Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases

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JUSTICE THURGOOD MARSHALL AND THE LEGACY OF DISSENT IN FEDERAL ALIENAGE CASES

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I. INTRODUCTION

Thurgood Marshall, whose name will be forever etched in the memory of a nation, tirelessly prodded the American conscience, searing the ugliness of segregation and racial hatred, calling us to reach deep within ourselves to discover the better part of our human nature. Yes, he will be remembered as the first black Justice of the United States Supreme Court. More significantly, though, will be the memory of the voice he gave to the voiceless. Before ascending to the bench, Marshall, an accomplished litigator, fought many battles on behalf of the NAACP Legal Defense and Education Fund, including the much celebrated case of Brown v. Board of Education.¹ Once on the bench, his pursuit of equality and justice continued unabated, whether or not he managed to persuade a majority of his colleagues to listen to those long silenced voices.

When Justice Marshall arrived at the Court on October 2, 1967, he brought with him all that had gone on before in his life, all that he had seen, felt, and experienced. His environment, growing up black in a segregated society, the stories of lynchings, and the horribly demoralizing Jim Crow laws had an undeniable impact on this man destined for the nation’s highest Court. On the occasion of the announcement of his

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¹ 347 U.S. 483 (1954).
retirement from the bench in 1991, he responded to a reporter’s question:

“No, I am not free, certainly I am not free.” And then he began one of his characteristic reminiscences, telling the story of a Pullman porter he knew as a child, one of his father’s Baltimore friends who worked on the Baltimore & Ohio Railroad. “He had been in every city in this country, he was sure, and he had never been in any city in the United States where he had to put his hand in front of his face to find out he was a Negro. I agree with him,” Marshall said, “No, I am not free.”

These tattered and torn garments of life, however, were clearly not the cloak of a defeated man; his whole life is testament to a person’s ability to rise above adversity. Just as clearly, however, these garments were not, indeed could not, be shed when he stepped into the robe of power; of necessity, his life story was woven in the fabric of his judicial life.

Although Marshall will be remembered most for his efforts to end racial prejudice, the unique vantage point that he brought to the Court transcended to many other areas of constitutional law. Whatever the issue, when a tension between governmental might and individual right came before the Court, he more often than not passionately sided with the underdog; he wanted justice, justice at almost any cost.

This concern for the individual found its way into his opinions in federal alienage cases, continuing a century old legacy of dissent. It is these cases and this tradition that will be the focus of this essay. Many other commentators in both the popular culture and the legal community will write about other aspects of his life and work; it is my limited desire to remember the important contribution Justice Marshall made in the federal alienage cases.

II. INTRODUCTION TO THE ALIENAGE CASES

To set the stage, we must briefly explore the contrast between state and federal alienage cases. The opening act takes us back to the era of

3. By federal alienage cases, I mean those cases in which the federal government has discriminated based on alienage or has in some other way uniquely burdened aliens or a subgroup of the class of aliens. These cases are contrasted with state alienage cases.
Plessy v. Ferguson where the principal protagonists were Chinese immigrants. In Yick Wo v. Hopkins, the Court struck down a San Francisco ordinance requiring a special permit for all laundries constructed of wood because the ordinance had been discriminatorily applied against Chinese immigrants. The Court recognized that “[t]he rights of the petitioners . . . are not less because they are aliens and subjects of the Emperor of China . . . The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.”

Personhood did not, however, protect Chinese nationals in exclusion and deportation proceedings. In The Chinese Exclusion Case, and Fong Yue Ting v. United States, the Court held that the political branches of the federal government had the power, the authority, and the constitutional right to exclude or expel a person or a class of persons from the United States solely on racial grounds. The Court held that “[i]f, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion” is within the power of the government, even in times of peace.

Exiting the nineteenth century, and reentering in the latter stages of the twentieth century, we find different protagonists, but the Court's analysis of the issues remains much the same. In reviewing state laws adversely affecting aliens, the Court has mainly employed a strict scrutiny analysis, concluding that such laws violate the Equal Protection Clause of the Fourteenth Amendment. Since “aliens as a class are a prime example of a 'discrete and insular' minority, classifications based on alienage, like those based on nationality or race, are inherently


5. 118 U.S. 356 (1886).
6. [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that . . . the ordinances . . . are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws . . . [W]hile this consent of the supervisors is withheld from them and from two hundred others . . . all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business.
7. Id. at 373-74.
10. 130 U.S. at 606; see also 149 U.S. at 707 (“The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).
suspect," and are, therefore, "subject to close judicial scrutiny." On what basis can the judiciary ignore the claims of this recognized "discrete and insular" minority in federal alienage cases? The answer lies in the Court's understanding of the source of constitutional protection for aliens—"theirs by sufferance, and not of right." Although aliens "in several respects stand on equal footing with citizens, . . . [this equality is a] matter of permission and tolerance." In other words, an alien's constitutional rights are "illusory." The Court has reconciled the Yick Wo tradition and the Chinese Exclusion tradition by examining the extent to which the federal and state governments should be concerned with issues of alienage:

With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. For more than a century a majority of the Supreme Court has held that the federal government's power over aliens is plenary, subject to virtually no substantive constitutional restrictions. And, for exactly 100 years a vocal minority on the Court has objected, declaring that the constitutional rights of aliens, recognized in the Yick Wo tradition, are truly anchored in the rights of these aliens as persons and not as a privilege extended at will by the federal government.
III. MARSHALL’S DISSENTS


