclusion authority. However, historical and diplomatic circumstances have made the detention of many Cubans something more than temporary. There is no way of knowing when, if ever, their detention will end.163 Potentially permanent imprisonment without judicial trial or even the accusation of a crime implicates an individual’s liberty interest.164 According to the *Japanese Immigrant Case*, where liberty is implicated, the alien must be given due process protections.

What those due process protections entail should be determined according to the balancing test enunciated in *Mathews v. Eldridge*.165 There are several interests to be considered on the government’s side of the *Eldridge* equation. First, the Supreme Court has repeatedly stated that the government has a strong interest in determining the admissibility of entrant aliens.166 However, in this particular case, the challenge does not involve the government’s decision that the Cuban refugees are inadmissible, but rather touches solely upon the government’s decision to incarcerate these aliens.167

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161. The government’s reasons for holding the Cubans vary widely: some have been convicted of crimes in the United States ranging from minor infractions to serious offenses; others have violated the immigration laws. Many of the Cubans have completed their sentences for the crimes they committed, but have continued to be incarcerated. There are other Cubans, however, who have committed no crimes in the United States, but were detained immediately upon their arrival more than six years ago. They were detained for a variety of reasons. For example, some were believed to have been convicted of crimes in Cuba, or to be mentally incompetent. N. Y. Times, Mar. 10, 1986, at A1; col. 1.


163. See *supra* notes 14–15 and accompanying text.

164. See *supra* notes 145–48 and accompanying text.


166. See *Ekiu v. United States*, 142 U.S. 657, 659 (1892) (national self-preservation requires that sovereign nations possess the power to prohibit the entrance of aliens).

Second, the government has an interest in being able to deport those aliens found to be excludable as quickly as possible. To the extent that temporary detention hastens that process, the government has a strong interest in being able to detain excludable aliens. However, in this instance the government cannot claim an interest in speedy deportation procedures because the Cubans cannot be deported.  

Third, the government has an interest in detaining those aliens who pose serious risks to our society, whether or not deportation is feasible. However, the government has a countervailing interest in not detaining any Cuban based on an erroneous determination of the alien's potential threat to society. This interest is based on two considerations. First, there is a strong economic incentive to minimize the substantial costs of incarcerating aliens who do not realistically pose a threat to society. Second, the government has an interest in protecting the fundamental principles upon which this country was founded, and in applying them in a consistent manner to all persons. When fundamental values, such as a person's inalienable right to liberty, are ignored with regard to the treatment of certain groups or individuals, society as a whole suffers because the fundamental values which protect the liberty of everyone are undermined.

Finally, the Eldridge test recognizes that the government has an interest in minimizing the fiscal and administrative burdens that result from added procedures. However, with regard to the Cubans, the government has little argument against added procedures due to higher administrative costs, because it is apparently willing to spend substantial sums incarcerating

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168. See supra notes 14–15 and accompanying text.
Contrary to the arguments advanced in this Comment, the Eleventh Circuit found Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), to be controlling in Fernandez-Roque and reversed the district court’s determination that where refugees are indefinitely incarcerated a liberty interest arises. However, this Comment has rejected Mezei, and therefore the Eleventh Circuit’s analysis. Furthermore, the appellate ruling does not reflect upon the district court’s analysis of the Eldridge test, or its analysis of the process that would be due to the Cuban refugees were a liberty interest to be found.
171. Id.
172. Id. The district court apparently equated the interests of the government with the interests of society. The court referred to “governmental” and “societal interests” interchangeably. Id. at 1133–34. Arguably, the interests of the government and society could be quite different. However, in Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court also indicates the social interests are to be imputed to the government by using the terms “government interest,” id. at 335, and “public interest,” id. at 347, interchangeably.
173. Fernandez-Roque, 567 F. Supp. at 1134. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 217 (1953) (Black, J., dissenting) (“No society is free where government makes one person’s liberty depend upon the arbitrary will of another.”).
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these individuals for the rest of their lives. In fact, by granting additional due process procedures, the government may actually save money because it will no longer have to bear the extraordinary costs of improperly imprisoning these individuals.

On the Cubans' side of the Eldridge equation is a substantial interest in freedom from arbitrary incarceration. The right to be free from imprisonment without the protections of judicial process is fundamental. Many of the Cuban refugees have already spent long periods of time in federal prisons and face the real possibility of spending the rest of their lives behind bars. The categorization of this type of treatment as civil rather than penal begins to wear thin under these circumstances. This is the type of punishment that our society reserves for its most heinous felons. Because the government's interest in summary proceedings involving the Cuban refugees is limited, and because the practical effect of the treatment the Cubans have received is analogous to criminal punishment, substantial procedural protections should be granted to the Cuban refugees.

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176. Id., at 1128, 1133. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (freedom from bodily restraint is fundamental to the liberty interests that are protected by due process).
177. See Ingraham v. Wright, 430 U.S. 651, 674 (1977) (it is a fundamental constitutional principle that a government may not hold and physically punish a person without due process).
178. Rodriguez-Femandez v. Wilkinson, 645 F.2d 1382, 1385 (10th Cir. 1981). See also N.Y. Times, Mar. 10, 1986, at A1, col. 1; A13, col. 5. Several hundred of the Cuban refugees have been held for up to six years. Most of the Cuban refugees are being held in federal penitentiaries where conditions of overcrowding and violence are severe. Id.
179. Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1056 n.6 (N.D. Ga. 1981) ("The legal fiction that an excludable is 'waiting at the border' wears quite thin after a year at the Atlanta Federal Penitentiary.").
181. See Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1128, 1131 (N.D. Ga. 1983), rev'd, 734 F.2d 576 (11th Cir. 1984), for a detailed explanation by the trial court of the procedural protections that should be granted to Cuban refugees under the Eldridge test. See supra note 169, explaining that the Eleventh Circuit's reversal does not implicate the district court's analysis of the Eldridge test.

The district court mandated a substantial list of procedural protections, including: (1) prior written notice of the factual allegations supporting detention, and access to underlying evidence possessed by the government, Fernandez-Roque, 567 F.Supp. at 1134–35; (2) the right to present documentary evidence and compel the attendance of witnesses, id. at 1135–36; (3) the right to confrontation and cross examination of witnesses, id. at 1136; (4) a neutral hearing body whose determination is based exclusively on evidence produced at the hearing and whose determination is not reviewable by other government officials, id.; (5) a written statement of the reasons for the hearing officer's determination, id.; (6) protections against self-incrimination, id. at 1137; (7) the right to counsel provided at government expense where necessary, id. at 1138–39; and finally, (8) a requirement that the government bear the burden of proving that the alien is likely to abscond, is a risk to national security, or is a serious threat to persons or property in the United States, id. at 1139–40.
III. CONCLUSION

The idea that the powers of government should be carefully constrained to protect human rights and liberty is a cornerstone upon which the political traditions of this nation have been built. The concept is fundamental to the structure of our society. Therefore, it is shocking to find people in this country who have been excluded from that tradition and left with little protection against the exercise of governmental power. This is the situation faced by many Cuban and Haitian refugees. As excludable aliens, they are subject to nearly unlimited governmental authority. Yet, it has not always been so. Early in this century, the Supreme Court had begun to grant excludable aliens protections against the excesses of government power. Two decisions in particular, *Wong Wing* and the *Japanese Immigrant Case*, provide a structure for defining the extent of the government’s authority and the rights that excludable aliens may claim. It is time to return to those earlier authorities and bring excludable aliens into the mainstream of this country’s traditions. Sometimes, a step backward is progress.

*Tamara J. Conrad*