cise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." [1264]

Except for the Alien Act of 1798,[1265] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes [1266] and was followed by a series of exclusions based on health,

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[1264] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindienst v. Mandel, 408 U.S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch 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. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Brennan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the government. Id. at 858. That there exists *some* limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), *aff'g by an equally divided Court*, 785 F.2d 1043 (D.C. Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community," Hampton v. Mow Sun Wong, 426 U.S. at 102, Congress may treat them in ways that would violate the Equal Protection Clause if a state should do it. *Diaz* (residency requirement for welfare benefits); *Fiallo* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong*, 426 U.S. at 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the Equal Protection Clause if adopted by a state, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978). *See* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

[1265] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[1266] Act of March 3, 1875, 18 Stat. 477.