A. Kleindienst v. Mandel

In *Kleindienst,* a group of American academics had invited Ernest Mandel, a Belgian journalist and self-avowed “revolutionary Marxist,” to speak in the United States. Mandel’s application for a nonimmigrant visa was denied because of his political beliefs.23 Suit was brought to test the constitutionality of the exclusion. In all previous exclusion cases, the Court had held that the admittedly unenumerated power to exclude was plenary in nature, subject to none of the power limiting guarantees of the Bill of Rights. So, for instance, the indefinite detention of a twenty-five year resident of the United States, attempting to reenter after an extended absence, violated no substantive or procedural provision of the Constitution, even where the government refused to divulge its basis for exclusion.24 “[E]xclusion of aliens is a fundamental act of sovereignty;” therefore, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”25 The plaintiffs in *Kleindienst* faced an unbroken chain of precedent suggesting that any attempt to base their case on Mandel’s purported rights would be futile.

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23. 408 U.S. 753. The Attorney General also refused to waive this ground of excludability, stating that Mandel’s activities on a prior trip to the United States “went far beyond the stated purposes of his trip.” Id. at 759. Appellee argued that the failure to grant the waiver was unconstitutional because the First Amendment rights must prevail, at least where the Government advances no justification for failing to grant a waiver. Id. at 767-68.
24. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). (Mezei was detained on Ellis Island “pending deportation.” The detention was indefinite in nature because no other country would accept him). The modern analogue to Mezei’s detention is the detention, now in its second decade, of certain Cubans who came to this country as part of the Mariel boat lift. See, e.g., Gisbert v. U.S. Atty.Gen., 988 F.2d 1437 (5th Cir. 1993) (extended detention of excludable alien “pending deportation” does not violate substantive or procedural due process rights).
To distinguish this case from the prior exclusion cases, plaintiffs alleged that the American citizens' First Amendment rights to hear Mandel were violated; they did not assert that Mandel had First Amendment rights that would limit the federal government's power to admit or exclude. The Court clearly recognized that this case implicated the American citizens' First Amendment rights to hear Mandel.26 Thus, it seemed that for the first time the Court had squarely before it two well founded but conflicting claims, those of the government that its power over admission and exclusion is plenary, and those of the American academics that their First Amendment rights were violated. In the previous cases, the Court could dodge this central issue because there always existed a lingering doubt about the legitimacy of the alien's claim to constitutional protection: does an alien, outside the United States, possess constitutional rights that must be assessed alongside the government's claim of power? In this case, the rights claimants, as American citizens, clearly had a legitimate claim for constitutional protection.

The shift of emphasis from the aliens' rights to the citizens' rights was to no avail. The academics' First Amendment rights must, the court concluded, be subordinated to the government's right to exclude because "the power to exclude aliens is "inherent in sovereignty,"... The Court without exception has sustained Congress' 'plenary power' to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'... 'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."27 The Court refused to weigh the relative strength of the government's interests against the rights of the individuals, concluding that the plenary power doctrine dispensed with any need to assess the strength of this very real First Amendment right.28

Justice Marshall, joined by Justice Brennan, dissented.29 This dissent differed from previous dissents in plenary power cases in two significant ways. First, Marshall and Brennan were the first Justices to suggest that the substantive guarantees of the Constitution applied to limit the government's power in an exclusion case. The prior dissents involved either procedural rights or substantive rights in the deportation or expulsion context. For example, the author of the Chinese Exclusion Case, Justice Field, dissented in Fong Yue Ting v. United States, noting the "wide and essential difference" between deportation and exclu-

26. 408 U.S. at 765.
27. Id. at 765-66 (citations omitted).
28. Id. at 765.
29. Id. at 774. Justice Douglas also dissented. Although he thought that exclusion on ideological grounds, like exclusion on racial grounds, was impermissible, he would have decided the case on narrower statutory grounds. Id. at 770-774.
To him, and the two other charter plenary power dissenters, the noncitizen's location was crucial. If the noncitizen was in the United States, she was protected by the Constitution and the government's power to deport, as expansive as it might be, must succumb to the Constitution's power-limiting provisions.

Marshall could move from deportation to exclusion because of the second difference between this case and the older plenary power cases: in *Kleindienst* the Court was asked to reevaluate plenary power in light of a claim of constitutional protection by American citizens. Many of the earlier plenary power cases greatly affected American citizens, but the government's decision to exclude in previous cases was not challenged on the ground that it violated the rights of citizens. Quoting the Court in *United States v. Robel*, Marshall said:

At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute. "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." In *Kleindienst*, both the majority and the dissent agreed that the unenumerated governmental power to exclude clashed with the American academics' First Amendment freedom. Unlike the majority, however, Marshall took the protections of the Bill of Rights seriously, even in the exclusion context. Since the government sought to exclude Mandel solely because of his political beliefs without any further legitimate justification, the power to exclude had to succumb to the guaranties of the First Amendment.

Marshall's rationale, if adopted, would not have been an unworkable interference with legitimate national security and foreign policy concerns of the political branches. The majority thought that adopting Marshall's approach would lead to one of two "undesirable" results:

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30. 149 U.S. at 746 (Field, J., dissenting). At the time the Court viewed the Constitution as inapplicable outside the United States, thus partially explaining the dissenters' emphasis on the location of the noncitizen. *See In Re Ross*, 140 U.S. 453 (1891) (Constitution has no extraterritorial effect). Today it is clear that some constitutional provisions apply extraterritorially to protect citizens. *See Reid v. Covert*, 354 U.S. 1 (1957) (civilian citizens being tried for crimes by United States courts abroad are entitled to the protections of the Fifth and Sixth Amendments). Aliens outside the United States may not be able to claim constitutional protection because aliens "receive constitutional protection [only] when they have come within the territory of the United States and developed substantial connections with this country." *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

31. 408 U.S. at 782 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967)).

32. *See id.* at 783 ("When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of individual freedom.").
1) plenary power would be totally undermined in any case in which an American citizen desired to hear an alien, or 2) "courts in each case would be required to weigh the strength of the audience's interest against that of the Government . . . making the determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas." There was no basis for either assertion. Yes, plenary power to exclude would have been limited to the extent that the government, consistent with our constitutional tradition of free speech, could not exclude people solely for elaborating on their political or economic theories. The political branches need not, however, mourn such a loss; they would have still possessed a hefty arsenal quite capable of repelling any invasion of unwanted aliens. From Marshall's viewpoint, an alien could have been excluded if required by "[a]ctual threats to the national security, public health needs, and genuine requirements of law enforcement." Currently, the Immigration and Nationality Act provides for the exclusion of terrorists, security threats, and aliens who "would have potentially serious adverse foreign policy consequences for the United States."

For Marshall, Brennan, and Douglas, the bottom line was that the First Amendment ought to be respected even in the immigration area: "Our cases make clear . . . that the government has no legitimate interest in stopping the flow of ideas. It has no power to restrict the mere advocacy of communist doctrine, divorced from incitement to imminent lawless action."

B. Fiallo v. Bell

Five years later, Marshall and Brennan, now minus Douglas but joined by White, dissented in Fiallo v. Bell, a case involving the clash between equality and plenary power. Again, exclusion, not deportation, was involved. Again, the claims of citizens, not aliens, were at issue. In Fiallo, three illegitimate children and their natural fathers brought suit, alleging that the immigration laws as then written violated the Fifth Amendment's concept of equal protection.

The Immigration and Nationality Act provides favorable treatment to families of American citizens or permanent resident aliens seeking to reunite in this country. For instance, children of American citizens can

33. *Id.* at 768-69.
34. *Id.* at 783.
36. 408 U.S. at 780.
immigrate without regard to numerical ceilings imposed by Congress. At the time of the suit, the Immigration and Nationality Act defined the term "child" as "an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother." Since the plaintiffs' parent-child relationship involved the father-illegitimate child, this immigration benefit was denied.

The plaintiffs alleged "double-barreled discrimination based upon sex and illegitimacy." Even though mainstream constitutional jurisprudence counsels heightened scrutiny in cases involving gender discrimination as well as in cases involving discrimination on the basis of illegitimacy, the mainstream is the wrong stream in federal alienage cases, at least according to a majority of Supreme Court justices. Rejecting these domestic constitutional norms, the Court chose, instead, to follow the norms established in The Chinese Exclusion Case:

Judicial deference, not heightened scrutiny, is appropriate in cases involving the admission, exclusion, and expulsion of aliens because, the Court said, the exercise of this power involves "fundamental principles of sovereignty." Marshall and company, as expected, disagreed. They could not fathom why unsubstantiated appeals to unenumerated principles of sovereignty should automatically trump well established equal protection doctrine. Reiterating a theme he developed in Kleindienst, Marshall suggested that the old plenary power cases—Chinese Exclusion and its progeny—are not the strongest precedents in the United States Reports. Giving faint praise to the majority's reluctance to endorse

39. 430 U.S. at 788 (emphasis added).
40. Id. at 793.
42. 430 U.S. at 796 (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)).
43. Id. at 795 n.6.
44. Id. at 805 (Marshall, J., dissenting).
Chinese Exclusion's complete judicial abdication in federal alienage matters, Marshall exposed the "completely 'toothless' " nature of the majority's review.45 "[T]he majority concludes: '[B]ut the decision nonetheless remains one solely for the responsibility of the Congress and wholly outside the power of this Court to control.' Such review reflects more than due deference; it is abdication."46

The dissent viewed the plaintiffs' claims in Fiallo as even more compelling than those advanced in Kleindienst. In Kleindienst, the rights claimants focused on the rights of citizens, but the Congressional policy to exclude those espousing communist doctrine "had not focused on citizens and their need for relief."47 The family reunification provisions at issue in Fiallo, in contrast, were enacted specifically to provide relief to those residing in America. The Immigration and Nationality Act reflects a clear intention "to provide for a liberal treatment of children and [concern for] the problem of keeping families of United States citizens and immigrants united."48 Especially since the purpose of the immigration law was to benefit United States citizens, where those benefits were distributed in a discriminatory fashion, the Court ought to employ domestic constitutional norms in determining the level of review.49

Although Marshall clearly disagreed with the plenary power concept, he distinguished Fiallo from previous plenary power cases, including Kleindienst, and would have decided the case on narrower grounds because in this case the policy behind the immigration laws was to benefit citizens and not aliens reaching out for our shores. Having stated that the plenary power doctrine was faulty and that, in any event, this case differed from previous cases, Marshall concluded: "Once it is established that this discrimination among citizens cannot escape traditional constitutional scrutiny because it occurs in the context of immigration legislation, the result is virtually foreordained."50 Applying heightened scrutiny, Marshall would have struck down the law because the government failed to meet its heavy burden. Noting both the underinclusive and overinclusive nature of the statute, the dissent stated that administrative convenience (in establishing paternity) was not a sufficient government interest to save the classification.51 Contrary to the suggestions by the government, the dissent found no important foreign

45. Id.
46. Id. at 805 (citations omitted).
47. Id. at 808.
49. See 430 U.S. at 807.
50. Id. at 809.
51. See id. at 811-13.
policy implications at issue, especially since the family reunification provisions are not designed to operate as flexible foreign policy tools, looking, instead, to the local laws of the sending country to determine whether the requisite family relationship existed.\textsuperscript{52}

Marshall's conclusion certainly follows from his premise that domestic constitutional norms apply. Marshall fails, however, to adequately explain why or how it was established that domestic constitutional norms \textit{ought} to apply.\textsuperscript{53} He certainly wants them to apply, but whether they \textit{ought} to apply appears to be the essential inquiry in the debate. Both sides, however, dodge this inquiry: the majority assumes that domestic norms do not apply because the government is exercising fundamental sovereign powers, and the dissent claims they do apply because the rights of citizens are at stake. Put simply, the majority and dissent talk past each other, never fully addressing the central question of how to decide between the claims of legitimate government power on the one hand and the dictates of the power limiting and rights granting provisions of the constitution on the other.\textsuperscript{54} How to reconcile the power and rights issue seems to be at the much neglected core, and Marshall addressed these issues more fully in \textit{Jean v. Nelson}.

C. Jean v. Nelson

\textit{Jean v. Nelson}\textsuperscript{55} was not a plenary power case. From the majority's perspective it was not a constitutional case at all. Plaintiffs, a class of unadmitted Haitians, claimed that their detention by the INS without parole pending the determination of their asylum claims violated the Fifth Amendment's equal protection component. They alleged that their detention without parole was based on race and/or national origin in violation of the Constitution. The Supreme Court dodged the constitutional issue, explicitly refusing to address that issue, ruling instead that the applicable statute and regulations required parole decisions to be made without reference to race or national origin.\textsuperscript{56}

\begin{itemize}
  \item \textsuperscript{52} See \textit{id.} at 808 ("Here, the purpose of the legislation is to accord rights, not to aliens, but to United States citizens. In so doing, Congress deliberately chose, for reasons unrelated to foreign policy concerns or threats to national security, to deny those rights to a class of citizens traditionally subject to discrimination." (footnote omitted)).
  \item \textsuperscript{53} The majority said that the "fallacy of the assumption" that domestic norms apply "is rooted deeply in fundamental principles of sovereignty." \textit{id.} at 795 n.6. In addition to a majority of the Supreme Court, the lower courts seem to treat the Chinese Exclusion tradition as firmly embedded in our constitutional jurisprudence. See, e.g., Gisbert v. United States, 988 F.2d 1437, 1440 (5th Cir. 1993) ("The exclusion of aliens is a fundamental act of sovereignty .... The political branches have plenary authority to establish and implement substantive and procedural rules governing the admission of aliens." (citations omitted)).
  \item \textsuperscript{54} Possibly this debate was omitted because the positions of both the majority and the dissent had been so well entrenched by previous plenary power opinions that no one saw the need to retrace the steps leading to this impasse. Section IV of this essay will explore the dialogue that took place in the earlier plenary power cases.
  \item \textsuperscript{55} 472 U.S. 846 (1985).
  \item \textsuperscript{56} See \textit{id.} at 857.
\end{itemize}
Justice Marshall, joined once again by Justice Brennan, dissented. Marshall concluded that the constitutional question was unavoidable because the statutory and regulatory provisions did not provide enough smoke to screen out the equal protection analysis. Although agreeing with the proposition that the Court should avoid constitutional review when non-constitutional avenues are present, the dissenters saw no plausible interpretation of the statute or regulations that would have required the INS to make discretionary parole decisions using national origin neutral criteria.

Turning to the constitutional issues, Marshall concluded that any parole determination based on race or national origin violated the equal protection guaranties of the Fifth Amendment. Building upon a century of dissent from plenary power, he viewed the Bill of Rights as a limitation upon the broad power of the political branches over questions of admission, exclusion, and expulsion.

In one sense this dissent reaches farther than the others in that the plaintiffs claiming the protection of the Fifth Amendment are unadmitted, undocumented aliens with no ties to the United States. Marshall’s previous dissents had involved claims by United States citizens that the immigration laws, or the enforcement thereof, violated their constitutional rights. Dissenters prior to Marshall had argued that aliens in deportation proceedings possessed substantive constitutional rights, and aliens, even those in exclusion proceedings, possessed procedural due process rights. In the *Jean v. Nelson* dissent, Marshall argues that aliens in exclusion proceedings, who have no particular ties to the United States, are protected—to some extent—by the substantive guaranties of the Fifth Amendment.

In another sense, the dissent attempts to cast the case in very narrow terms. Marshall couched the issue as whether aliens being detained pending determination of admissability are entitled to the guaranties of equal protection with respect to a decision on parole. The dissent was silent on the issue of whether excludable aliens possess constitutional rights with respect to the exclusion decision itself. In this case the decision whether to admit or exclude had not yet been made, the aliens

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57. See id. at 858 (Marshall, J., dissenting).
58. See id.
59. See, e.g., Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting) (arguing that it was unconstitutional to deport a long time permanent resident solely “because he joined a political party that California and the Nation then recognized as perfectly legal”).
60. See, e.g., Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) (“I conclude that detention of an [excludable] alien would not be inconsistent with substantive due process, provided-and this is where my dissent begins-he is accorded procedural due process of law.”); see also id. at 227 (“When indefinite confinement becomes a means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them.”).
61. See Jean v. Nelson, 472 U.S. at 858.
62. See id. at 877.
were detained pending a determination of that issue, and the case was addressing an auxiliary issue of the parameters of the detention/parole power exercised by the Executive.

This dissent is important to the plenary power literature because it squarely addressed the relationship between plenary power and individual rights. Recognizing that the Executive's immigration power is extremely broad, Marshall wrote:

In general, national origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policies. When central immigration concerns are not at stake, the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders.\(^{63}\)

Marshall seems to suggest an elastic matrix by which to assess the strengths of the government's claim of power relative to the individual's claim of constitutional protection. Where the alien has no United States ties and is not present in the country and the government's assertion of power involves exclusion (the core immigration power) the government's case is at its apex. "It's in this area that the Government's interest in protecting our sovereignty is at its strongest and that the individual claims to constitutional entitlement are the least compelling."\(^{64}\) On the other hand, where no immigration concerns are present and the alien is in the United States and has developed significant ties, the alien's case is at its strongest.\(^{65}\)

Many cases in between are not so easily categorized. Some involve direct conflict between a core immigration power and the rights of citizens or aliens who have great affinity to this country.\(^{66}\) Other cases involve countless variations on the theme where the immigration issues are to a greater or lesser extent peripheral and the alien's ties to the United States are attenuated in varying degrees.\(^{67}\) In most of these cases, the Court has reaffirmed the federal government's plenary power

\(^{63}\) Id. at 881 (citation omitted).

\(^{64}\) Id. at 875.

\(^{65}\) The State alienage cases provide the best example of this category. States have no immigration power, and aliens are classified as a "discrete and insular minority," therefore, the Court reviews most state alienage classifications under a strict scrutiny standard. See, e.g., Bernal v. Fainter, 467 U.S. 216 (1984).

\(^{66}\) See, e.g., The Chinese Exclusion Case, 130 U.S. 581 (1889) (alien subject to exclusion was attempting to return to California where he had lived and worked for 12 years).

\(^{67}\) See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (clash between the alleged Fourth Amendment rights of a nonresident alien and the police powers of the federal government); see also Mathews v. Diaz, 426 U.S. 67 (1976) (equal protection claim by aliens who had resided in this country for less than five years or who were not permanent residents challenging the denial of certain welfare benefits to such aliens).
over aliens and has concluded that this power is unencumbered by domestic constitutional norms. 68

Marshall’s dissent points to two areas where plenary power has not foreordained the outcome. First, aliens, even excludable aliens, are entitled to the trial rights guaranteed by the Constitution prior to the imposition of a criminal penalty. 69 Second, non-enemy aliens can claim compensation pursuant to the Fifth Amendment for an unlawful taking. 70

Having established that aliens, even those outside the country, have successfully claimed constitutional protection in at least two areas, Marshall then turned to the pressure point of the debate between plenary power advocates and detractors—the status of the Yick Wo tradition relative to plenary power. He reaffirmed the long standing dissenting viewpoint that since aliens are “persons” under the Constitution, “it cannot rationally be argued that the Constitution provides no protection to aliens” detained pending adjudication of asylum claims. 71 Simple logic, he said, required this conclusion, otherwise “the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens.” 72

The Jean dissent is narrowly tailored to the specific facts of the case and recognizes the government’s broad interests over questions of admission and exclusion. Marshall makes no attempt to provide a formula for determining the relationship between the government’s plenary immigration power and the rights of aliens. “This dissent is not the place to determine the precise contours of petitioner’s equal protection rights.” 73 The importance of this and other dissenting opinions in plenary power cases, however, lies not in the development of specific tests or even in the conclusions they reach. Rather, their significance, legally, politically, and morally lies in the willingness to engage in a dialogue about the relationship between the government’s conceded power over aliens and the rights of those aliens as “persons” under our Constitution.

D. United States v. Verdugo-Urquidez

A recent dissent written by Brennan and joined by Marshall explored, in the limited context of a criminal trial, this relationship between

68. See, e.g., Mathews v. Diaz, 426 U.S. at 81 n.17 (“[A]ny policy toward aliens is . . . so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”) (quoting Harisaides v. Shaughnessy, 342 U.S. 580, 588-89 (1952)).
69. 472 U.S. at 873 (Marshall, J., dissenting) (citing Wong Wing v. United States, 163 U.S. 228 (1896)).
70. See id. (citing Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931)).
71. Id. at 875.
72. Id. at 874.
73. Id. at 880.
governmental power and alien rights. In United States v. Verdugo-Urquidez, the Court held that the warrantless search of a Mexican national's residence in Mexico did not violate the Fourth Amendment, even though the Mexican national was sitting in a United States jail. Not a typical plenary power case because issues of admission, exclusion, and expulsion were not present, the case does, I think, exemplify the nature of plenary immigration power and the dichotomy between the Yick Wo tradition and the Chinese Exclusion tradition. The divergence seems to occur at the point at which the Court perceives that the governmental unit involved needs extraordinary flexibility in addressing an issue. Where the Court sees no need for governmental flexibility, as in the state alienage cases, strict scrutiny is employed. Where, however, the Court believes that the political branches of the government need operational flexibility, such as in the foreign affairs arena, the Chinese Exclusion line is followed, with almost complete deference to the political branches.

Although Chief Justice Rehnquist, for the majority, articulated several theories for denying the defendant in Verdugo-Urquidez the protection of the Fourth Amendment, he concluded by saying:

Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

In the final analysis, the Yick Wo tradition was ignored because of the Court’s conclusion that the political branches of the federal government should not be saddled with the limitations of the Fourth Amendment when involved in international police work.

The dissent, on the other hand, viewed the Fourth Amendment and other rights protecting provisions of the Constitution as limitations on the government’s power, whatever the nature of that power, whether domestic or international. Quoting the plurality in Reid v. Covert, the dissent reminded the Court that “the United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.” By focusing on the source of governmental power,

75. Id. at 275.
76. 354 U.S. 1, 5-6 (1957).
77. 494 U.S. at 281 (Brennan, J., dissenting).
the dissent discovered the nature of an alien’s rights. Although the protective umbrella of the Bill of Rights does not extend to protect every human being on the planet in every situation, it should shelter those showered with prosecution under the criminal laws of the United States. Pursuant to a doctrine of mutuality, a criminal defendant “is protected by the Fourth Amendment because our Government, by investigating and prosecuting him, has made him one of ‘the governed.’” 78

Addressing directly the majority’s reluctance to interfere with foreign affairs operations, Brennan and Marshall suggested that the Fourth Amendment may operate differently with respect to international non-law enforcement activities of the United States government. Operations against enemy aliens in wartime would not make the enemy alien one of the “governed” entitled to the protections found in the Bill of Rights. 79 With respect to non-law enforcement action against non-enemy aliens, “doctrinal exceptions” to the Fourth Amendment may apply “more frequently abroad, thus lessening the purported tension between the Fourth Amendment’s strictures and the Executive’s foreign affairs power.” 80 Moreover, according to the dissent, redress for a Fourth Amendment violation might be available “only if the Executive decides to bring a criminal prosecution and introduces evidence seized abroad.” 81 Pursuant to this doctrine of mutuality, the constitutional limitations on federal power become enforceable only where the coercive arm of the government attempts to “govern” a non-citizen abroad. 82

IV. BUILDING THE FOUNDATION: THE EARLY DISSENTERS

Marshall’s theme in these dissents was simple: exercise of the foreign affairs powers cannot transgress those national values deeply embedded

78. Id. at 291-92.
79. See id. at 292 (“Accepting respondent as one of ‘the governed’, however, hardly requires the court to accept enemy aliens in wartime as among ‘the governed.’”
80. Id.
81. Id. at 293 (italics in original).
82. Verdugo-Urquidez represents a strong break from one of plenary power’s exceptions, that aliens are entitled to the protections of the Bill of Rights in a criminal trial. See Wong Wing v. United States, 163 U.S. 228, 237 (1896) (“[W]hen Congress sees fit to . . . [subject] the persons of aliens to . . . punishment, . . . we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused”). Rejecting the Wong Wing rationale, the majority opinion appears to be an extension of the plenary power doctrine. Simply put, the foreign affairs power of the United States is exercised unfettered by the Bill of Rights, including the Fourth Amendment. Brennan and Marshall’s dissenting opinion is not as easily translatable to the immigration context. In the criminal law context, the United States has taken positive steps to govern the previously un governed; a doctrine of mutuality works well. In the immigration context two vastly different scenarios are present: 1) in exclusion cases, the United States rejects the alien’s request to be governed, and 2) in deportation cases, the federal government is attempting to relinquish the right to govern the individual. Mutuality works in neither situation. In the immigration context the limitations to plenary power must derive not from a theory of mutuality, but from the idea that in making immigration rules, the political branches, though possessing vast power, must abide by the restrictions imposed by our fundamental law.
in the Bill of Rights—even in the immigration context. His theme was not new. Although he made significant contributions to the judicial literature on the subject, the theme—the tradition of dissent—began one hundred years ago.

Throughout the history of the plenary power doctrine with its antagonist, the voice of dissent, the majority and the dissent have engaged in healthy dialogue. More than a discussion about the relationship between power and right, this dialogue has focused on how we, as Americans, define ourselves. In exploring our admissions, exclusion, and expulsion criteria; in exploring who is in and who is out; and in determining who gets to decide such issues, we define our national character. As with any family, members of the Court have differed drastically in how they approach such issues. These differences have proven outcome determinative.

The majorities in plenary power cases have consistently concluded that the political branches of each successive generation are totally free to set whatever immigration rules they want, bounded only by national and international political expediency. The dissenters, on the other hand, while conceding that the political branches have expansive immigration power, hold firm to the conviction that a priori norms shape the contours of this power. These dissenters believe that the rights protecting provisions of our constitutional traditions bind and limit the exercise of the immigration power.

Put simply, plenary power cases involve a clash between governmental power and an individual’s claim of entitlement to constitutional protection. The Court, in Galvan v. Press, succinctly articulated the dichotomy:

The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.... [However, as] a “person”, an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen.

83. See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 34 (1983) (“The primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices.”); See also Sanford Levinson, Constitutional Faith 92 (1988) (“The ability of a community to choose, as well as be chosen, itself generates profound tensions. The American creed suddenly takes on a potentially exclusionary character, even if its primary history has been to accept the inclusion of groups with quite different histories from that of the dominant population.”); and Schuck, supra note 4, at 85 (“Immigration law is a fulcrum of our political system. By seeking to define, mold and protect the American community, it undertakes to answer the first questions that any society must put to itself: What are we? What do we wish to become? How shall we reach that goal? And most fundementally, which individuals constitute the “we” who shall decide these questions?”).
85. Id. at 530.
The majorities in the plenary power cases focus almost exclusively on the first half of the equation—the power over the admission, exclusion, and expulsion of noncitizens involves fundamental principles of sovereignty, deeply rooted in international law. The second half of the equation—the rights aspect—has been virtually ignored because, from the Court’s viewpoint, the government’s interest is so compelling as to mute any potentially interfering interests.

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. 86

To the extent it has been explored, the majority has dismissed the rights claims by concluding that an alien’s rights, even the species called constitutional rights, derive from a terminable at will grant from the federal government and not directly from the terms of our constitutional document. Citing Vattel and other prominent international law theorists, the Court in Fong Yue Ting v. United States 87 said: “By the law of nations, doubtless, aliens residing in a country . . . are subject to its laws, and may invoke its protection against other nations.” 88 Relying on this understanding of international law, the Court concluded:

Chinese laborers, therefore, like all other aliens residing in the United States . . . are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property . . . But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest. 89

86. The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 609 (1889).
87. 149 U.S. 698 (1893).
88. Id. at 724.
89. Id. See also Harisaides v. Shaughnessy, 342 U.S. 580, 586-87 (1952) (“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. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance.”). True, the Court has bolstered its conclusion by arguing that aliens lack constitutional rights in the immigration context. The Kleindienst and Fiallo cases, however, expose the Court’s lack of reliance on this rationale. In those cases, the Court steadfastly retained and applied the
From the 1880s until now a majority of the Court has continuously trumpeted the powers of the federal government in matters of alienage while seriously undervaluing the pleas of aliens and citizens alike who have called on the Court to bridle this vast power by using the Bill of Rights to limit plenary power. In exalting federal power while devaluing individual rights, the Court has concluded that it is not its task "to reshape a world order based on politically sovereign States." The majorities over the past century have steadfastly maintained the position that the substantive dictates of the Bill of Rights have no effect in the immigration context. They have not, however, adequately explained how the federal government, a government of granted and limited authority, can act without concern for the power limiting and rights granting provisions of the Bill of Rights.

The dissents have attacked the majority opinions at this weak point. "The [immigration] power . . . flows from sovereignty and from the [naturalization] power. . . . The power to deport 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 guaranty of the Fifth Amendment has never been satisfactorily answered." To a government of delegated powers, which are both limited and at least loosely enumerated, the concept of unbridled power is foreign. The "doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists." The question of the scope and extent of the immigration power provides the central point of departure between the majority and the dissent. The majority refuses to concede that the Bill of Rights limits the political branches' power over aliens. As I have written elsewhere, this conclusion is based on the Court's perception of the United States' place as a sovereign nation in a world of sovereign nations. While recognizing our national sovereignty, the dissent forcefully argues that internal constitutional restraints impose restrictions on the federal government's exercise of its immigration power.

plenary power doctrine in the face of constitutional claims advanced by citizens as opposed to aliens.

90. Harisaides, 342 U.S. at 596 (Frankfurter, J., concurring).
91. Harisaides, 342 U.S. at 599 (Douglas, J., dissenting).
92. Fong Yue Ting, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting). See also id. at 757-58 (Field, J., dissenting) ("The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty."); see also id. at 762 (Fuller, C.J., dissenting) (The federal government "cannot, in virtue of any delegated power, or power implied therefrom, or of a supposed inherent sovereignty, arbitrarily deal with persons lawfully within the peace of its dominion.").
93. Scaperlanda, Polishing the Tarnished Golden Door, supra note 4.
The dissents' approach, in contrast to the majority, also focuses on the rights of "persons" under the Constitution. It is firmly embedded in our constitutional doctrine that an alien is a "person" entitled to Fifth Amendment protection, therefore, the Court—and even more importantly the political branches—should take the individual's claim of right as a restriction on the political branches' claim of power. The dissenters view the dichotomy between the Yick Wo tradition and the Chinese Exclusion tradition as a false one. Contrary to the prevailing view, the rights of aliens emanate from personhood and not the beneficence of the United States. "The rule laid down in [Yick Wo] as much applies to congress, under the Fifth Amendment, as to the states, under the Fourteenth."95

From a "rights" vantage point, questions of expulsion or deportation raise much graver issues than the denial of equal protection by a state or local government. Many equal protection, due process, or First Amendment concerns pale in insignificance when compared to the severity of deportation.96 Deportation is punishment "beyond all reason in its severity... As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all relations... there contracted."97 Therefore, if aliens are "persons" in any meaningful sense under the Fifth and Fourteenth Amendments, the Yick Wo tradition must extend to questions of expulsion and deportation.

Marshall's opinions echoed the themes of the earlier dissenters. In carrying on this legacy, he argued forcefully that the immigration power ought to be limited by the Constitution, especially the Bill of Rights.

V. CONCLUSION

Despite criticism from its limited detractors,98 dissent as a judicial institution remains a vibrant feature on the legal landscape. Several

94. See Wong Wing v. United States, 163 U.S. 228, 238 (1896).
95. 149 U.S. at 762 (Fuller, C.J., dissenting).
96. Yick Wo involved the oppression of a few in a single occupation, but mass deportation involves the arrest, deportation, and complete interruption of the lives of hundreds of thousands of aliens. See Fong Yue Ting 149 U.S. at 744 (Brewer, J., dissenting). "[W]hatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. ... The governments of other nations have elastic powers. Ours are fixed and bounded by a written Constitution. The expulsion of a race may be within the inherent powers of despotism," but it is not within the powers delegated to the federal government. Id. at 737 (Brewer, J., dissenting).
97. Id. at 759 (Field, J., dissenting). "It may deprive a man and his family of all that makes life worth while." Harisaides v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting). The majority has continuously concluded that deportation is not punishment. This determination has had two grave consequences for the affected alien: 1) the full panoply of constitutional trial rights are not constitutionally mandated, and 2) the constitutional prohibition of ex post facto laws does not apply. Since deportation grounds can be applied in ex post facto fashion, most "constitutional protection" for aliens is "illusory." Id. at 600 (Douglas, J., dissenting) ("Unless they are free from arbitrary banishment, the 'liberty' they enjoy while they live here is indeed illusory.").
justifications exist for penning a dissent: "[t]he most enduring dissents, however, are the ones . . . that seek to sow the seeds for future harvest. They are the dissents that soar with passion and ring with rhetoric."99

For a century, the sowers have sown, planting the seeds of convergence between domestic and immigration-related constitutional norms. They have challenged the Court and the other branches to apply our fundamental law to those "huddled masses" who now reside in the United States, and even to those "yearning to breathe free" who have not yet entered the "golden door." None of the plenary power dissenters has ever suggested that a noncitizen’s rights are equal to those of a citizen. They all recognize that an alien’s constitutional claim strengthens when she is in the United States and developing ties here. They also recognize that the federal government’s power is extensive in the immigration context, rising to an apex in the admissions decisions. What they have sought, what they have faithfully argued for, is a holding that wherever and whenever our government exercises its immigration power, it must do so within the parameters of our written Constitution. The exact relationship between federal power and alien right would be worked out as cases arise. The important thing, from the dissents’ perspective, is that the Court and the political branches develop a respect for our constitutional values in the immigration context, irrespective of the final contours of the doctrine that replaces plenary power.

Looking realistically at the current Court, the harvest will not be reaped anytime soon.100 What I do hope is that one or more members of

99. William J. Brennan, Jr., In Defense of Dissent, 37 HASTINGS L.J. 427, 430-31 (1986). Another more immediate audience for a dissenting opinion is the legislature, which may, at a subconstitutional level, alter the law established by the majority of the Court. See Voss, supra note 98, at 653-54. There are signs that Congress has listened to Marshall’s message and partially heeded his call. The statutes involved in both Kleindienst and Fiallo have been modified, bringing them closer to our domestic constitutional norms. Today, an alien cannot be excluded from this country solely “because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien’s admission would compromise a compelling United States foreign policy interest.” The Secretary of State must notify the Chairs of both the Judiciary and Foreign Affairs Committees of the House and Senate of the reasons for such determination. § 601 of the Immigration Act of 1990, 101-649, 104 Stat. 4978 (1990) Pub. L. No. codified at INA § 212(a)(3)(c)(iii), (iv), 8 U.S.C. § 1182(a)(3)(c)(iii), (iv) (1993). Immigration benefits are now available based upon the illegitimate child/father relationship provided a bona fide parent-child relationship exists. See § 315(a) of the 1986 Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 2613, 3359, codified at INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1993) (emphasis added).

100. I take this pessimistic view because of plenary power’s long and relentless history. In the 1950s, Justice Frankfurter wrote for the Court:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely ‘a page of history,’ but a whole volume.
the current Court will pick up where Justice Marshall left off and continue the sowing long into plenary power's second century. This, at least, will "prevent the process from becoming rigid and stale. And, each time the Court revisits [the plenary power] issue, the justices [will be] forced by a dissent to reconsider the fundamental questions and to rethink the result."\textsuperscript{101} And, maybe someday, the harvest will come in and the Court will agree that this Nation's fundamental values, as expressed in the Constitution, which apply to protect members of the community, will extend to apply to the question of communal formation.

\textsuperscript{101} Brennan, \textit{supra} note 99, at 436.